[redacted]

NATIONAL UNIVERSITY
LIBRARY
SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES



89 P.2d – 90 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1939, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 89, Nos. 1-4;
Vol. 90, Nos. 1-4.

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.89-90 P.2d
4th Reprint—1974

CASES REPORTED

	Vol.		Page
Agnew v. Wenstrand, App.	90	P.2d	813
Agudo v. Monterey County, Sup.	89	P.2d	400
Aitken; City of Los Angeles v., App.	90	P.2d	377
Alameda County v. Ross, App.	89	P.2d	460
Alameda County; Skidmore v., Sup.	90	P.2d	577
Allan; McManus v., App.	89	P.2d	690
American Liquid Gas Corporation; Davidson v., App.	89	P.2d	1103
American Trust Co.; Security-First Nat. Bank v., App.	90	P.2d	335
Aqueduct Const. Co.; Reider v., App.	89	P.2d	169
Arellano v. City of Burbank, Sup.	89	P.2d	113
Atlas Imperial Diesel Engine Co. v. Criscuolo, four cases, App.	89	P.2d	674
Avery; Maxon v., App.	89	P.2d	684
Ayer; People v., App.	90	P.2d	819
Bank of America Nat. Trust & Savings Ass'n v. Security-First Nat. Bank, App.	90	P.2d	335
Barney v. First Nat. Bank, App.	90	P.2d	584
Barrios v. Iwaki, App.	89	P.2d	417
Barsha v. Metro-Goldwyn-Mayer, App.	90	P.2d	371
Battaglia v. Winchester Dried Fruit Co., App.	90	P.2d	111
Bechtel v. Cake, App.	90	P.2d	122
Bennett's Estate, In re, Sup.	90	P.2d	84
Benton; People v., App.	89	P.2d	1089
Berger, Appeal of, App.	89	P.2d	679
Board of Education of City of San Diego; Taylor v., App.	89	P.2d	148
Board of Sup'rs of Los Angeles County; Brock & Co. v., App.	90	P.2d	353
Boggs; King v., App.	90	P.2d	814
Boggs' Estate, In re, App.	90	P.2d	814
Booker, Appeal of, Sup.	90	P.2d	72
Boyd v. Lancaster, App.	90	P.2d	317
Boysen, Appeal of, App.	89	P.2d	667
Bragg v. Bragg, App.	90	P.2d	329
Branch; Sandrini v., App.	90	P.2d	593
Brandt v. Brandt, App.,	89	P.2d	171
Breusing; Scott v., App.	89	P.2d	662
Brock & Co. v. Board of Sup'rs of Los Angeles County, App.	90	P.2d	353
Bruneman v. Bruneman, App.	90	P.2d	323
Bruneman's Estate, In re, App.	90	P.2d	323
Buckley v. Shell Chemical Co., App.	89	P.2d	453
Buck Sun v. Haines, App.	89	P.2d	121
Busick; People v., App.	89	P.2d	657
Cake; Bechtel v., App.	90	P.2d	122
Cake v. Corporation of America, App.	90	P.2d	122
California Casualty Indemnity Exchange v. Industrial Accident Commission of California, Sup.	90	P.2d	289
Carlos; Kuehn v., App.	89	P.2d	672
Carmody v. Powell, App.	89	P.2d	158
Carpenter v. Pacific Mut. Life Ins. Co. of California, three cases, Sup.	89	P.2d	637
Chan Buck Sun v. Haines, App.	89	P.2d	121
Chanslor-Canfield Midway Oil Co. v. Johnson, Sup.	90	P.2d	572
Christensen; People v., App.	89	P.2d	1095
Christin; Story v., App.	89	P.2d	144
City and County of San Francisco; Meridian, Limited, v., Sup.	90	P.2d	537

	Vol.		Page
City of Burbank; Arellano v., Sup.	89	P.2d	113
City of Huntington Park; City of Los Angeles v., App.	89	P.2d	702
City of Long Beach; Wiersma v., App.	89	P.2d	1107
City of Los Angeles v. Aitken, App.	90	P.2d	377
City of Los Angeles v. City of Huntington Park, two cases, App.	89	P.2d	702
City of Los Angeles v. City of South Gate, two cases, App.	89	P.2d	702
City of Los Angeles; McAdams Oil Co. v., App.	89	P.2d	729
City of South Gate; City of Los Angeles v., App.	89	P.2d	702
Clark; McKaig v., App.	90	P.2d	108
Clark v. Marjorie Michael, Inc., Super.	90	P.2d	866
Clark; Meadows v., App.	90	P.2d	851
Coca Cola Bottling Co. v. Feliciano, App.	89	P.2d	686
Cohen v. Metropolitan Life Ins. Co., App.	89	P.2d	732
Congregation Ahabot Israel; Congregation Mukuom Israel v., App.	90	P.2d	118
Congregation Mukuom Israel v. Congregation Ahabot Israel, App.	90	P.2d	118
Connard v. Pacific Electric R. Co., App.	90	P.2d	817
Cooper v. McDonald, App.	89	P.2d	412
Copley; People v., App.	89	P.2d	160
Cornell v. Hollywood Turf Club, App.	89	P.2d	449
Corporation of America; Cake v., App.	90	P.2d	122
Coy; Skinner v., Sup.	90	P.2d	296
Crabtree v. Western Pac. R. Co., App.	90	P.2d	835
Crawford v. Marysville Fuel Co., App.	90	P.2d	861
Criscuolo; Atlas Imperial Diesel Engine Co. v., App.	89	P.2d	674
Cross Water Co. v. Ferrero, App.	90	P.2d	98
C. S. Smith Metropolitan Market Co. v. Lyons, App.	89	P.2d	425
Davidson v. American Liquid Gas Corporation, App.	89	P.2d	1103
Day v. General Petroleum Corporation, App.	89	P.2d	718
Denning; Wellman v., App.	89	P.2d	672
Donegan; People v., App.	90	P.2d	856
Donkin v. Killefer, App.	90	P.2d	810
Douglas Aircraft Co. v. Johnson, Sup.	90	P.2d	572
Drapeau; Reader v., App.	89	P.2d	654
Dubuque Fire & Marine Ins. Co.; Sandberg v., App.	90	P.2d	586
Duclos v. Tashjian, App.	90	P.2d	140
Dumas; People v., App.	90	P.2d	344
Dunn's Estate, In re, App.	89	P.2d	667
Echlin v. Superior Court in and for San Mateo County, Sup.	90	P.2d	63
Edgar Bros. Co.; Poore v., App.	90	P.2d	808
Edwards v. Hutchings, App.	90	P.2d	349
E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38–44, App.	89	P.2d	435
Ellis; People v., App.	89	P.2d	1107
Elston's Estate, In re, App.	90	P.2d	608
Entremont v. Whitsell, Sup.	89	P.2d	392
Fairbairn; Lester v., App.	89	P.2d	1091
Fallon v. Superior Court in and for City and County of San Francisco, App.	90	P.2d	858
Feliciano; Coca Cola Bottling Co. v., App.	89	P.2d	686
Ferrari; Lewis v., Super.	90	P.2d	384
Ferrero; Cross Water Co. v., App.	90	P.2d	98
Fireman's Fund Indemnity Co.; Katsulakis v., Sup.	89	P.2d	643
Fireman's Fund Indemnity Co.; Valladao v., Sup.	89	P.2d	643
First Nat. Bank; Barney v., App.	90	P.2d	584
Fisk; People v., App.	89	P.2d	142
Fleming; McGill v., App.	90	P.2d	341
Fontes v. Menke, App.	89	P.2d	669
Gaskill v. Wallace, App.	89	P.2d	687
Gatchell; Owings v., App.	90	P.2d	368
General Petroleum Corporation; Day v., App.	89	P.2d	718

	Vol.		Page
Gish v. Los Angeles R. Corporation, Sup.	90	P.2d	792
Golden State Glass Corporation v. Superior Court of Los Angeles County, Sup.	90	P.2d	75
Haddock v. Republic Productions, App.	89	P.2d	423
Haines; Chan Buck Sun v., App.	89	P.2d	121
Hall-Baker Co.; Pimentel v., App.	90	P.2d	588
Hammond v. McDonald, App.	89	P.2d	407
Hammond v. Omar's Dome, App.	89	P.2d	412
Handschy v. Handschy, App.	90	P.2d	123
Harper; Pacific Indemnity Co. v., App.	90	P.2d	132
Hatheway v. Industrial Accident Commission of California, Sup.	90	P.2d	68
Hayward Lumber & Investment Co. v. Ross, App.	90	P.2d	135
Healy v. Yellow Cab Co. of California, App.	90	P.2d	116
Hein's Estate, In re, App.	90	P.2d	100
Hepner v. Hepner, App.	90	P.2d	321
Heron; People v., Super.	90	P.2d	154
Hezmalhalch; Knowlton v., App.	89	P.2d	1109
Hollywood Turf Club; Cornell v., App.	89	P.2d	449
Homan; Nider v., App.	89	P.2d	135
Homan; Nider v., App.	89	P.2d	136
Hougham v. Rowland, App.	90	P.2d	860
Huffines v. Standard Brands of California, App.	90	P.2d	599
Hugh Evans & Co.; Jensen v., Sup.	90	P.2d	72
Hutchings; Edwards v., App.	90	P.2d	349
Hyatt v. Standard Brands of California, App.	90	P.2d	599
Industrial Accident Commission of California; California Casualty Indemnity Exchange v., Sup.	90	P.2d	289
Industrial Accident Commission of California; Hatheway v., Sup.	90	P.2d	68
Industrial Accident Commission of California; Travelers Ins. Co. v., App.	90	P.2d	327
Inman, Ex parte, App.	89	P.2d	421
Iwaki; Barrios v., App.	89	P.2d	417
Izuel; Rotea v., App.	89	P.2d	405
Jensen v. Hugh Evans & Co., Sup.	90	P.2d	72
Johnson; Chanslor-Canfield Midway Oil Co. v., Sup.	90	P.2d	572
Johnson; Douglas Aircraft Co. v., Sup.	90	P.2d	572
Jones; Los Angeles County v., Sup.	90	P.2d	802
Junkin; Steuri v., App.	90	P.2d	127
Kane v. Universal Film Exchanges, App.	89	P.2d	693
Katsulakis v. Fireman's Fund Indemnity Co., Sup.	89	P.2d	643
Keim v. Roether, App.	89	P.2d	187
Kelly; People v., App.	90	P.2d	605
Kettleman North Dome Ass'n v. State, Sup.	90	P.2d	572
Killefer; Donkin v., App.	90	P.2d	810
King v. Boggs, App.	90	P.2d	814
King; People v., Sup.	90	P.2d	291
King v. Schumacher, App.	89	P.2d	466
Knowlton v. Hezmalhalch, App.	89	P.2d	1109
Kramer v. Sanguinetti, App.	90	P.2d	103
Kuehn v. Carlos, App.	89	P.2d	672
Lancaster; Boyd v., App.	90	P.2d	317
Lane; Runkle v., App.	89	P.2d	1094
Langazo v. San Joaquin Light & Power Corporation, App.	90	P.2d	825
Lang Transp. Co.; Petersen v., App.	90	P.2d	94
Larrabee; Phillips v., App.	90	P.2d	820
Lester v. Fairbairn, App.	89	P.2d	1091
Lewis v. Ferrari, Super.	90	P.2d	384
Lewis; People v., Sup.	89	P.2d	388
Leypoldt, Ex parte, App.	90	P.2d	91

	Vol.		Page
Lisenba; People v., Sup.	89	P.2d	39
Long Beach Drug Co. v. United Drug Co., Sup.	89	P.2d	386
Los Angeles, City of, v. Aitken, App.	90	P.2d	377
Los Angeles, City of, v. City of Huntington Park, two cases, App.	89	P.2d	702
Los Angeles, City of, v. City of South Gate, two cases, App.	89	P.2d	702
Los Angeles County v. Jones, Sup.	90	P.2d	802
Los Angeles R. Corporation; Gish v., Sup.	90	P.2d	792
Lyons; C. S. Smith Metropolitan Market Co. v., App.	89	P.2d	425
McAdams Oil Co. v. City of Los Angeles, App.	89	P.2d	729
McDonald; Cooper v., App.	89	P.2d	412
McDonald; Hammond v., App.	89	P.2d	407
McDowell; Williams v., App.	89	P.2d	155
McGill v. Fleming, App.	90	P.2d	341
McKaig v. Clark, App.	90	P.2d	108
McKaig v. Moutrey, App.	90	P.2d	108
McKay v. Retail Automobile Salesmen's Local Union No. 1067, App.	89	P.2d	426
McKay v. Retail Automobile Salesmen's Local Union No. 1067, App.	90	P.2d	113
Macken; People v., App.	89	P.2d	173
McKibben; People v., App.	90	P.2d	331
McKimmins; Shelly v., App.	90	P.2d	842
McKinley; Sullivan v., App.	89	P.2d	125
McManus v. Allan, App.	89	P.2d	690
McNeal, Ex parte, App.	89	P.2d	1096
MacPherson v. MacPherson, Sup.	89	P.2d	382
Maggio Bros. Co.; Ure v., App.	89	P.2d	436
Marjorie Michael, Inc.; Clark v., Super.	90	P.2d	866
Martin v. Vierra, App.	90	P.2d	846
Marysville Fuel Co.; Crawford v., App.	90	P.2d	864
Maxon v. Avery, App.	89	P.2d	684
Meadows v. Clark, App.	90	P.2d	851
Meeks; People v., Super.	90	P.2d	148
Menke; Fontes v., App.	89	P.2d	669
Meridian, Limited, v. City and County of San Francisco, Sup.	90	P.2d	537
Metro-Goldwyn-Mayer; Barsha v., App.	90	P.2d	371
Metropolitan Life Ins. Co.; Cohen v., App.	89	P.2d	732
Monterey County; Agudo v., Sup.	89	P.2d	400
Montgomery; People v., App.	89	P.2d	184
Moorhead v. Shafer, App.	90	P.2d	356
Mortgage Inv. Co. of Los Angeles; Siemon v., Sup.	90	P.2d	84
Morton; People v., App.	90	P.2d	845
Moutrey; McKaig v., App.	90	P.2d	108
Nebelung v. Norman, App.	89	P.2d	713
Nider v. Homan, App.	89	P.2d	135
Nider v. Homan, App.	89	P.2d	136
Norman; Nebelung v., App.	89	P.2d	713
Oakdale Irr. Dist.; Stevens v., Sup.	90	P.2d	58
O'Donnell; Pettigrew v., App.	90	P.2d	93
Omar's Dome; Hammond v., App.	89	P.2d	412
One 1933 Plymouth Sedan De Luxe Automobile, Engine No. PD165124; People v., Sup.	90	P.2d	799
Owings v. Gatchell, App.	90	P.2d	368
Pacific Electric R. Co.; Connard v., App.	90	P.2d	817
Pacific Indemnity Co. v. Harper, App.	90	P.2d	132
Pacific Mut. Life Ins. Co. of California; Carpenter v., Sup.	89	P.2d	637
Parnham v. Parnham, App.	89	P.2d	189
Pearson; People v., App.	90	P.2d	94
Pearson v. Superior Court in and for Contra Costa County, App.	89	P.2d	162
Peers v. Stoll, App.	90	P.2d	119
People v. Ayer, App.	90	P.2d	819

	Vol.		Page
People v. Benton, App.	89	P.2d	1089
People v. Busick, App.	89	P.2d	657
People v. Christensen, App.	89	P.2d	1095
People v. Copley, App.	89	P.2d	160
People v. Donegan, App.	90	P.2d	856
People v. Dumas, App.	90	P.2d	344
People v. Ellis, App.	89	P.2d	1107
People v. Fisk, App.	89	P.2d	142
People v. Heron, Super.	90	P.2d	154
People v. Kelly, App.	90	P.2d	605
People v. King, Sup.	90	P.2d	291
People v. Lewis, Sup.	89	P.2d	388
People v. Lisenba, Sup.	89	P.2d	39
People v. Macken, App.	89	P.2d	173
People v. McKibben, App.	90	P.2d	331
People v. Meeks, Super.	90	P.2d	148
People v. Montgomery, App.	89	P.2d	184
People v. Morton, App.	90	P.2d	845
People v. One 1933 Plymouth Sedan De Luxe Automobile, Engine No. PD1C5124, Sup.	90	P.2d	799
People v. Pearson, App.	90	P.2d	94
People v. Pollock, App.	89	P.2d	128
People v. Ryan, App.	90	P.2d	603
People v. Schrader, App.	90	P.2d	331
People v. Spear, App.	89	P.2d	445
People v. Stevens, App.	90	P.2d	595
People v. Tellez, App.	89	P.2d	451
People v. Thompson, two cases, App.	90	P.2d	598
People v. Tilkin, Super.	90	P.2d	148
People v. Walker, App.	90	P.2d	854
People v. Yalo, Sup.	89	P.2d	391
People v. Yuen, App.	89	P.2d	438
People v. Yuen, Sup.	90	P.2d	291
Peters v. Pioneer Laundry Co., App.	90	P.2d	146
Petersen v. Lang Transp. Co., App.	90	P.2d	94
Pettigrew v. O'Donnell, App.	90	P.2d	93
Phillips v. Larrabee, App.	90	P.2d	820
Phipps v. Superior Court in and for Alameda County, App.	89	P.2d	698
Pimentel v. Hall-Baker Co., App.	90	P.2d	588
Pioneer Laundry Co.; Peters v., App.	90	P.2d	146
Platt v. Union Packing Co., App.	89	P.2d	662
Pollock; People v., App.	89	P.2d	128
Pomin; Strosnider v., App.	89	P.2d	179
Poore v. Edgar Bros. Co., App.	90	P.2d	808
Powell; Carmody v., App.	89	P.2d	158
Provident Irr. Dist.; Provident Land Corporation v., App.	90	P.2d	138
Provident Land Corporation v. Provident Irr. Dist., App.	90	P.2d	138
Reader, Petition of, App.	89	P.2d	654
Reader v. Drapeau, App.	89	P.2d	654
Regan v. San Mateo County, App.	90	P.2d	363
Reider v. Aqueduct Const. Co., App.	89	P.2d	169
Renz; Whittell v., App.	89	P.2d	668
Renzel Co. v. Warehousemen's Union I. L. A. 38–44, App.	89	P.2d	435
Republic Productions; Haddock v., App.	89	P.2d	423
Retail Automobile Salesmen's Local Union No. 1067; McKay v., App.	89	P.2d	426
Retail Automobile Salesmen's Local Union No. 1067; McKay v., App.	90	P.2d	113
Reutler; Stewart v., App.	89	P.2d	402
Riley; Swing v., Sup.	90	P.2d	313
Riley; Wyckoff v., App.	90	P.2d	608

	Vol.		Page
Rodman v. Superior Court in and for Nevada County, Sup.	89	P.2d	109
Roether; Keim v., App.	89	P.2d	187
Ross; Alameda County v., App.	89	P.2d	460
Ross; Hayward Lumber & Investment Co. v., App.	90	P.2d	135
Rotea v. Izuel, App.	89	P.2d	405
Rowland; Hougham v., App.	90	P.2d	860
Runkle v. Lane, App.	89	P.2d	1094
Russell v. Zink, App.	90	P.2d	360
Ryan; People v., App.	90	P.2d	603
Sandberg v. Dubuque Fire & Marine Ins. Co., App.	90	P.2d	586
Sandrini v. Branch, App.	90	P.2d	593
Sanguinetti; Kramer v., App.	90	P.2d	103
San Joaquin Light & Power Corporation; Langazo v., App.	90	P.2d	825
San Mateo County; Regan v., App.	90	P.2d	366
Santos v. Santos, App.	89	P.2d	164
Satterthwaite, Ex parte, App.	90	P.2d	325
Schrader; People v., App.	90	P.2d	331
Schumacher; King v., App.	89	P.2d	466
Scott v. Breusing, App.	89	P.2d	662
Security-First Nat. Bank v. American Trust Co., App.	90	P.2d	335
Security-First Nat. Bank; Bank of America Nat. Trust & Savings Ass'n v., App.	90	P.2d	335
Security-First Nat. Bank v. Stack, App.	90	P.2d	337
Shafer; Moorhead v., App.	90	P.2d	356
Shaw, Ex parte, App.	89	P.2d	161
Shell Chemical Co.; Buckley v., App.	89	P.2d	453
Shelly v. McKimmins, App.	90	P.2d	842
Siemon v. Mortgage Inv. Co. of Los Angeles, Sup.	90	P.2d	84
Skidmore v. Alameda County, Sup.	90	P.2d	577
Skinner v. Coy, Sup.	90	P.2d	296
Smith Metropolitan Market Co. v. Lyons, App.	89	P.2d	425
Sommerville, Ex parte, App.	90	P.2d	588
Southard, In re, Sup.	90	P.2d	304
Spaulding; Stephen v., App.	89	P.2d	683
Spear; People v., App.	89	P.2d	445
Special Assembly Interim Committee on Public Morals of California Legislature, Petition of, Sup.	90	P.2d	304
Spiers, In re, App.	89	P.2d	456
Stack; Security-First Nat. Bank v., App.	90	P.2d	337
Standard Brands of California; Huffines v., App.	90	P.2d	599
Standard Brands of California; Hyatt v., App.	90	P.2d	599
Standard Oil Co. of California; Tsirlis v., App.	90	P.2d	128
Stanfield's Guardianship, In re, App.	89	P.2d	696
State; Kettleman North Dome Ass'n v., Sup.	90	P.2d	572
Stephen v. Spaulding, App.	89	P.2d	683
Steuri v. Junkin, App.	90	P.2d	127
Stevens v. Oakdale Irr. Dist., Sup.	90	P.2d	58
Stevens; People v., App.	90	P.2d	595
Stewart v. Reutler, App.	89	P.2d	402
Stewart v. Stewart, App.	89	P.2d	404
Stoll; Peers v., App.	90	P.2d	119
Story v. Christin, App.	89	P.2d	144
Strosnider v. Pomin, App.	89	P.2d	179
Sullivan v. McKinley, App.	89	P.2d	125
Sun v. Haines, App.	89	P.2d	121
Superior Court in and for Alameda County; Phipps v., App.	89	P.2d	698
Superior Court in and for City and County of San Francisco; Fallon v., App.	90	P.2d	858
Superior Court in and for Contra Costa County; Pearson v., App.	89	P.2d	162

	Vol.		Page
Superior Court in and for Merced County; Thome v., App.	90	P.2d	364
Superior Court in and for Nevada County; Rodman v., Sup.	89	P.2d	109
Superior Court in and for Sacramento County; Waterland v., App.	90	P.2d	344
Superior Court in and for San Diego County; Union Trust Co. of San Diego v., Sup.	90	P.2d	582
Superior Court in and for San Mateo County; Echlin v., Sup.	90	P.2d	63
Superior Court of Los Angeles County; Golden State Glass Corporation v., Sup.	90	P.2d	75
Swing v. Riley, Sup.	90	P.2d	313
Tashjian; Duclos v., App.	90	P.2d	140
Taylor v. Board of Education of City of San Diego, App.	89	P.2d	148
Tellez; People v., App.	89	P.2d	451
Thome v. Superior Court in and for Merced County, App.	90	P.2d	364
Thompson; People v., App.	90	P.2d	598
Thrasher v. Thrasher, App.	90	P.2d	365
Tilkin; People v., Super.	90	P.2d	148
Toomey v. Toomey, Sup.	89	P.2d	634
Travelers Ins. Co. v. Industrial Accident Commission of California, App.	90	P.2d	327
Tretheway's Estate, In re, App.	89	P.2d	679
Tsirlis v. Standard Oil Co. of California, App.	90	P.2d	128
Union Packing Co.; Platt v., App.	89	P.2d	662
Union Trust Co. of San Diego v. Superior Court in and for San Diego County, Sup.	90	P.2d	582
United Drug Co.; Long Beach Drug Co. v., Sup.	89	P.2d	386
Universal Film Exchanges; Kane v., App.	89	P.2d	693
Ure v. Maggio Bros. Co., App.	89	P.2d	436
Valladao v. Fireman's Fund Indemnity Co., Sup.	89	P.2d	643
Van Ness v. Van Ness, App.	89	P.2d	106
Vierra; Martin v., App.	90	P.2d	846
Walker; People v., App.	90	P.2d	854
Wallace; Gaskill v., App.	89	P.2d	687
Warehousemen's Union I. L. A. 38-44; E. H. Renzel Co. v., App.	89	P.2d	435
Waterland v. Superior Court in and for Sacramento County, App.	90	P.2d	344
Watson's Estate, In re, App.	90	P.2d	349
Wellman v. Denning, App.	89	P.2d	672
Wenstrand; Agnew v., App.	90	P.2d	813
Western Pac. R. Co.; Crabtree v., App.	90	P.2d	835
Whitsell; Entremont v., Sup.	89	P.2d	392
Whittell v. Renz, App.	89	P.2d	668
Wiersma v. City of Long Beach, App.	89	P.2d	1107
Williams v. McDowell, App.	89	P.2d	155
Winchester Dried Fruit Co.; Battaglia v., App.	90	P.2d	111
Wittman v. Wittman, App.	89	P.2d	419
Wyckoff v. Riley, App.	90	P.2d	608
Yalo; People v., Sup.	89	P.2d	391
Yellow Cab Co. of California; Healy v., App.	90	P.2d	116
Yuen; People v., App.	89	P.2d	438
Yuen; People v., Sup.	90	P.2d	291
Zink; Russell v., App.	90	P.2d	360



CALIFORNIA REPORTER

IN VOLUME

89 PACIFIC REPORTER

SECOND SERIES

CAL.REP.89–90 P.2d—1

PEOPLE v. LISENBA.*

Cr. 4068.

Supreme Court of California.

March 21, 1939.

Rehearing Granted April 20, 1939.

1. Criminal law ⇐363, 404(4)

Production in court of snakes, identified as those employed by defendant and his accomplice in plan to cause death of defendant's wife on trial for her murder by drowning in bathtub, was properly permitted as part of res gestæ and tending to corroborate prosecution witnesses' testimony and otherwise support People's case.

2. Criminal law ⇐358
Homicide ⇐166(7, 12)

In trial for murder of defendant's wife, testimony that defendant told witness six days after wife's death that he would collect insurance on her life and marry witness, that he gave witness some money and promised to pay her more if she would testify that she met defendant and deceased five weeks before, that witness saw deceased on morning of latter's death, that deceased then complained of not feeling well, and that witness and defendant registered at hotel that night and talked over his assertion of attempt to frame him for wife's death, was admissible as tending to establish claimed motive of collecting insurance money and marrying witness and to disclose effort by defendant to establish alibi.

3. Criminal law ⇐531(3)

Evidence *held* to show that defendant's confession of murder was made freely and voluntarily, without promises, immunities, threats, or violence, and hence admissible in evidence, though he was questioned for many hours.

4. Homicide ⇐253(1)

Evidence *held* sufficient to support conviction of first-degree murder.

5. Homicide ⇐30(2)

That accomplice was principal actor in commission of homicide, which he and defendant planned and perpetrated, did not relieve latter from full responsibility therefor.

6. Criminal law ⇐372(4)

In trial for murder of defendant's wife, insured in his favor, by drowning in bathtub, evidence that his former wife, also so insured, was found drowned in bathtub of their home several years before, was admissible as tending to show that second wife's death was result of general plan by defendant to insure, marry, and murder his victims in order to collect insurance.

7. Criminal law ⇐372(1)

Evidence of defendant's prior acts and crimes similar to that charged is admissible to show that latter crime was result of general plan or scheme.

8. Criminal law ⇐374

To render evidence of defendant's murder of his former wife by drowning in bathtub admissible on trial for murder of his second wife in same manner to show that latter's death was result of general plan or scheme to insure, marry, and murder his victims, prosecution was not required to prove elements of previous crime beyond all reasonable doubt.

9. Criminal law ⇐1169(5)

In trial for murder of defendant's wife, admission of evidence of his murder of his former wife in same manner without proof thereof beyond all reasonable doubt was not prejudicial to defendant, in view of instruction that jury must believe beyond such doubt that former wife was murdered before considering facts of such transaction.

10. Homicide ⇐268

Whether woman, whom witness testified that he saw in defendant's yard on morning after night on which accomplice testified that defendant's wife was murdered, was defendant's wife, was question for jury on conflicting evidence in trial for murdering wife.

11. Criminal law ⇐743

Inconsistencies in defendant's testimony were matters for jury to determine in considering and evaluating entire evidence on murder trial.

SEAWELL and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Major Raymond Lisenba was convicted of first-degree murder, and he appeals.

Affirmed.

William J. Clark, R. E. Parsons, and Samuel L. Rummel, all of Los Angeles, for appellant.

*For subsequent opinion see 94 P.2d 569.

U. S. Webb, Atty. Gen., Warner Praul, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

In an indictment returned by the grand jury of Los Angeles county, Major Raymond Lisenba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the "accidental" appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will hereinafter be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We turn now to a discussion of pertinent evidence in the case.

Viola and James Pemberton, husband and wife, when called by the prosecution testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises; that as the witness James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) submerged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg "was swelled and very blue."

A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he "noticed a cut on her [deceased's] left toe, her big toe on the left foot"; that the flesh of her left leg "was very dark * * * and it was almost black between the ankle and the knee, very black"; that the "whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg" and was "some swollen."

Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowl-

edge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would "get me some rattlesnakes, I will give you $100" and "defray all expenses"; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost $5 but the defendant paid him $20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again talked with the defendant at his barber shop at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said "that is the one I want"; that the following day the defendant sent him to purchase the snake so designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to "Snake Joe" at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said "his wife [the deceased] had $5000 worth of insurance and he was going to collect it"; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to "perform some kind of an operation on her for pregnancy"; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to "Snake Joe" from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a. m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and said, "I am going in and drown her"; that the witness stayed in the automobile; that the defendant came out about 4:00 a. m. and said, "That is that"; that at approximately 6:30 or 7:00 a. m., the defendant said the deceased had been dead since 4:00 a. m. and the house "cleaned up"; that defendant then asked him to "help me carry it" whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bathroom; that the defendant took the upper part of deceased's body and the witness the lower part and carried her "towards the fish pond"; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him "when I get this money"; and that some time later the defendant gave him $100 and instructed him to "get out of town". The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with "Snake Joe", whom she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there

were boxes in the back of the car; that they again drove out to the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with "Snake Joe"; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared "white and jittery and had been drinking".

Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired if he had snakes "with fangs and poison"; that Hope purchased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake, stating that he had lost $100 to the defendant in a poker game and the defendant had offered to bet him $50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

Joe Houtenbrink, known as "Snake Joe", testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid $3.00; that Hope said he had a friend and "he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes"; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover or top for the snakes; that he saw Hope the following day about 3:00 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were "the actual snakes that were at the house that day". Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, "Snake Joe", still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified, was employed by defendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In People v. Bannon, 59 Cal.App. 50, 56, 209 P. 1029, 1032, it is stated that: "As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation." See also, People v. Peete, 54 Cal.App. 333, 348, 202 P. 51, and 8 Cal.Jur. 143, sec. 228. Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be

mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the people, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, "drowning and an acute cellulitis [swelling] of the legs." Cellulitis, he testified, is "always due to an infection of some kind"; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by "animal poisons" it would progress "much faster". He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be "the venoms of insects and snakes, spiders, and so forth". He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the "animal poison" type and "could have been" caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had made a special study of snakes and snakebites; that on deceased's great toe of the left foot he had discovered an "old laceration wound approximately a quarter of an inch in length" which could have been caused by a number of things but, in his opinion, had been caused "by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding", adding that the single incision was such "as could be caused by a fang striking at an angle, perhaps". In his brief the defendant concedes that this testimony is corroborative of Hope's story.

Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a $5000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on

June 25, 1935, he delivered to her a $5000 policy which named the defendant as beneficiary, that subsequently and on July 30th, he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental character of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a $5000 policy and the other for a $700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on hers; that defendant said he had ample insurance in two or three companies but applied for a $3000 policy on himself; that the policies were issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for $3500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that they began living together early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in "marvellous health" up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation that the parties were married at the time of making application therefor.

E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of $10,000 from an "estate".

[2] Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased) came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness and would give her $2000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen the deceased on her porch and that deceased had then complained of not feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified the card on which she had written the notes and also the

hotel register. She further testified that defendant gave her $60 at that time and promised her $2000 later.

We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an alibi in the event his foul deed came to light.

[3] At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the people undertook to establish that the statement or confession was the free and voluntary act of the defendant, uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the statement or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the people's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was "booked" at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

It appears from the testimony adduced by the people that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and "slapped" the defendant's face when the defendant was said to have referred to the deceased as a "whore". Other than subjecting defendant to constant questioning, and the "slap" administered to him, the several officers categorically denied that any threats or promises were made to or any physical beatings were inflicted upon the defendant during the two day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned, no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8:00 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

It is apparent, therefore, that the evidence is sharply conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant "when he was arraigned" on April 21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on voir dire, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the manner of the commission of the homicide; that the officers accused him of lying and threatened to take him back to the house and "beat your God damned head off"; that he could not take another beating and therefore offered to "gladly admit it [Hope's story] and save myself other punishment". On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2nd and 3rd.

Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2nd, he took the defendant from his cell in the county jail to the Chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there; and that Hope was brought into the room.

Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied "Nothing". This session ended at 11:50 a. m.

on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2nd, that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the defendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if possible, an alibi.

At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3:30 a. m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession which the prosecution thereupon offered and had admitted in evidence.

It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in People v. Lehew, 209 Cal. 336, 341, 287 P. 337, 339, that: "Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. * * * In People v. Siemsen, supra [153 Cal. 387, 95 P. 863], it is declared that the 'admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.' The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. * * * A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admissions was properly admitted."

In the present case the testimony is overwhelming to the effect that during May 2nd and May 3rd, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's own testimony. That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he

freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4, 5] Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would prove fatal; that he gave Hope $20 and the latter had "certain kinds of boxes made" and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope $6 to purchase two "hot" snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11:00; that he gave Hope all the money he had, about $100, and left about 1:00 p. m. because deceased "had been too good to me and I just couldn't have anything to do with that part of it"; that Hope said deceased would die in about one hour; that he (defendant) returned about 4:00 p. m. and found Hope intoxicated and that Hope had deceased "full of liquor"; that Hope told him he had put her foot in the box containing a snake; that Hope left and returned at 6:00 a. m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding that Hope would "care" for the deceased, who was still alive, by burning the "house up"; that Hope came to the shop about 1:00 p. m. and reported that he had not burned the house but had thrown deceased "in the bath tub and drowned her" and then placed her body in the fish pond; that he upbraided Hope for "the worst thing you could have done" because he [defendant] "had a wife drown in a bath tub in Colorado Springs a little while ago"; that he told Hope "there ain't enough men in the District Attorney's office to make me talk", adding "and there wasn't if he [Hope] had not told it"; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased "was to be murdered by Hope" and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may have offered the Reed woman a $1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were "the true stuff" and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defendant admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpetrated.

[6, 7] In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on the death of the victim, the prosecution offered evidence tending to show that a former wife of the defendant, equally

heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries so incurred was later and while recuperating, drowned in the bathtub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, prima facie, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p. m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were "neat" and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he "really don't know how it happened" as his (former) wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled about fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the *right hand side* of the car (though she was supposed to be driving on the left side) with her head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood *inside* the car, especially on the back of the cushion on the *right* side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

Miss Grace Yarnell, a cousin of this former wife of the defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store about 5 p. m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of luke-warm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but that she

apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he "couldn't permit anything of that sort." The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies.)

Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain x-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this evidence as against his conflicting medical testimony touching the same subject.

John A. McKelvey testified that when defendant purchased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road *as he was driving.*

C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned in the bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a $5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who, as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental, double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident was admissible not to prejudice the defendant

by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. People v. Stutsman, 66 Cal.App. 134, 225 P. 477; People v. Barnes, 111 Cal.App. 605, 295 P. 1045; People v. Morani, 196 Cal. 154, 160, 236 P. 135; Holt v. U. S., 6 Cir., 42 F.2d 103, 106, 107; People v. Gosden, 6 Cal.2d 14, 24, 56 P.2d 211. See, also, the English "bathtub" murder case, R. v. George Joseph Smith, 21 Cr.App.R. 229, 236.

The Morani case, supra, contains the following [196 Cal. 154, 236 P. 138]: "'In the case of People v. Seaman, 107 Mich. 348, (65 N.W. 203, 61 Am.St.Rep. 326), it is said: "Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain."'"

It is stated in the Holt case, supra [42 F.2d 106], that:

"No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the quo animo, scienter, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

"When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * * The courts generally use the phrase 'at or about the same time,' but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was here proved, go only to the weight of the evidence, not to its admissibility. * * In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial."

In the Gosden case, supra, the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that [6 Cal.2d 14, 56 P.2d 215]: "Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife.

People v. Northcott, 209 Cal. 639, 652, 289 P. 634, 70 A.L.R. 806."

[8] Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in Lund v. State, 207 Ind. 347, 190 N.E. 850, 853, that: "It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient."

In 1914, Ohio adopted a contrary rule when in the case of Baxter v. State, 91 Ohio St. 167, 110 N.E. 456, 458, to which the defendant refers us, it was declared that: "Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses." However, defendant has failed to note that in the later case of Scott v. State, 107 Ohio St. 475, 141 N.E. 19, 26, the Ohio court renounced the rule of the Baxter case, declaring:

"Is the rule in the Baxter Case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists, and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

"That this common sense view of the situation obtains in certain other American jurisdictions is shown by the fact that while the case of Baxter v. State, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the Baxter Case is frequently cited, the degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not 'beyond a reasonable doubt.'"

In effect, we recently held in People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491, 493, that evidence which merely *tends* to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other offenses. In so concluding, we quoted from People v. Whiteside, 58 Cal.App. 33, 38-41, 208 P. 132, to the effect that: "If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary, in order that Stivers' testimony be admissible that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. * * *"

We also there quoted from People v. Sindici, 54 Cal.App. 193, 196, 201 P. 975, to the effect that: "Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. * * *"

In People v. Baker, 25 Cal.App.2d 1, 76 P.2d 111, 112, it is declared in part

that: "It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged."

In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defendant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

[9] But, even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding that the rule as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

[10] In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

The defendant's sister testified that she visited with him and the deceased early in July, 1935, and saw Hope there on several occasions; that she heard the deceased state she desired an abortion whereupon the defendant said Hope would "take care of her". The witness also testified that during 1933–34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body) and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the commission of the homicide he and the defendant had imbibed rather freely of liquor.

The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

[11] The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as "Dr. Smith"; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conver-

sation stated that she could not go through with the ordeal of child-birth and that "Dr. Hope will take care of me" (though earlier defendant had testified he introduced Hope as "Dr. Smith"); that he saw Hope again on August 3rd (which corroborates Hope's story of being with defendant two days prior to the homicide) but that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope "cared" for deceased; that Hope left about 1:00 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his "confession" had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake.) On cross-examination the district attorney confronted the defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was "crazy to have a baby, but I don't want one". We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

The entire record has been examined and all contentions advanced have been considered. Reference to other items of evidence not here mentioned would neither add to nor detract from the conclusion here reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed.

The judgment and order are, and each is, affirmed.

For the reason that Mr. Justice HOUSER was not present at the time when the argument was heard in this case, he does not participate in the decision thereon.

Mr. Justice NOURSE sitting pro tempore.

SEAWELL, Justice (dissenting).

I dissent. The Court opinion is so deficient in its statement of the facts to which it refers in general and sweeping terms as supporting its conclusion that it becomes necessary to set forth much of the evidence which was adduced in the case in order to appreciate the kind of evidence, with all of its weird absurdities and vagaries, which must be given verity in order that the judgment in the case may stand. This case makes it singularly appropriate that the familiar rules which cannot be ignored in the consideration of criminal cases be re-stated. A few of these cardinal principles are: that suspicion, however strong, will not justify a conviction of crime; that probabilities alone are not sufficient to sustain a conviction; that a person may not be convicted upon the doctrine of chances, that is to say, that the chances are greater that he is guilty than that he is innocent; that the proof of guilt must be of the character and quality which convinces the mind beyond all reasonable doubt and to a moral certainty of the guilt of the accused; that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *" Section 1111, Penal Code. Lastly, the evidence must be reasonable and substantial

and not of a haphazard or irrational type, or rendered inherently improbable or doubtful by its own unreasonableness. It must bear the stamp of sincerity and truthfulness, rather than bear the impress of fabrication.

This case presents a perfect illustration of the dangers and abuses which result from a failure in the trial of criminal cases to adhere to the age old rules and maxims of criminal jurisprudence, which are cherished next only to the Magna Charta as safeguards of life and liberty when either is placed in jeopardy by an accusatory process. At least six major issues, including two entirely different alleged attempts to take life by different methods, were injected into the case, which no doubt greatly influenced the jury against the defendant in the consideration of the evidence relevant only to the commission of the crime charged in the indictment. This evidence no doubt created such strong prejudice against the defendant that it is extremely questionable that the jury was able to withstand its influence and calmly and dispassionately weigh the credibility of the witnesses by the application of "the rule of reasonableness", or to observe the presumptions and inferences with which the law clothes all persons charged with the commission of a public offense. Other errors which we deem equally as prejudicial to the rights of the defendant as those above mentioned will receive the attention which their importance merits.

Some twenty years prior to his indictment, defendant adopted the name of Robert S. James, and we will refer to him by the name of his adoption. For a period of fifteen years he conducted a barber shop in the city of Los Angeles, in the name of James, and he was known solely in his business transactions and to his friends and acquaintances by the name of Bob or Robert S. James. He is a native of the state of Alabama, and was a member of a large family consisting of a mother, brother and several sisters. Numerous collateral relatives on both sides of the parental tree constituted the gentry with whom he spent his early boyhood days, in hard circumstances of poverty, in a rural community. His father, who was an itinerant watch and clock repairer, laterly drew apart from the mother and the children, and the latter, being left in the mother's care, were compelled by force of circumstances, in every instance, to leave their home at early ages and find employment in order to maintain themselves and the household. The defendant's school advantages were very scant. At an early age he worked in cotton mills, a coal mine, and, finally, with the assistance of relatives, he was enabled to attend a school conducted for the preparation of young men who planned to engage in the barbering business. He followed this trade—except for the time he spent in the service during the World War—from early manhood to the time he was formally charged with the murder of his wife, Mary Emma James, on May 6, 1936, at the city of Los Angeles where he conducted the usually appointed barbershop, consisting of three or four chairs, with a beautyshop stall or apartment, located at 522 West 8th street, a business district in said city. His patrons consisted of persons engaged in business in the area in which his shop was located, and the general public desiring the services of a barber. Among his patrons were several life insurance agents or representatives of life insurance companies, who were on cordial terms with him. They had frequently requested him during years of business contact to give them the names of his customers who might likely become interested in life insurance. The defendant, in several instances, interested himself in their behalf by assisting them with information and using his good offices with his patrons in procuring applications of desirable prospects for life insurance policies in the several companies represented by said agents. There is nothing in the record which tends to indicate that he did not conduct himself and his business in an orderly and business like way, until after he became the special subject of a most intensive investigation conducted by the district attorney's office, aided by a dozen or more investigators attached to that office working in concert with certain members of the police department and the sheriff's office. The starting point of the investigation is not made certain by any member of the party in charge of the investigating forces but evidently it was begun shortly before the defendant was taken into the personal custody of said officers, and held in detention for several days in a private residence, without authority of law. Not until the alleged confession of the defendant had been procured, which will hereafter be considered, was he formally charged with the murder of Mary James, and officially lodged in the county jail, the place pro-

vided by law for the detention of persons held to await trial for the commission of felony charges.

Defendant Robert S. James, and Charles H. Hope, were indicted on May 6, 1936, and arraigned on the same day. On May 11th, each defendant entered his plea of "Not Guilty" and James entered the further plea of "Not Guilty By Reason of Insanity". The case was thereupon set for trial to begin June 22, 1936. Defendant's application for thirty additional days to prepare for trial and to take the deposition of witnesses residing in the State of Alabama as to his mental condition, was denied. Counsel entered into stipulations as to the taking of certain depositions and the trial began on June 23, 1936. On the following day Hope was sworn and became a witness in behalf of the prosecution. On arraignment day the Court appointed the public defender as attorney for Charles H. Hope, but as he withdrew his plea of "Not Guilty" and entered a plea of "Guilty as charged in the indictment" on or before the first day of the trial, the public defender appeared in court only at such times as it was necessary for him to join in a request for the postponement of judgment to a day subsequent to the conclusion of the trial of James, which event occurred on July 28, 1936. That Hope's change of his plea and alignment with the prosecution was induced by the hope of receiving some favor or immunity is too self-evident to require argument. The judgment pronounced by the Court upon Hope was imprisonment for "the term prescribed by law". This judgment relieved him of the death penalty. Four days prior to the day judgment was pronounced on Hope, Robert S. James had been found guilty of murder of the first degree, which carried with it the death penalty, and the Court, on September 10, 1936, made a formal pronouncement of judgment by imposing the death penalty on him in accordance with the jury's verdict. The plea of "Not Guilty by Reason of Insanity" was withdrawn and this appeal was taken from the order denying defendant's motion for a new trial and from the judgment of conviction; also upon assignments of misconduct on the part of the district attorney and the Court respectively, during the course of the trial. It is sufficient to concern ourselves only with those assignments which constitute the major grounds of the appeal.

It can be said without fear of overstatement of the fact—if the circumstance is of sufficient importance to merit mention in our judicial records—that in no case which has come to the attention of this Court for review, in its entire judicial existence, has the spectre of weird, ghastly and unnatural wickedness, from first to last, stalked a judicial proceeding in such hideous forms as are set forth in the presentation of the instant case on behalf of the People. The rule is well settled in criminal law that evidence pertinent to the investigation of a material fact or issue in the case is admissible notwithstanding the fact that it may tend to reflect prejudicially or unfavorably upon the character or credibility of the person whose acts are under investigation. But the rule is otherwise when it cannot be seen that proof, or proffered proof of an alleged fact or condition, would tend to establish the corpus delicti, or prove a single fact material to the case, but which, on the other hand, would have the effect of producing a state of mind that would render it less probable that the verdict would reflect the calm and dispassionate consideration of the jury unbiased by repeated references to improper matters.

Lord Chief Justice Hale's admonition uttered many years ago as to the great care and caution that should be exercised in the examination of those accusations and acts, detestable in nature and which are easily made and hard to be defended against, has been adopted as a canon of our American law. He said in part: "* * * the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." Doubly aggravated becomes the error where matter of the ineffaceable type is emphasized by frequent and vehement references both in the evidence and in argument. The reason for the observance of the rule which excludes all allusions to highly prejudicial or defamatory matters—true or untrue, and whether expressed in words or by exhibits—is that the minds of the investigators may be free to weigh dispassionately close and vexatious questions of fact unaffected by prejudice or hatred arising out of extraneous matters. It is not only the theory but the mandate of the law that every person accused of crime is entitled

to be tried by a jury charged with the duty of making an earnest effort to resolve every reasonable doubt, intendment of law, and presumption of fact in favor of innocence, where it can reasonably be done, and where two opposing conclusions may be drawn from a given statement of facts, the one leading to innocence should be adopted, and the other, leading to guilt, should be rejected. The minds of the jurors must be kept free and uninfluenced by any matters or things which will tend to hinder them in strictly following the law in the discharge of this important office. The degree of harm or damage that may ensue by the violation of this age old rule of law is relative to the particular or kind of acts which constitute the particular crime under investigation. From what has been said we do not mean to imply that facts which are admissible under the law are to be excluded from the case because of any inherently prejudicial quality which they may possess, but we do say that if the offense is of such a nature that it must, from necessity, arouse in the mind of the average person a deep sense of aversion to a person charged with the commission of such offense, that circumstance does not give the prosecution the right to add other prejudicial matters which bear no proper relevancy to the crime charged, and which would thereby place the defendant in a more unfavorable light in the eyes of the jury, than he would have stood had the inadmissible evidence not been injected into the case.

It is appellant's contention that the double theory adopted by the prosecution as to the manner by which the life of Emma James was planned to be taken, first by the rapid and effective method of drowning, and secondly, by the much slower and less certain method of bringing about her death by the venom of a rattlesnake, are too self-contradictory, inconsistent and absurd to form a common basis, and the two theories with their weird ramifications were invented and built up for the sole purpose of fomenting a state of irremediable hostility and ineffaceable prejudice in the minds of the jurors against the defendant, and were intended to serve, and did serve, as grounds for depreciatory allusions and references to matters which could not have been of the least assistance to the jury as aids in arriving at the truth of the charge. One rattlesnake was not deemed sufficient to execute the asserted fiendish purpose of the accused, according to co-defendant Hope, but three or four were obtained by him notwithstanding no claim was made that the deceased was bitten by more than one, and only *one* of the *two* fangs which rattlesnakes normally have, produced any mark upon the toe or body of the deceased, and that was on the underside or *bottom* of the *toe*.

The final theory of the prosecution is that the deceased came to her death from drowning by the criminal act of James. What part James took in accomplishing her death by drowning is left to speculation and conjecture. The bite of a rattlesnake is offered as a contributing cause of death. The cursory examination made by the autopsy physician showed that her lungs contained an unusually large quantity of water. When found, the upper part of her body was slightly beneath the surface of the water in a lily or fish pond. It requires no expert evidence to establish the commonly known fact that drowning takes place within a very short time upon submersion of the human head, and in far less time than is required for the venom of a rattlesnake to be carried through the blood stream from the toe, where the circulation of the blood is more feeble than in any other part of the human body, to the vital organs and cause death, even in those cases in which death ensues.

What aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury, could have been to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error.

Rattlesnake venom, even when it proves fatal, is slow in action compared with the quick and decisive method of death by drowning. It will be kept in mind that the evidence as to the use of rattlesnakes, as a means of producing death was certainly a highly controversial issue which rests wholly upon the word of Hope, an accomplice, whose testimony is not sufficient to support a conviction unless it is corroborated to the extent required by section 1111, Penal Code, and that issue was opposed by the only other witness to the alleged fact, the defendant, who unqualifiedly de-

nied Hope's testimony as to the part rattlesnakes were made to play in hastening or having anything whatever to do with the death, or with any attempt to encompass the death, of the deceased. If Hope's testimony on this issue should be discredited, it would necessarily tend to impeach him generally. The rattlesnake issue is important for the further reason that a person who causes rattlesnake venom (poison) to be injected into the blood stream of a human being would be guilty of first degree murder in the event it actually caused death. In all likelihood the person so causing the death would be condemned to suffer the death penalty by virtue of the provisions of section 189, Penal Code, which provides that "all murder which is perpetrated by means of 'poison, or * * * 'torture' * * * is murder of the first degree", or under the general rules of law which prescribe that all murder committed in an unusually cruel manner is murder of the first degree and subjects the perpetrator to the death penalty, at the discretion of the jury trying the case. We mention the penalty because a great deal of evidence was introduced in the case in support of the theory that the deceased, who was six weeks advanced in pregnancy, and had suffered from nausea, dizziness, and kindred symptoms of pregnancy to a degree that she became unusually miserable and discouraged as to her ability to pass through the ordeal of childbirth, may have come to her death by an attempted abortion practiced by Hope, with the assistance or connivance of James. The theory of accidental death caused by falling in a fainting spell, or by self-infliction also were issues which the defendant had a right to have the jury pass on.

If death ensued as the result of an attempt to commit an abortion, the degree of crime would not be higher than murder of the second degree, the maximum penalty being life imprisonment. Thus the penalty for criminal abortion was commensurate with the term meted out to Hope under his plea of guilty. We mention this matter in view of the Court's instruction to the jury that if it returned a verdict of guilty, it could not be less than murder of the first degree, and also as bearing on the reference made to the punishment of abortion during argument of counsel for the People as tending to buttress Hope's righteous motives; further, its tendency to render less effective the inferences which the defense was entitled to draw by reason of the delay in passing judgment on Hope's plea, which was early changed from "Not Guilty" to "Guilty", until after he had testified and the jury had rendered its verdict in the James case. Counsel for the People in decrying the abortion theory in his argument to the jury stressed the point that if the abortion story was true, Hope would have been a foolish man to have entered a plea of guilty of murder of the first degree with a possibility of suffering the extreme penalty in view of the principle of law that if Mrs. James died "as the result of an abortion to be performed on her by Mr. Hope, the very most that Mr. Hope could be guilty of, under the evidence, would be murder of the second degree, for which his life is not in jeopardy". At this juncture counsel for the defense interrupted with the objection that counsel had no right to instruct the jury as to matters of law. The Court agreed with the objecting counsel that the jury must accept the law as given by the Court, but in so doing said that in view of what the deputy district attorney had stated the law to be "the Court informs the jury where an illegal operation is performed and death is a result therefrom and is caused thereby, the person performing such illegal operation is guilty of second degree murder". The jury was not instructed and therefore did not know that punishment for second degree murder might equal in terms of years the punishment prescribed for first degree murder, which is imprisonment for life. That was the punishment imposed on Hope for the part he took in a homicide which the prosecution in its argument denounced as equaling the foulest crime that blackens the pages of our criminal calendars. The effect of the incident above referred to was to bolster up and support Hope's testimony on the theory that if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense, and thereby preclude the possibility of the infliction of the death penalty. It is convincing beyond all question from the vigorous and vehement manner in which the death penalty against James was urged at every stage of the proceedings as the only verdict that could vindicate the law, that an offer on the part of Hope to plead guilty to second degree murder, if made, would have been rejected inasmuch as it would have tended to weaken the theory on which the death penalty was urged against James. Such a plea would have practically committed the prosecution of James to the

abortion theory. The defense insists that its claim made throughout the trial, which in substance was that Hope was induced by promises that if he would change his plea of "Not Guilty" to a plea of "Guilty", and align himself with the prosecution, said officers would use their best efforts to relieve him of the extreme penalty, was weakened, if not destroyed, by the trial incident referred to. It is contended that it put Hope in the favorable but false light of having been moved solely by the promptings of conscience, and not at all induced by promises or understandings that his life depended on his performance as a witness, and being so moved, he voluntarily decided to tell the truth at the risk of forfeiting his life, rather than to stand on a defense which would have absolutely barred the imposition of the death penalty. Later the abortion theory, of which there is much evidence, was erroneously, we think, ruled out of the case by the Court instructing the jury that there was but one of two verdicts that could be rendered, to wit, murder in the first degree, or not guilty of any crime. Consideration will be given later to the evidence bearing on this issue.

We are confronted in our examination of this appeal with a record of tremendous proportions, larger by far than is necessary to present every substantial question which merits serious consideration. Much space is devoted to ultra sordid and sensational subjects, many of which transgress the limits of rational conduct. The transcript of testimony contains more than two thousand five hundred pages of typed matter and the clerk's transcript exceeds two hundred pages, not to include voluminous printed briefs. This being a case in which the death penalty was imposed, and for the further reason that so many strange and inexplicable acts and incongruous situations are set forth as forming a part of the plan to take the life of the deceased, we deemed it our duty to assume the laborious task of making a careful examination of the entire record. It includes not only the proceedings had in the single charge of murder, alleged in the main case to have been committed August 5, 1935, the consummation of which the prosecution has advanced two theories, one being that Mary James met her death by drowning, accomplished by James, the motive being to collect on certain life insurance policies issued on her life in which he was the beneficiary; and the other theory being that James, with the assistance of Hope (whose part in the homicide is left in an equivocal state as to whether he acted with the criminal intent in the commission of the specific homicide alleged in the indictment or whether he believed he was aiding and abetting a plan to murder a different and unnamed person) aided in accomplishing her death by thrusting her left foot into a box containing a rattlesnake procured by Hope at the behest of James, whereby her toe was bitten by said snake, in furtherance of the plan to cause her death by rattlesnake venom. The record also contains evidence which has to do with a different and distinct crime committed in another state, some four years prior to the crime alleged in the indictment, which evidence the People claim proves, beyond a reasonable doubt and to a moral certainty, that James, being prompted by a similar motive, conceived and executed by the adoption in part of similar methods, did, on September 21, 1932, attempt to murder, and a few days thereafter, to-wit, October 14, 1932, in the State of Colorado, succeed in murdering his former wife, Winona James, commonly known as Nona James, he being the beneficiary named in insurance policies issued on her life.

At the time of Winona's marriage to the defendant, she carried insurance policies on her life aggregating the sum of $9,000 payable in case of death by natural causes. One of said policies which paid a death benefit of $5,000 also provided double indemnity in case of accidental death. James was made the beneficiary in said policies, as he was in the policies afterwards issued to Mary James. He was paid double indemnity on the $5,000 policy on Winona's death, proof of accidental death being satisfactorily established. The sum total which he received as beneficiary under said policies issued to Winona amounted to $14,000.

On September 21, 1932, a few days after the marriage of Winona and James, he and his wife set out on a trip by automobile, to visit James' former home in Alabama where a number of his near relatives resided. A number of his wife's relatives resided near Manitou, Colorado, and they planned to stop on their journey to visit with them. While there, they took a trip as they had planned to do, to Pike's Peak. While descending the peak not far from its summit, (appellant's theory) the wife driving the automobile, lost control or

failed to properly direct it, and it left the tortuous, steep and somewhat narrow gravelled road-bed and was precipitated a considerable distance down the mountain side before it became lodged against a large granite boulder. James, who according to his story, was viewing the scenery at the close of day with the aid of field-glasses, jumped or was thrown from the car and received minor bruises and an injury to his back. Mrs. James being unable to extricate herself from the perils of her position suffered severe fractures of the cranial structure as a result of her occupancy of the car. She was taken to a hospital at Colorado Springs where she received medical care. She regained consciousness on the following morning and when her condition warranted, she was taken to a cottage which the defendant had rented and where he remained with her until she was found around 4:30 or 5:00 o'clock in the afternoon, by her husband, lying drowned in the bath tub, upon his return from a trip to the business district of Manitou, accompanied by the local delivery-man who was making a delivery of provisions purchased by James. The grocery store was approximately one mile from the James cottage and James had on previous occasions ridden with the delivery-man in making deliveries to the cottage. The cause of death was examined into by the county coroner and the officials who are charged with the duty of examining into the causes of death in such cases and no suspicion of any criminal agency was hinted at until April, 1935, some three years after the murder is charged to have been committed, and some eight months after the death of Mary James of whose murder the defendant stands convicted. It seems that the investigators of the district attorney's office for some time had been working on the theory that the defendant had murdered his wife. It came to them from some source that the defendant and Lois Wright were living together in incestuous relations. It was in the investigation of the incest charge and from information furnished by Madge Reed, whose connection with the case will later be considered, that the indictment was found. The investigators of the incest charges, which resulted in three convictions, and the murder charge involved in this appeal, and the murder of Winona, claimed to have been committed in the jurisdiction of Colorado, were developed together by the investigators attached to the district attorney's office, working in conjunction with certain members of the Los Angeles police force and the sheriff's office. James was taken into custody at his home, No. 3886 South La Salle avenue, and was held in detention in a privately owned residence, No. 3882 South La Salle avenue, located next door to his home, under the exclusive control of the prosecution's forces. In this house a dictaphone had been installed for spying purposes, operated under the direction of Police Officer Everett E. Kynette, the head of the "Spy Squad". The means by which the evidence was obtained to effect James' conviction on the incest charges does not appear, but it is probable that it was accomplished with the use of the dictaphone apparatus and the spy system which was admittedly operated from the house in charge of the investigators located next door to the James home.

It would not be within the reasonable observance of the limitation of space or time to attempt anything resembling a complete review or analysis of the evidence introduced into the case. In fact, it would be practically impossible to harmonize much of the testimony given by the prosecution's chief witness, Hope, with a course of rational conduct. The motive which might prompt the commission of crime ordinarily discernible in every criminal case, is unquestionably present in the instant case, but the evidence amassed to prove the plan of execution takes such a wide departure from a normal course of conduct, making due allowance for the abnormalities of the criminal minded, as to require close scrutiny of the testimony of the witness upon whom judgment of conviction must ultimately stand or fall, as tested by the rule of reasonableness and examined in the light of the strength of the evidence relied upon to support the indictment.

There is little in the record which sheds light on the background of Hope's life. He was thirty-seven years of age at the time of the trial and testified that he was married. He testified that during the year immediately prior to the trial he had been engaged in the business of "building maintenance" without stating the nature of that business or where he was so engaged. He spoke of having been engaged in business at Pomona during his acquaintance with James but when asked by counsel for the defense the kind of business he was en-

gaged in an objection to the question interposed by counsel for the prosecution was sustained on the ground that the question was immaterial. It appears by affidavits that he is an ex-sailor and had worked as a floor finisher. It also appears that he had had some kind of employment or connection with a drug concern for a time and that his employment was generally of the casual kind and in the nature of odd jobs. Evidently he was not engaged in any continuous employment and was idle a large portion of his time. He testified that he had known James for a period of seven years and that he had been a customer of his barbershop at irregular intervals and had at other times dropped in to exchange words of greeting. He also had borrowed small sums of money from James and had otherwise sustained friendly relations with him. James had let him use his car on a number of occasions. There is no suggestion in the record that a purpose to engage in a criminal conspiracy to take the life of any person by the instrumentality of poisonous reptiles, or otherwise, existed in the mind of either of the parties, until suddenly and unexpectedly, in the month of June, 1935, as the two walked from James' barbershop, James said to Hope, according to the latter's testimony, that a friend of his "had a wife who had been bothering him a bit and he was going to kill her and [the friend] wanted to get some rattlesnakes, and laughed about it." Hope corrected the above statement which he attributed to James to agree with the earlier testimony given by him before the grand jury in explanation as to the reason why the friend wanted to kill his wife, to read as follows: "I have a friend who has a wife that is keeping him broke and he wants to kill her. He is going to kill her with a rattlesnake." He further corrected his testimony to agree with his grand jury testimony, to read: "He (James) said this man will give you $100 to buy these rattlesnakes."

It is the testimony of Hope that he did not know the identity of the woman thus marked for death but he nevertheless set about to procure and did procure rattlesnakes which he believed were to be used in the commission of a murder for which he expected to receive the sum of $100. Hope testified that he did not know the snakes were intended to be used as a means of killing Mrs. James until a very brief period before he assisted James in carrying the box containing the rattlesnake into the dining room, where, as he described, Mrs. James was lying on her back, strapped to the dining room table with her limbs extending beyond the edge of the table, and with strips of adhesive tape pasted across her eye-lids and over her mouth, with no garment on her body but a night-gown, partially upraised.

That Hope was at least given to the inordinate use of alcoholic spirits whenever obtainable is apparent from the evidence. His admissions, if accepted at their face value (but which are repudiated in the main by the defendant), would stamp him as occupying a low plane in the scale of moral perverseness, willing to take life by adopting indescribably wicked and cruel means of torture.

A large mass of evidence in the form of depositions bearing on James' mental capacity and temperamental characteristics as exhibited in his adolescent period and during his early manhood, was injected into the case by the attorneys for the defendant, primarily offered as tending to show that he was congenitally a weak-minded and incompetent person.

This testimony was primarily offered for the purpose of affording grounds for the exclusion of any testimony bearing on the purported confessions made to the investigators, on the grounds that James was a person without sufficient understanding and lacked the mental capacity to appreciate the import and effect of the alleged statements, or confession, which it is claimed he voluntarily made, and that he was mentally unable fairly to protect himself without the aid or advice of someone against the methods applied by the massed forces of trained and experienced investigators. This testimony, in the main, had very little, if any, relevancy to the commission of the specific act charged against the defendant, and it was not in itself sufficient to show that he was a person who, under normal circumstances, was unable to appreciate the common affairs of life. Whether he was a person who would be more likely to fall a prey to coercive methods than the average individual was a proper matter for the jury's judgment in the light of all the circumstances shown by the evidence, whether direct or deducible by reasonable inferences from proven facts. The mental capacity of a witness so far as it affects understanding or the intent of the person whose act is the subject of inquiry, is always a matter for the jury's consideration. The evidence was not of the kind, however, that would excuse

the commission of a homicide on the ground that the accused was insane. The evidence bearing on the formative periods of his life disclosed both commendable characteristics and acts of youthful folly, neither better nor worse than those which might be expected to mark the conduct of the average boy reared under similar circumstances. It may be noted that it appears that he married in early manhood and whether this first wife died or the parties became divorced is not made clear. Whether the marriage was dissolved by death or divorce is not relied upon as a material issue in the case. It further appears that the defendant was a fancier of, and, at times, was the owner of, game chickens and a particular breed of bulldogs.

His acts with respect to matters that occurred during his maturer years will hereafter receive such notice as their relevancy may seem to require.

We are now brought to a consideration of the evidence which has a direct bearing on the specific murder alleged in the indictment, to-wit, the alleged felonious killing of Mary Emma James, with malice aforethought.

Mary Emma James' name before marriage was Mary Emma Busch, and she was a beauty parlor operator. She was a woman evidently in her thirties and James was approximately forty years of age at the time they were married. Mary Emma Busch, to whom we shall also refer to as Mary or Mary James, entered the employ of James in March, approximately five months before she was discovered dead, August 5, 1935. She and Miss Viola Lueck, who since the death of Mary James, married James Pemberton, had been companions and intimate friends for approximately two years prior to the marriage of James and Mary Busch. Miss Lueck was an employee of the telephone company. She met James for the first time the next day after Mary Busch (Mary James) had become acquainted with him. She and Mr. Pemberton were engaged to be married during the period of time immediately preceding Mary's death, and it had been arranged that the wedding was to take place at the James home. Naturally a relation of cordiality and friendship existed between James and wife on the one hand, and Mr. Pemberton and his intended bride, on the other. Mutual social relations existed between the two couples, and exchanges of social courtesies were quite frequent. The James home was located at 1329 West Verdugo road, La Canada, county of Los Angeles. The home was pleasantly situated and was built in cottage fashion. The yard was planted to garden grasses and contained shrubbery, flowers and a few orange and fruit trees. A lily pond occupied a part of the front yard. Cement walks led to and around the pond and walk-ways meandered the gardens. A garage, a chicken pen, in which some four dozen chickens were kept, and a yard in which three dogs were kept, constituted the rear of the premises. The house appears to have been located in an attractive sylvan district.

Mr. Pemberton and Miss Lueck had visited Mr. and Mrs. James on Wednesday evening, July 31, five evenings prior to the finding of Mrs. James' dead body. At that visit the celebration of the Pemberton-Lueck wedding was discussed. It was arranged on that evening that the James were to take dinner with Miss Lueck and Mr. Pemberton at the apartment house where Miss Lueck was living, on Monday evening, August 5, provided Mrs. James, who had been suffering from symptoms of pregnancy, was able to come to Los Angeles. If not, they were to dine at the James' home. About two o'clock Monday afternoon, August 5, James called up Miss Lueck at her apartment, and told her that Mary was not feeling well enough to come to Los Angeles and asked her and Mr. Pemberton to come out to his home for dinner. He said that Mary had the vegetables ready, and that he would stop and get the steaks and necessary food on the way to his place. He said that he would meet her in front of the telephone office where she worked at 7:30, after he closed his barbershop. James arrived in due time with Mr. Pemberton, whom he had picked up on the way to meet Miss Lueck. The latter got into James' car and the party drove to a market, where James bought steaks and some cottage cheese. He said the cottage cheese was for Mary in case she could not eat steak.

The three, James driving, arrived at the James' cottage at 8:10 or 8:15 in the evening. He drove into the driveway at the back of the house and parked. Both witnesses, Miss Lueck and Mr. Pemberton, testified that James' conduct and appearance was usual and entirely normal. There were no lights in the house and the doors were unlocked. All the parties

entered the house through the rear door and looked into all the rooms, and Mr. James and Miss Lueck called Mrs. James a number of times. Someone suggested that she might have fainted on the grounds and her body might be concealed by the shrubbery. The parties opened the front door and James observed a note under the door which he picked up, stating that someone had been there on that day or the day before. Mr. James read the note aloud. It was written by Mrs. Ethel Smith, James' niece, and left in the crack of the door. Sunday, August 4th, she and her husband, and the father and mother of her husband, had called at about 5 o'clock, and finding no one home, she left the note. The doors were locked and the blinds were carefully drawn. James suggested that a search be made of the yard and he got a flashlight. Pemberton was familiar with the front yard, but not with the back yard. He went into the front yard and James went into the back yard. In his search about the grounds he followed a narrow walk which led through the shrubbery to the side of and skirted the fish pond. At this point he discovered Mrs. James' outstretched body. The lower limbs were resting across the narrow cement walk which was close to the water's edge and her head and upper part of her body extended into and was slightly submerged beneath the surface of the water, her face facing downward. He made an exclamation and went to the rear of the house to meet Mr. James. He told him to brace up, that he had a "shock". He told him Mrs. James was dead. He attempted to prevent Mr. James from going to where the body lay but he was unable to do so. James knelt down beside the body and tried to lift her from the water but was unable to do so and Pemberton assisted him in pulling the body back so that the head was clear of the water. He finally got Mr. James up and he had Miss Lueck take him into the house and he left to notify the sheriff's office at Montrose. Mrs. James was described by him as wearing pajamas. Miss Lueck also said she had on pajamas and bedroom slippers. The light wire fence which enclosed the rather shallow pond was crushed at the point where the body had lain. The pond was approximately twelve or fourteen feet in dimensions and the water was from ten or twelve to sixteen inches in depth, the bottom being covered with cement. Miss Lueck testified that James was moved to tears and kept repeating, "Oh, I am so sick; what will I do without her." He was apparently deeply grieved and was taken to a couch in the yard where he was apparently prostrate for some time. A physician who had been summoned to the home administered to Mr. James. He was afterwards taken to the place where Miss Lueck lived and given such care as his condition seemed to require. That his grief had all the appearance of being genuine and not simulated is testified to by Miss Lueck and Mr. Pemberton who were in close social relations with James and his wife, and by all who were in a position to have had any knowledge of the subject. The testimony is to the effect that James was kind and affectionate in his treatment of his wife and both seemed happy in their marital relations. The home was pleasantly appointed and the grounds are described as being exceptionally beautiful.

In going through the house in search of any message that Mrs. James may have left, or any evidence which might throw light on her death, Miss Lueck discovered in a dish or bowl on a table in the dining room, a sealed blue envelope addressed in pencil to Mrs. James' sister, Mrs. R. H. Stewart, Las Vegas, Nevada. She called Mr. James' attention to it and he requested her to open it. The letter was written in pencil on blue stationery, corresponding to the envelope, and was in the following words:

"Dear Sis.

"Just a line this morning to let you know I am pretty sick. My leg is all swollen, something bit me while wattering my flowers this morning. I cut my toe yesterday and having lots of bad luck, this is old blue Monday, but my daddy will be home early to nite and he takes good care of me.

"Be sure and write me soon and Ill let you know how I get along. Sis."

On the back of the envelope is written: "From Mrs. R. S. James, 522 W. 8th St. Los Angeles."

The letter is concededly in the hand of Mrs. James but it is claimed that it is not written in the legible and steady hand which usually characterized her hand writing as shown by exemplars.

It is the contention of the prosecution that the letter was written under the compulsion and dictation of James or as Hope's testimony would indicate, at a time

when she was under the influence of intoxicating liquors. Hope's testimony was that Mrs. James drank large quantities of whiskey during the last hours of her life. James testified that she never, at any time, drank any liquors and further, that she was continuously suffering from nausea and dizziness caused by pregnancy, and it was with difficulty that she could retain any kind of food or fluid on her stomach. She had consulted Dr. James De Witt George, an obstetrician and gynecologist of the city of Los Angeles twice as to her condition, first on July 16th at his office and again on July 30th, five days prior to her death, at her home. The physician testified as to her pregnancy and as to symptoms of nausea and sleeplessness. He prescribed for her.

In further refutation of the alcoholic indulgence told by the accomplice Hope, the autopsy physician, Dr. F. A. Wagner, who made a chemical test of the stomach and kidneys the day following death as to the presence of alcohol, reported that he found none. At the time he held the autopsy he reported death from drowning. He also reported acute cellulitis of the legs. Cellulitis is an inflammation of the cellular tissues. No suspicion existed in the mind of anyone that Mrs. James' death was caused by criminal means until several months thereafter. The body was exhumed nine months after burial and a re-examination of it was made after the Hope rattlesnake theory had been advanced by the investigator in the case. Dr. Wagner had given no thought to the rattlesnake theory until the subject was pressed upon him by one or more of the investigators. With this suggestion in mind he reconsidered his former report. He performed the autopsy on the day next following the day her body was found as heretofore related. He testified that he found a laceration on the under surface of the left great toe. The left leg was considerably swollen. The lungs contained a considerable amount of water. There was no disease of any of the vital organs. The uterus showed a normal pregnancy of proximately six weeks duration. Superficial bruises, showing black and blue spaces of varying extent were found on certain parts of the body.

A chemical analysis of the stomach, liver and kidneys did not react to, or show the presence of any *poison*. He defined "acute cellulitis" as a swollen or inflamed condition of the tissues. He said "it may be due to anything of a micro-organic nature". The discoloration of the leg was quite marked to the knee. The swelling continued to the hip. The bruises or contusions upon the body were on the chest and the interior portion of the right arm and extended to the back of the arm. He noticed slight bruises or scratches on the forehead and face. Evidently the witness in describing the body and its condition was using, for purposes of illustration, a photograph taken after the body had been disinterred, and it is not clear in some instances as to whether he was testifying to the condition that existed at the time of the autopsy or as it existed after it had been exhumed nine months later. His first examination was cursory merely. That physical and organic changes of the body must have taken place during its long burial period would be an inevitable result. When the body was brought into the morgue after nine months' burial the skin had slipped from the left leg. The doctor stated that cellulitis (which is medically defined as inflammation of the cellular tissue) was the result of bacterial action. It was due to an infection of some kind, animal or vegetable. It could have been caused by the bite of a rattlesnake, venomous insects or spiders, or by the inoculation of vegetable bacteria. The notes taken by him at the autopsy, he said, were very brief. Asked whether he had reached any opinion as to what had caused the incision on the bottom side of the toe, his answer was, "Not a definite one, no, sir." He had never seen a puncture made by the fang of a rattlesnake, nor had he ever seen anyone who had been bitten by one. He described the puncture as resembling one made by a nail or any other ordinary pointed instrument. The laceration was about a quarter of an inch long and led away from what he thought was the point of entry. He was of the opinion "that one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake". It was possible that it could have been made by a thorn. He said that he had definitely formed the opinion that there was a puncture but it is quite manifest that he paid but little if any attention to the laceration at the autopsy and made no special examination of it. He made no attempt to determine whether the cellulitis was caused by vegetable or animal bacteria. In giving, on direct examination, his conclusion as to whether the puncture

or laceration was made by the fang of a rattlesnake or by some other means, he said: "From the description of the bite as shown in the literature [and the condition described by the witness] one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake or anything else that would have a similar instrument for making such a puncture or laceration." He was then asked: "Q. Did you reach such a conclusion? A. I did." As to whether the cut on the toe was made by stepping on a nail, thorn, or was made by coming in contact with any other sharp instrument was not of itself a question of expert evidence. The doctor suggested that he was no better qualified to testify on that subject than a layman would be. On *redirect,* the doctor said the cellulitis was more like that caused by venom or poison than the growth and development of a toxin of bacteria. He further said there was evidence of a gangrenous condition. The doctor was not positive as to what caused the condition found on the leg. He could not say the condition he found had not been caused by the bite of a black-widow spider or other poisonous insect.

Dr. Gustave F. Boehme, called as a specialist on the habits of rattlesnakes and snake venom, and who had himself been bitten by a rattlesnake and had treated a patient who had been so bitten and had seen others who had been bitten, made an examination of the body of Mrs. James with Dr. Wagner May 5, 1936, nine months after burial. Superficial material which had accumulated on the limb was removed. The left leg was very much enlarged as compared with the other leg and it was markedly discolored, almost mahogany in color. There was some swelling on the lesion from the knee to the hip. Running across the great toe he observed an old laceration about a quarter of an inch in length. "So far as the wound itself was concerned," the witness continued, "it *could* have been caused by laceration; it *could* have been caused by snake bite; it *could* have been caused by *some other method,* but combining it with other findings in that, I did come to an opinion." "Q. What is that opinion? A. That opinion was that *probably* this woman's toe had been bitten by some venomous creature, *probably* a snake, and all the findings on the leg were *compatible* with such a finding." The specialist testified that the venom of a snake (no doubt the same law would apply to all other venomous insects and members of the reptile family) travels "by the lymphatics" and not so much by the blood vessels which causes progressive localized swelling. The venom acts on the blood vessels to produce large black and blue areas. From the physical findings corresponding to a snake bite on the woman's leg, the witness concluded it was a *probability.* (All emphasis added.)

The single laceration, instead of two (rattlesnakes have two fangs) and the position of the laceration on the bottom of the toe, the specialist said, could be accounted for "by the fang striking at an angle, *perhaps.*" The witness testified that when the fangs of a rattlesnake enter those parts of the human anatomy where the blood vessels are large and numerous the venom is more rapidly absorbed and carried to the vital organs than it would be if injected into the toe. Swelling following the injection of poisonous reptile virus becomes perceptible from two to four hours thereafter. In cases where it proves fatal death usually ensues from sixteen to twenty-four hours unless the progress of the poison is arrested. Of course, much depends upon the amount of virus injected, the physical condition of the person, and the part of the body into which the virus is injected. Over the objection of the defendant, the witness, Dr. Boehme, testified that on May 5th, nine months after Mrs. James' death, Snake Joe, extracted the venom of two rattlesnakes (one of which it is claimed was in the box into which Mrs. James' foot was forced), and the witness gave in detail the process by which it was extracted from the fangs, and injected by him into the bodies of two guinea pigs. He described minutely the manner in which the guinea pigs died. The squeal of pain, twitchings, convulsions and final death struggles which followed the injection of the venom were dramatically told. The guinea pig lived twenty-nine minutes. The second, which had a lighter solution of venom injected into its body, showed similar symptoms. It died in one hour and twenty-nine minutes after injection, writhing and twitching in pain. The injection was made in the interior abdominal wall. An examination was made and the walls of the abdomen were found to have turned black and blue and the intestines were in sharp contraction, and were also black and bluish, or discolored. The stomach presented the same appearance. The lungs held a large amount

of blood and the heart was contracted. The heart, lungs, kidneys and stomach of Mrs. James, were, according to the autopsy physician, normal and showed none of the signs found in the guinea pigs, as described by the doctor who performed the guinea pig autopsies. As between the bite of a black-widow spider, a tarantula and a rattlesnake, the witness said that the condition of Mrs. James indicated that it was caused by the bite of a rattlesnake. The doctor testified that where the fang of a rattlesnake enters the flesh there is an area of suppuration or festering about the wound. The history was obtained from Dr. Wagner and from what he saw, the wound did not indicate suppuration. He was then asked if the absence of suppuration did not indicate that the wound was caused by something else other than a rattlesnake bite and his answer was: "Well, it may have been some other,—produced by some other instrument that was not infected." Dr. Wagner when asked whether the condition he found was of the nature of bacteriological infection or of the venom type said: "It was more like that which is caused by a venom or poison rather than the growth of and development of a toxin of bacteria." He said he found nothing which would tend to contradict a story of infection by snake bite, but on the other hand, he did not say that he found a condition that would justify him in concluding that only the venom of a rattlesnake could have produced the condition which he described; nor was he willing to say that the condition he saw could not have been caused by numerous and common bacterial infections which are wholly separate and apart from venom poison. He did see evidence of a gangrenous condition. There was nothing so unusual as to the appearance of the body when the autopsy was made as to excite more than passing notice. No chemical test or microscopical examination was made at any time to determine the nature or cause of cellulitis. The testimony of the two expert witnesses called by the People to prove or demonstrate that the condition which they described had its origin in or was caused by rattlesnake venom or any one of the many other potential causes, is so vague and indefinite as to unmistakably disclose a state of grave doubt and uncertainty on the part of the witnesses as to whether the condition which they describe as cellulitis was the result of a snake bite, or was produced by any other of the many causes know to medical science. Their testimony as to this issue, even regarded as opinion evidence, is so weakened by qualifications, such as "it could have been", or "might have been" caused by rattlesnake venom, and by indulging in possibilities and probabilities as to reduce its evidentiary value quite to the level of conjecture and speculation as to what did cause or may have caused, a condition which is neither unusual nor uncommon in the practice of medicine. Mrs. James was some six weeks advanced in pregnancy and there was evidence, given by the defendant, it is true, to the effect that she was in the habit of taking off her shoes during the warm August days and walking about the walks and yard, and she had mentioned the fact, according to James, that she had stepped on something which had cut her toe. This is in accord with the reference made in the letter addressed by her to her sister which the prosecution contends was written by Mrs. James at the dictation of James while she was intoxicated.

It is not disputed that the condition as described could have been caused by the entry of toxic or bacterial poison through a laceration or cut of the flesh however made. The truth or falsity of James' testimony was a matter for determination by the jury in the exercise of its discretion in subordination to the rules of evidence. Excluding his testimony entirely as to this issue, the question is, however, as to whether there is substantial expert evidence to support the contention that the cellulitis was caused by the bite of a rattlesnake. Giving full import and significance to the language contained in the record, it is apparent, as a matter of law, that it is too uncertain, indefinite and doubtful to establish the fact for which it is offered, unaided by corroborating evidence from other sources. The prosecution must therefore look to the testimony of Hope or the alleged confession of James for substantial corroboration.

In reviewing the story as related by Charles H. Hope, sometimes called "Chuck" Hope, we will adopt his language and method of expression as nearly as it is feasible to do, resorting to quotation points only in such instances as it may appear necessary to express the exact meaning of the witness.

We have already spoken of his plea of guilty entered soon after the trial began and the judgment of life imprisonment imposed upon him at the conclusion of the

James trial. Our attention will be directed to a statement and review of his testimony as it appears in the record before us with such pertinent comments and references to other evidence or circumstances or instances as may bear directly on the particular issue under discussion. The story as related by him follows: He had known defendant James for a period of about seven years prior to August 5, 1935. During that period he had visited James' barbershop at intervals of from one to two or three weeks either as a customer or in making passing calls when he was not employed. He had borrowed small sums of money from him at various times.

In June, 1935, at the barbershop, out of a clear sky, James asked him if he knew anything about rattlesnakes and Hope said, "No." James asked him if he could find out about them, and Hope said he would try. Hope said James' explanation of his inquiry was that "he had a friend who had a wife who had been annoying him quite a bit and he wanted to get some rattlesnakes, and he laughed about it". James told him if he would get him some snakes he would give him $100. Hope testified he saw him again in a casual way at the barbershop during the later days of June, and James asked him if he had found out about rattlesnakes, and Hope said he thought he could buy some for him. Hope purchased three from R. H. Kirby, a keeper of a place of amusement and a dealer in reptiles. Hope took the rattlesnakes to his apartment, where he kept them for two days and then delivered them to James, at his home. Hope paid the snake dealer $5 for the snakes. James asked him where he got the snakes and Hope told him it didn't make any difference and left. James gave him $20. He saw James later at the barbershop. Hope was then getting ready to move to a different part of the city. James told him he could come out and stay at his home for four or five days; that he had some work he could do. He went to James' home and stayed there several days. Hope, on James' instructions, had a cabinet maker make two boxes in which the snakes were to be kept, and he was instructed to tell the cabinet maker, if he asked any questions, that they were to keep white mice in. Hope testified that he bargained for two white mice when he purchased the snakes. The boxes were 24 by 9 inches and had a glass sliding top. He paid $5 for the boxes. Hope delivered the boxes to James and he put two snakes in the box for delivery to the man who had a troublesome wife. James told him he wanted a hole cut in the side of the box large enough to permit the insertion of "two fists". Hope said he did not see James again until he called at the barbershop about the middle of July. James told him the man was dissatisfied; he said the snakes were not fighters; that he and his family had been to Ocean Park and saw good snakes there. That afternoon James and Hope went to the Ocean Park snake pit and avoided the appearance of being acquainted.

At this point the witness seemed confused and his testimony was incoherent in some particulars. He said, "When we went to Ocean Park we submitted them and sold them for seventy cents a pound. James asked me if I was busy that afternoon and I told him I was not. So I went down to Ocean Park with him." They then went to the pit and waited for an hour. "I was asking him questions—I didn't hear a whole lot of it, but I did hear from the man that owned the pit say, 'I will bet you $20 there isn't a poisonous snake in the pit.' I went around on the other side as he [James] told me to do and I didn't want anybody to think we were together. * * I heard Mr. James say to the man that owned the pit as he walked over to my seat and he pointed out one snake and said, 'That's the one I want and left'." His testimony that the owner of the pit made an offer to wager $20 as above set out was later changed to make it read that James made an offer to wager $20 there was not a poisonous snake in the pit at the time. Some confusion as to the Long Beach exchange of snakes brought forth the following questions and answers: "Q. And you gave the snake which you had purchased at Long Beach to the man at Ocean Park? A. Yes, sir. He wasn't there at that time. They had a doctor there. I waited for this man to show up and he didn't show up there. I said, 'We are very hot,' and I said, 'Wait there while I dump this snake—'." What he said to the doctor of undisclosed identity, was stricken out on motion. Hope said he waited until the snake man came and he, Hope, pointed out what he thought to be the snake that James had selected from the pit the day before. The man put it in a box and Hope delivered it to James' barbershop. James paid him $5 for the snake and went home and Hope went his way. When working,

Hope occasionally stopped at the barbershop for service or a friendly visit. Hope saw James again after August 3 at his barbershop and James said the snake was "no good". He wanted some fighters. Hope said he had heard that the gentleman at Ocean Park had snakes that were bought of Snake Joe of Pasadena. James said, "Go over and get some if you want real fighters, they fought chickens and dogs." Hope, who said he was furnished by James with explanations as to the purpose to which the snakes were to be put, further said that he was to tell Snake Joe, in order to impress him with the importance of obtaining a poisonous snake, that he, Hope, had lost his money in a poker game—to a person not named—and that he was going to win back what he had lost at poker by betting the man who had won his money that Snake Joe actually had in his snake pit poisonous reptiles.

Snake Joe was called by the prosecution and he said that according to his book Hope was at his place on August 3, and told him he had already bought some snakes from other places, but they were not "hot" and he wanted a real "hot" one and he was directed to him. Hope said that "a friend and he had a bet on, and he wanted to kill a dog and he said if it would kill a dog he would collect quite a bit of money out of the bet and make up on the bet again, and he wanted to get 'hot' snakes." Hope bought two snakes on August 3, paying $3 for the two. On August 4 he returned the snakes and received $1.50 for the two. Hope told the snake man the Humane Society had stopped the fight. This last sentence was stricken out on suggestion by the court. The sentence stricken out gives rise to the same suggestions or hints which several times appear in the evidence as to whether snakes were on occasion pitted against dogs, or other animals or game cocks in wagering contests.

Hope told James that after making inquiries all over the country he had gotten two snakes from Pasadena. One was in a glass box and the other was in a small box that had a screen door on top. He was driving James' car. He put them in the automobile and took them to Los Angeles and telephoned to James that he had the snakes. James met him in front of his shop and told him to drive around the block. James finally came out and got into the car and drove out Vermont avenue to Slauson avenue. Hope said his wife was then at his apartment. James drove the car on all occasions when Hope accompanied him, except the first. James asked Hope where he was going and he said, home. Hope's car was at Beverly and Vermont avenues. En route he and James stopped at a drug store and James gave him a prescription and handed him $5 to have it filled and to buy "two inches of adhesive tape". He asked the druggist what the prescription was for but the druggist refused to tell him. He took the adhesive tape and the filled prescription and gave them to James. In answer to the question as to what next happened, Hope, after starting an answer, called for a drink of water and the court took a recess. What the prescription contained, if the circumstance actually happened, is not disclosed. It may be suspected from several suggestive circumstances which will later be related, that it was to be used in an attempt to bring about an abortion. Hope later admitted that he had been connected with a drug company in some capacity. Upon reconvening Hope resumed his testimony. He said that after he had procured the prescription and they were on their way James told him "his wife had $5,000 worth of insurance and he was going to collect it". James said no more on the subject so far as Hope could recollect than the above quoted words. Neither did James say anything, so far as the memory of the witness went, about Hope taking any part in collecting the insurance. At Beverly and Vermont avenues Hope got into his car and went to his wife's apartment and took her to dinner and later to a show. The witness was then asked when he next saw Mr. James and his answer was, "I went after my wife by 10 o'clock in the morning." He then drove with his wife to La Canada and instructed her to wait on the corner. He arrived at the James residence about 12:30 or 1 o'clock, and James came out. Hope said James had been drinking a little bit. He told him he had come for the snakes and James said he could not have them right then. He had a couple or three drinks with James in the garage. The snakes were in boxes in the garage and alongside of the boxes there were three or four dead chickens. He went back to where his wife had parked and told her he couldn't get the snakes then and she apparently drove off and he went back to the garage and was there ten minutes when James came in and bluntly said:

"You are in this thing as deep as I am. You have bought these snakes all over the county. I have had you visit here at the house. Different people have seen you." He further said: "Now, bring that box in the house". Hope walked ahead of James carrying the glass-top box with the snake in it. James passed Hope entering the house. He thus described the situation: "Mrs. James was lying on the breakfast table with a piece of adhesive tape over her eyes and over her mouth. He went ahead of me, raised her foot up so I could get by, and pointed to where I was to set the box, on the seat of the breakfast table. * * * In setting that down the top flew back. He put her foot in the box. The snake was in the box and was alive. After he closed the box I took it back to the garage." As he entered the room he noticed Mrs. James move on the table. She was in a night-gown, her legs were bare. It was the left leg that was placed in the box. Hope said the time required for the entire operation was not more than three minutes. He immediately returned to the garage and after remaining there 15 or 20 minutes James brought him a water glass full of whiskey. He had some drinks with James. James asked him why he was so nervous and said: "She is all right. Drink this, it will steady your nerve." Hope replied that he wanted the key to his car; he wanted to get away. James brought him the key to his car. Hope put the dead chickens and the box with the snakes and a gunny sack in the car. Hope drove to his wife's apartment in Los Angeles but she was visiting friends. He drove to where she was and she and her friends got in the car (apparently Hope's car), and he followed her driving James' car to their apartment and Mrs. Hope then got in the James' car. "Q. And then where did you *three* go? A. We drove toward Pasadena, stopped on the way, and she had dinner, drank some beer. We went over to this place (Snake Joe's) where I had purchased the snakes and returned the two snakes to this man." After leaving Snake Joe's the witness said he did not know where they did go. They started for the beach. On La Cienega, within a mile or two of Venice boulevard, he threw out one of the boxes containing a snake. The second box was thrown out along the roadway on Venice boulevard. He and his wife and the third party, if there was another party, called on friends and Hope went alone to James' residence, reaching there about 1:30 a. m. He went to return him his car. He put the car in the garage and James came out. James had been drinking. He wanted to know of Hope what he had done with the snakes and where he had been. Hope got in the car and the two sat down. James put the bottle of whiskey on the seat and the two had a couple of drinks. He (James) cooled down a bit and said: "Those snakes are no good either. My wife is not even sick." Hope said, "Why didn't you take her to the *hospital?*" James said: "No, they will strike us both higher than a kite." Why Hope should have suggested taking Mrs. James to a hospital in frustration of the plot to kill her passes human understanding.

It appears from the foregoing colloquium, so far as it can be rationalized, that Mrs. James was in dire need of medical assistance for a condition brought about by an attempt to commit an abortion, and obviously not for a condition brought about by an attempt to take her life. The necessity for urgent medical aid and James' reply to Hope as to what would happen to them if the cause of Mrs. James' condition was revealed to medical skill, gives more than mere color, considered with other evidence which crops out a number of times in the case, to the theory that Mrs. James submitted to an attempt on the part of Hope and James to perform an unlawful operation in which death ensued and in their dilemma to avoid responsibility they carried her to the pond to give the appearance of death caused by drowning. That the autopsy physician had no thought of an attempted abortion and made no examination to determine abortion as a cause of death and made only a casual observation of the uterus from the abdominal incision, is patent from his direct examination. Some two or three weeks later and after considerable evidence had been introduced tending to support the abortion theory the doctor was recalled in rebuttal and testified that he examined the uterus including the vaginal region. Asked if he found any evidence of an abortion having been committed he said he did not. He observed a fetus indicating a pregnancy of about six weeks. Asked on cross-examination if the presence of the fetus was not absolutely conclusive that an abortion had been committed his

answer was "Yes, sir". There is obviously some error in the transcript or misunderstanding on the part of the witness as to the question. The presence of the fetus would only indicate that it had not been expelled or removed from the uterus but that fact alone would not prove that an abortion had or had not been committed or attempted. An attempt to commit an abortion frequently results in death. No examination was made as to the condition of the fetus inasmuch as the theory of drowning was accepted as final. There is no evidence to show that the interior of the uterus was examined. In fact there is no evidence to show that more than a casual or general observation was made. The doctor testified that an abortion may be committed by administering drugs, or by violent exercise, which would include manipulation of the body, and if an operation was attempted in any other way than by the use of instruments there would be no way of ascertaining that an attempt had been made.

After James had predicted what would happen if they had taken Mrs. James to a hospital, Hope said James "jumped up and said, 'I am going to drown her'." James then went in the house and Hope said he stayed in the car and at about 4 o'clock, after some two or three hours had passed, James came to the car and said, "That is that". He presently said to Hope, "Stay here a little bit and I will take you into town". At about 6:30 or 7 o'clock a. m. James came out of the house to the garage and said, "She has been dead since 4 o'clock. The house is all cleaned up and you will have to go in and help me carry it out". Hope entered the house and saw Mrs. James' dead body on the floor of the hallway. Her head pointed toward the front door and her feet toward the bathroom. James took hold of the upper part of the body and Hope took hold of the lower portion and James went through the door that led to the sidewalk. He said to Hope, "You will have to put her in the fish pond", and Hope said, "I won't do it." He went back to the car and after four or five minutes James returned to the garage and handed him a bucket full of soiled clothes among which were a couple of Turkish towels. He saw a couple of pieces of rope, a red sweater and some tape. Three blankets were also put in the rear of the car. They started for Los Angeles. James said to him not to get excited or nervous, that he would take care of him when he got the money. He and James drove to Virgil and Bryne streets where James got out. He handed Hope $30 and said that he would have to dispose of the stuff and get out of town. Hope put the bucket and blankets in his car and went to get his wife and found her eating breakfast. He took her to work and came back and put the stuff in the sack with the dead chickens and put it in the car. He then went for a drive, but didn't know where he was going. He left the blankets in his house and they were sent to the laundry with other soiled linen. All other articles he disposed of in an incinerator back of a drug store on South Vermont. He said he could not remember all the materials that were burned but he named a red sweater, and a couple of Turkish towels. There were other things but he did not know what they were. Hope was shown a piece of ordinary cotton clothesline rope and said it resembled pieces of rope he burned in the incinerator. One of the investigators in searching an old trunk that belonged to James and which had been stored or left in the garage or outhouse where his niece resided for quite a long while, testified that he found in the trunk cotton rope of the same type. Hope, upon being asked a second time how Mrs. James was dressed when her foot was placed into the box containing the snake, materially contradicted his former testimony, by saying that she was dressed in pajamas and house shoes. On cross-examination his answer to the question "How much of the foot was placed in the box", was "I don't know—the foot was immediately pulled out very fast". He thought James' hand clasped the calf of her leg. He withdrew the leg practically instantly. The foot was slightly above the snake's head.

Hope said he asked James how he was able to get Mrs. James on the table in the position she was and he said he told her that a doctor was coming out to perform an operation on her for pregnancy. This and other evidence strongly indicates that Mrs. James was seriously contemplating relieving her pregnancy by artificial means. He told Snake Joe that the snakes were to fight chickens and dogs. That, he said, was what James instructed him to say.

After Monday, August 5th, this being the day Mrs. James was found lying in the pond, Hope says he did not see James for several weeks thereafter. He first saw

him in the barbershop quite a while after August 5th. He was asked if he had a conversation with him. His answer was "Oh, just the general topics of the day at that time. Yes; nothing was said about this."

A month after Mrs. James' death he saw James again at the barbershop and they conversed on the subject of the killing. He told Hope, so he testified, that he, James, would give him $1,000, "if *we* testified that *we* saw Mr. and Mrs. James married". By *we* presumably he referred to Hope's wife. Hope said his answer was, "No, I wouldn't do it." He saw James at a later period at his barbershop, the time he was unable to state, but it was some time after August 5th, as he dropped in the shop to get his hair cut. As James was finishing cutting his hair he slipped $100 in his hand which was covered by the barber's apron. The shop was full of people. He said, "Don't remember anything about me, and I advise you to get out of town." Asked if he said anything else the witness continued, "He said, 'Don't try to give it [the money] back to me; somebody will see you, and you will get us all in bad'."

A blue blanket, a pink blanket and a tan blanket which the witness testified were given to him by James and which he took together with soiled clothing from the James home on August 5th, were identified by Hope. R. H. Kirby, Mike Allman and Joe Houtenbrink, commonly known as Snake Joe, all dealers in and exhibitors of snakes and reptiles were called upon singly to stand and were identified by Hope. On cross-examination the witness admitted that he had read much of the testimony he had given before the grand jury and he had read his wife's testimony.

Continuing his testimony he said he kept the three Long Beach snakes in his apartment for two days and when James gave him the money for them he delivered them to his La Canada home. There appears to be some discrepancy as to the length of time he had them at his apartment. Evidently he had them for several days on his own statements. After delivering the three snakes he did not see James until two weeks thereafter, at the barbershop. The witness then said that he delivered the snakes at James' garage "around the 5th or 6th of July". He said he was getting ready to move and he had to get the snakes out of his apartments. He was out of work and he moved to the James home to do some work about the place. Hope rather decried the suggestion that he was doing work of any great consequence or that he was on the place at the hours Mrs. James was there, during the day time. He admitted that he fixed a chicken coop, tightened a little wire and "raked around a clothesline". The other days he was there he said he came into town with James or with James and James' sister. He stayed at the home four or five days and Mrs. James was there two days of that period. She left to attend a dental convention in session at Long Beach and Hope left the day following her departure. He was at home on the day the landlord was removing hardwood to another place. Mrs. James was at Long Beach on that day. James' sister, Mrs. Eva Murphy, chief evening operator of the telephone company at Morris, Alabama, was visiting James and his wife during the time Hope was temporarily stopping at the James home. Lois Wright, James' niece was at the home on occasions. He saw and talked with James' sister several times while he was stopping at the James home. The landlord was also there moving flooring from the premises. Hope indicated that he took only his breakfasts at the James home but lodged there nightly, getting in late. On cross-examination he testified for the first time that James paid him $100 the night he delivered to him the Ocean Park snake. This amount is in addition to the $100 which he says James slipped into his hand under the barber's apron or cover while shaving him. On cross-examination Hope testified that he saw the snake strike the deceased in the lower region of the foot. The snake was coiled. Its head traveled but three or four inches. He heard no rattle. Mrs. James was dressed in a nightgown. Hope denied that he ever pretended to have any knowledge of medicine but said that James told Mrs. Murphy, James' sister, in his presence, that Hope did possess medical skill and he, Hope, made no denial of the representation. Continuing his answer he said: "And neither did I deny the name that he introduced me by when his niece was right there and knew my right name." This reference was to an occasion when he was introduced as "doctor".

Hope admitted that he had talked many times with seven or eight of the investigators, naming officers J. C. Southard and Scott Littleton, and others who were preparing the case and he had been taken by

them to places associated with the offense charged and had eaten meals outside the county jail, and had also talked with the district attorney and the deputies in charge of the prosecution but denied that he had discussed what he proposed to testify to with anyone.

When Hope went to Kirby's to buy the first lot of snakes he told Kirby that the snakes were to be used for experimental and scientific purposes. As an aid to Hope in his scientific research Kirby gave him a small jar containing crystalized or dried, rattlesnake venom. Crystalized or dried venom is as poisonous as the fresh venom. Hope took the jar of crystals and put it in his suitcase and had forgotten about it, but when he moved to James' place it came to his mind in some way and he offered it to James and James said he "didn't want it", and rejected it. Asked what he did with it his reply was, "I don't remember what became of it. I may still have it; I don't know". At another time in his examination he said he gave it to James. This testimony further intensified the mystery in which the whole theme of the plot to produce death by resorting to the means of rattlesnake poisoning was enveloped. Hope said that the last time he saw Mrs. James alive was in the afternoon next preceding her death. He did not then speak to her and not a word was spoken in the house by anyone. He had been informed that she was pregnant. Not a word further in explanation of the circumstances in which he had seen her or the condition she appeared to be in or the particular place where he saw her on the afternoon preceding her death, was related by the witness. He testified that he did not know whether venom in crystalized form was or was not poisonous.

It was quite impossible to have Hope give a definite answer as to what James' condition as to sobriety was on the early morning of August 5 when he arrived or during the time he was at the house. He first said he concluded he had been drinking from the fact that he smelled the odor of liquor on his breath. He also said he and James took two or three drinks, not large ones, but he did not see James take any more.

From his statements as to what occurred at the James' home from 1 a. m. Monday, August 5, to 6:30 or 7 a. m. of that day, it may be inferred from some of the things he related that James appeared to have been affected by intoxicating liquor, and on the other hand he seems to intimate that he was not so affected. His testimony in this as well as in other respects is equivocal, as shown by the following excerpt:

"Q. Well when you saw him at 1:30 [this is when he first arrived at the James home on the day he helped carry her dead body to the pond] he appeared to be intoxicated to you, didn't he? A. I stated I didn't know whether he was mad [because of Hope's delay in arriving] or intoxicated.

"Q. And after he took the drinks with you, between 1:30 and 2 o'clock [a. m.] he appeared to be intoxicated, and not mad, at you, didn't he? A. Well, I wouldn't state that he was not intoxicated, or mad either. He didn't seem to be so mad then.

"Q. But he did seem to be more intoxicated, didn't he? A. Slightly, yes.

"Q. Did he appear to have been drinking when you saw him in the morning about 7 o'clock? [Objection to question overruled.] A. Well, I was so scared in the morning I don't know whether he was drunk, or not."

He said James seemed extremely nervous, but his speech "never was incoherent". Prior to this he said his speech was "very much shot". He didn't stagger while he was assisting him in carrying the body to the pond. James shortly thereafter drove him in the automobile to Los Angeles. The witness did not see James take a drink from the hour of 2 o'clock during the rest of the morning. They left at 7 o'clock. Hope says he was alone in James' automobile in the garage for some five hours or more, and gives no reasonable explanation for his long stay. He slept a part of the time surrounded by the horror of the scene from which he had both the means and opportunity of withdrawing.

Hope had done no work during the month of July except the few days he was engaged at the James' home. While doing this work he saw quite a few black widow spiders in the garage and in the hen-house and wash-house. (Black widow spiders as a secondary element in the case will later appear.) He said that during all the times that he had known James nothing had been said about killing his wife until the rattlesnake proposition was suggested by James a short time before her death. His sworn words are that he had no

knowledge as to how Mrs. James met her death except from what James told him. In short, he plead guilty to a charge of first degree murder which carried with it the possibility of the imposition of the death penalty, a crime which he did not commit, or assist in committing. No reasonable contention can be made on the evidence in the case that Mrs. James died from being bitten by a rattlesnake. Hope testified on the trial of the case that he took no part in drowning her, and did not know *except from James' ex parte statement* that she had been drowned.

The foregoing summary substantially contains all of the testimony given by Hope, who occupies the irreconcilable inconsistent position, in which he has placed himself, firstly, of being at one and the same time an accomplice to the murder of Mrs. James and secondly, not guilty of the crime. Drowning is the only way death could have been criminally accomplished if his testimony is to be taken as sufficiently convincing to establish the fact for which it was offered. It is not seriously contended that the deceased died from rattlesnake venom, and the abortion theory is most vigorously combatted by the people. Hope's testimony is, in several instances, confusing as to the sequence and order in which certain acts were performed, notably as to whether certain acts were done on Sunday, August 4th, or Monday, August 5th, and lacks, in some instances, definiteness as to time.

Mrs. Edna Hope, wife of Hope, followed him as a witness. She testified that Hope called for her at the place she was working at 1:30 or 2 o'clock, August 3, 1935. Neither the place nor the nature of her employment is stated. He was driving James' car. They stopped at a lunch place and had lunch and resuming their journey, Hope finally stopped in front of a snake farm. Mrs. Hope stayed in the car. Hope took a box and went to the side of a barn. He and Snake Joe finally came to the car carrying a box which Hope put in the car. Hope then drove to Los Angeles and let her out. He telephoned, inferentially to James, and left. She saw him again at 7 o'clock or 7:30. He was, at this time, driving the Hope car. They had dinner and went to a show. She saw Hope the following morning at 9:30 or 10 o'clock, and they had breakfast together. They drove to La Canada in their car and parked the car a block from the James home. He told her to wait as he would be back in half an hour. He came back to the car in fifteen or twenty minutes. They talked a few minutes and she drove to Los Angeles. She saw him again about 2 o'clock. He drove up to where she was visiting friends, in James' car, and honked and she came out. She followed him several blocks to the place where they lived and she then got into the James car and they drove to Pasadena where they had been the day before. She noticed some boxes in the back of the car. There was a bad odor about the car. Hope took a sack out of the James car and put it in the Hope car. She then parked her car and they drove to Pasadena and Hope got out at Snake Joe's and took a box inside and was there several minutes. He and Snake Joe came out and went to the corner and she turned and went down to the boulevard, honking the horn. Hope came out and they drove away. At La Cienega boulevard Hope threw out a box which landed in the weeds. No explanation or reason is given as to why he should throw two of his snakes into the highway. He had theretofore resold or exchanged other snakes to the dealers. At Venice, Hope threw out another box on Venice avenue, which had a glass top. They drove back to Los Angeles and had something to eat. Hope had an engagement to play cards. She said she went "over there with him", not designating the place. He took her home and left her. This was Sunday, August 4th. She did not see him again until about 8 o'clock the following morning as she was getting breakfast. She described him as appearing "white and jittery, and had been drinking". Hope took her to her work and about noon he came after her and took her to their apartment. She saw a blanket wrapped around a bundle in the middle of the floor. There was also another blanket. She sent one of the blankets to the laundry with a bundle of their laundry. When she got back to the office Hope got out of the car and said he "had things to burn". She saw him place a bundle in the incinerator back of the "place". It appeared to be a gunny sack. She identified three blankets, including the laundered blanket which Hope had brought to the apartment. She told the story as above set forth to the district attorney's office before Hope was indicted. She wanted to help him all she could.

The above is a full resume of Edna Hope's testimony made as definite as to circumstances as it is possible to do. There

is nothing in it to show that her curiosity was aroused as to Hope's mysterious trips to Snake Joe's pit, or to the James home, or as to what was contained in the boxes or sack which he transferred from one car to the other, or as to the throwing out of the two boxes onto the highways, one of which had a glass top, or as to what caused the bad odor which she detected, or as to what the articles were which Hope burned in the incinerator. What significance the Turkish towels, blankets and other destroyed articles may have borne to the theory of death by drowning, or even to the rattlesnake theory is certainly not perceptible. It is readily perceptible that the burned articles would have been more likely to have afforded incriminating evidence of death caused by an attempted abortion, if death so resulted, than they possibly could have served as proof of death by drowning. Hope himself said the bed sheet was bloody, attributing it to the slight cut on the toe.

Hope testified that Mrs. James was on her back with nothing on but a nightgown, raised above her knees, and her knees were projected slightly beyond the edge of the table. He was unable to definitely describe the method by which she was tied down other than to say the rope passed over her shoulders or chest. Her lower extremity was not fastened in any way to the table. Pieces of adhesive tape were stuck or pasted over her eyes and her mouth. It is not understandable why a person preparing another for drowning would lash his intended victim to a table. But the theory of the prosecution is that he was preparing her to be bitten on the foot or ankle by a rattlesnake. Hope said her foot was thrust into the box very swiftly and did not go deeply into the box. In fact he testified that James held her limb not far from the ankle or calf of the leg as the limb momentarily entered the box. There is no accounting for the gown which Mrs. James wore while she was on the table or as to whether it bore any evidence of an illegal operation. Hope testified to intensive cleaning up which he said James did following the rattlesnake episode and the sudden change of plan from death by rattlesnake venom to death by drowning. Why there should have been any occasion for extensive "cleaning up" or for the laundering of articles of household or personal use and the burning of others has not been explained, and there is no apparent rational theory upon which these activities can be reconciled with either of the two theories advanced by the state. He testified further that the body was dry and there was no water on the floor, and the articles which were carried away were also dry when he entered the room. The foregoing is substantially all of the testimony that may be said to bear directly on the corpus delicti, except the testimony of the defendant, the only other possible witness to the act, which will later receive attention. The balance of the evidence is of an indirect character and consists of various circumstances, to-wit: the alleged confession, alleged statements made by the defendant and certain acts which the prosecution claim tend to establish the crime and connect the defendant with it, including the issue of motive.

It may here be said that it is not to be taken as any inclination on the part of the author of this dissent to vindicate or minimize any of the acts or conduct of the defendant which reveal moral depravity or perverse tendencies by anything said in the analysis of the evidence, but it is our purpose and our bounden duty, in all cases, under the mandate of the law, to dispassionately and carefully examine the evidence presented on appeal, as to its sufficiency and consistency, and give effect to the cardinal rules of criminal procedure which are the palladium on the preservation of which depend those guarantees of protection to life and liberty which the state vouchsafes to every person charged with a criminal offense without regard to the heinousness of the offense charged or the station of the person against whom the law's severest penalty may be invoked.

It may further be stated as an axiom of law that a conviction may not be had on the weakness of the accused's defense but it must rest solely on the strength of the case made against him. Mere conjecture, or suspicions, however strong, are not sufficient to warrant a verdict of guilty. Nor can the doctrine of chances, which is to say, that the chances are greater that the accused is guilty than are the chances that he is innocent, be permitted to usurp the office of substantial proof which must satisfy and convince the understanding to a moral certainty. If the evidence convinces the minds of the jurors that the person on trial is criminally responsible for a homicide, and a doubt exists as to the degree of punishment which should be

imposed, their verdict must be in the lesser degree.

While it is not a circumstance, strictly speaking, which can affect the legal aspect of the case, it is nevertheless noteworthy that the jury was nine hours in deliberation—from 10:56 a.m. until 8:10 p.m.—before the verdict imposing the death penalty was consented to.

The defense base their arguments for a reversal on a number of grounds, the major ones being the inherent improbability and unreasonableness of Hope's absurd story, which, they claim, was fabricated by Hope under the tutelage of a large number of over-wrought investigators in charge of the prosecution. The defense's contention directed at Hope's testimony, is that before the testimony of a witness may be accepted as sufficient to sustain a judgment it must accord in the main at least with the normal conduct of persons responsible to society for those acts which are prompted by avarice, revenge, passions, and emotions which influence the average normal persons in doing deeds, good or bad. In those cases where the acts mark such a wide departure from the natural as to partake of the nature of the weird, extremely gruesome, and inexplicably uncanny, and to stifle the application of the common rules of reason or logic, proof of the specific acts charged should be established by very substantial and convincing proof. The claim is made that out of the multitude of detached erotic and sordid acts put in evidence against the defendant, many of them must fail because they were not established by the convincing force which the law and reason require in such cases and that many of the misdeeds charged were not relevant or material to the crime alleged in the indictment and obviously the only effect which such acts could have had was to turn the minds of the jury against the defendant so thoroughly that his defense and all that was offered in his behalf would be discredited by the jury and the presumptions of innocence and the doctrine of moral certainty would be swept aside by a flood of prejudice-begetting accusations against which the defendant, under the law, was entitled to be protected. In this connection, it may be stated, that three incest offenses charged against the defendant as having been committed with one Lois Wright were investigated and carried along with the murder charge, which crime was alleged to have been committed some eight months prior to the investigation of the incest charges. The investigations were so connected that the officers in testifying as to the arrest of the defendant and alleged conversations had with him bearing on the murder charge, would and did bring to the jury's attention the fact that the defendant was also charged with, if not then convicted, of the crime of incest. The incest charges were wholly separate from the murder charge and they should not have been injected into the murder case, especially by an officer of long experience, when testifying in the case. He too readily volunteered improper statements, and intentionally made reference to matters which were not responsive to any question propounded. It appears that the dictaphone installed in a house rented by the officers and adjoining the James residence and under the personal supervision of Officer Earl E. Kynette was the original plan adopted for the discovery of evidence to be used in the prosecution of the incest charges.

Among the several objections most strongly urged by the defense is one directed to the exhibition of live rattlesnakes. Others of like character are made to the exhibition of a dead snake enclosed in a glass jar, with open mouth and fangs projected from the upper jaw. Rattlesnake venom in crystal form, and fangs in the primary, secondary and third growths, and the manner in which they are attached to the upper jaw, and the method in which the virus is expelled through the fangs were exhibited and explained to the jury in much detail. The ways and habits, kinds and species, longevity in captivity, the manner in which they obtain their food, how and why they coil and strike, and the physical structure of reptiles of the crotalidae family and the excruciating pain the victim suffers as the subtle poison stealthily creeps through the circulatory system were meticulously discussed by naturalists, zoologists, entomologists and herpetologists, who had earned their degrees at venerable American and European universities. Three or four lay experts who had gained their knowledge of reptile habits from practical experience on the desert and in habitats where snakes are most abundant, added hundreds of pages to the record which could not have assisted the jury in the remotest degree in their consideration of the case.

Besides the snakes and their products which were put in evidence, photographs of the deceased, after the body had been exhumed, were also resorted to, and a human skull was used to illustrate the manner in which the injuries may have been inflicted upon the head of Winona James in the Pike's Peak automobile wreck.

There is no doubt that photographs and exhibits are admissible for purposes of identification and by way of illustration when material and germane to the issues involved but when they are not necessary or, from the nature of the subject under investigation, could not enlighten the jury as to the main facts in issue and are of such character as would tend to harrow the feelings or excite passion or prejudice in the minds of the triers of fact, they should not be received in evidence or exhibited to the jury.

The defense, naturally, protested against bringing into the courtroom a glass-top box containing two live rattlesnakes, and its exhibition to the men and women who composed the jury. Joe Houtenbrink, commonly referred to as Snake Joe, who operated a snake farm in West Valley boulevard, East Pasadena, was on the stand when the snakes were brought into the courtroom. The witness had testified that he first met Hope on August 3, 1935, at his place, No. 42 Cypress street, Pasadena. He sold him two snakes belonging to the diamond-back or *Crotalidae Atrox* family, for $3.00. He repeated Hope's story of a bet he had made with a man who wanted to kill a dog, and if the snake would kill a dog he could win and therefore he wanted real hot snakes. He had a box, one side of which was glass, into which the snakes were placed. On the next day, August 4th, he repurchased the snakes from Hope. Hope said the Humane Society stopped him from having the fight. Snake Joe gave him $1.50 for the two snakes. The witness was asked if he still had the same snakes in his possession and upon answering that he had, two men entered the crowded courtroom carrying a box containing two snakes (but one snake was in the box into which Hope said Mrs. James' foot was forced), which they deposited beside the bench. The following proceedings ensued: Mr. Clark, counsel for defendant, objected to the witness leaving the stand to inspect the box and making exhibition of any snakes to the jury. Counsel, in open court, requested the court by order or appropriate means to make or cause to be made a record "that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement; that several of them arose from their seats; that the attention of spectators and the jury was directed away from the testimony of the witness; that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial." (Uncontroverted affidavits aver that the snakes were sounding their rattles as they were carried down the aisle.) The court thereupon made the following statement:

"The court has no knowledge that there was any such manifestation on the part of the audience. The court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least it has not been seen by me.

"Mr. Clark: In other words your Honor has no knowledge that the statement I have just made is correct.

"The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation.

"Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think they are facts and that my statement is appropriately made at this time.

"The Court: So far as the facts of the two men having taken the box in from the courtroom door and passed up the aisle between two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that did occur."

Affidavits made by the attorneys for the defendant and which were not specifically traversed, were presented on motion for a new trial, containing averments describing the consternation, commotion and waves of terror which spread throughout the courtroom as the snakes were carried down the aisle, sounding their rattles, in the glass-faced box.

The snakes were received in evidence and exhibited to the jury against the objections of the defendant. Motions to strike

on numerous statutory grounds were denied.

The witness said he never saw James before he saw him in court. In describing Hope's condition at the time he returned the snakes he said, "He [Hope] had had a couple of drinks, is the way it looks, but he wasn't intoxicated. We had some drinks ourselves, I remember; went out and had a glass of beer together."

Roland H. Kirby, the Long Beach showman and exhibitor of reptiles of whom Hope purchased his first lot of snakes and from whom he received the jar of crystalized venom, in qualifying as an expert testified that he had had eleven years in research and experimentation work with reptiles and had lectured to classes in zoology and had attended experiments at different institutes in regard to the effects of snake poison. His knowledge was gained by reading and from practical experience. He said he had been bitten by a rattlesnake and spoke of the great suffering he endured and described the effect the venom had on him personally. In his experience three out of ten persons who were bitten, died. He exhibited several rattlesnake fangs by way of illustrating his testimony. Counsel for the prosecution cautioned that the fangs were potentially dangerous even when detached from the head, and advice was given that they be carefully handled. He recalled Hope buying the three snakes. Hope at no time gave any reason why he bought three snakes instead of one. So far as his testimony goes only one was actually used. At no time did James tell him to get any definite number and he seemed to have used his own judgment in procuring snakes for whatever purpose they were to be used.

Mike Allman is the proprietor of a "reptile exhibit" situated at Ocean Park. The reptiles are confined in a pit 30 by 40 feet in which there were from 150 to 200 reptiles on the day James and Hope entered. He performs in the pit with the snakes and the audience views the snakes from the rim. An iron railing extends about the rim of the pit as a protection to the visitors. His memory was somewhat hazy as to when or how they came in but it seemed to him that they had had a couple of drinks and they got noisy, he said, "as people frequently do in this place," and he became annoyed. They insisted that he did not have a poisonous snake in his pit; that he had removed their fangs. He did not pay much attention to them as he was talking to other people. Finally *James* made an offer to bet him he didn't have a poisonous snake. He got sore and was going to bet him but he bluffed out. He didn't notice them any more and didn't see them when they left. His observation of them was certainly very fleeting. The next day Hope came back with a glass covered box in which he had a half grown white rabbit and he said James had bet him $50 that he did not have a poisonous snake on the place; that he had lost to James $100 playing poker and he wanted Allman to guarantee that the snake was poisonous and he would have a chance to win back one-half of what he had lost. Hope wanted him to "put the rabbit in the box and kill it, to show that it was poisonous." Allman refused to do this and said he could take the rabbit any place he wished and test it out. Hope gave him $3 for the snake. The witness admitted that he had attended the trial and had heard Hope's testimony. The next time after the purchase that he saw James and Hope was in May, 1936, nine months after said purchase. James and Hope were taken by a number of the investigators for the district attorney's office who had been active in the case and other officers to Allman's place for identification. Allman had not seen James, if ever before, since July, 1935. He had no previous acquaintance with him. Allman admitted on cross-examination that the following questions were asked him, and the following answers were given by him when he appeared before the Grand Jury during the investigation of the murder charge. His answers were as follows:

"Q. And did they have any conversation with you? [After entry into the exhibit.] A. Yes, sir; I was playing with the rattlesnakes, as I generally will do, making them strike, and working around pretty close to them, and they got an idea the way a lot of people figure those snakes are harmless, but we don't remove any fangs * * * Well, one guy, *Mr. Hope*—he was the one that was a little bit—wanted to argue about it. He says, 'Those snakes are not poisonous.' I said, 'Certainly they are poisonous.' 'Well,' he says, 'do you want to bet $20.00 on it.' Something like that. I said 'sure, I will cover the bet.' Didn't you so testify before the Grand Jury, Mr. Allman? A. Yes, I did."

The witness acknowledged a later conversation which took place between him and James at Allman's in the presence of a number of officers at which time the following questions were asked and the following answers were given by him:

"Q. And it is a fact, is it not, that you said to these parties [officers] that you could identify Mr. Hope, but you wasn't sure of James? A. Yes, sir.

"Q. You say you didn't say that? A. I did."

On re-direct, the witness said he pointed out James and Hope as the men who had been at the snake-pit. On re-cross, he said that when he identified them the officers had Hope and James in custody and they were separate and apart from the other people. He didn't then know James was in custody. The witness veered quite a bit through several questions and finally said that when he saw the group together he recognized James as a person who had been in his place but he did not know his name. He said he remembered James on account of making the argument as to non-poisonous snakes. He had previously testified before the Grand Jury, and his memory was fresher then as to the events than at the trial, that he remembered *Hope* because of the poisonous snake argument he made. As a matter of evidence it was Hope who at the times he purchased snakes of the two other vendors stressed the fact that he wanted to be certain that his purchases were of the poisonous type and in one case used substantially the same language and methods as were used in effecting the Allman purchase. Asked if James did not request him to be careful as to his identification as it meant much to him, his answer was he did not recollect but he "guessed" James did request him to be sure of his identification. Asked if he did not say, "I think I saw you before, but I am not sure," he answered, "No, I don't think I said that."

"Q. Well, you did say something about thinking you had seen him before didn't you? A. No, I didn't say that either.

"Q. And yet you haven't the slightest recollection of what you did say? A. Not exactly, no."

Asked how James was dressed he said he thought he had on a dark suit but he wasn't sure. He didn't pay attention to clothes, he watched the face. Asked what the color of James' eyes were he said he paid no attention to his eyes. "You don't when you are in the pit." He was not able to describe the man's features or dress. He did not recollect whether he wore a hat, a cap, or neither.

Mrs. Ethel Smith, niece of defendant, testified that she and her husband, Raymond C. Smith, and her husband's father and mother, called at the James home Sunday afternoon at 5 o'clock, August 4th and found the back door locked. The shades were drawn and she could not see into the inner portion of the house. She did not knock or ring the door bell. She wrote the note found in the crack of the front door Monday evening by the Pembertons and James. The party remained fifteen or twenty minutes. Her husband and his father and mother walked about the grounds and picked some oranges and plums. She saw James on the following Wednesday at Viola Lueck's apartment. He said he found her note Monday and asked her if she was there Monday. She told him she was there Sunday. He asked her if she was on her vacation and where she went, and she said she drove up to Mount Wilson, and he said, he did, too, with Mary. He asked her if the officers were there to take names and she said no. James in explanation of the above conversation said that he did not recollect making the statement that he went up Mount Wilson on Sunday, August 4th, but said that he was up the previous Sunday and the officials searched the car for firearms, and that incident was doubtless in her mind. If Hope's testimony is true, Mrs. James was alive on the Sunday the Smith party called at the James home. His testimony was explicit as to when her foot was forced in the box containing the snake, to-wit, Monday morning, August 5th.

On May 8th, Charles Griffen, a member of the investigation staff of the district attorney's office, went to Ethel Smith's house and took from an old, discarded trunk belonging to James which was in the garage, and which James had sent to her home months before, a rope, which Hope testified was very similar to the rope used in tying Mrs. James to the table, heretofore described as an ordinary cotton rope commonly used for clothes-line purposes. James had moved from the La Canada home some months prior to this incident.

The only other testimony bearing upon the question as to the time decedent was last seen alive was given by Alfred Dins-

ley, a neighbor of Mrs. James. He lived at a distance of some four or five hundred feet of the James home but he was not personally acquainted with her. He had an impression of the general stature and appearance of a woman he had seen four or five different times on the James premises. He stored his laboratory apparatus in a shed which he daily visited. On Monday morning, August 5th, at 9:25 o'clock, he was carrying combustible garbage to a common incinerator used by himself and the Jamses, and as he passed near the James premises a pet bull-dog inside the James' gate began barking which attracted the attention of a woman in the chicken house on the James' property who came to the door about twenty-five feet distant from him, and "stared" him full in the face, half smiled and resumed her duty, and he went on his way. He described the woman as being mature, with blonde hair, and some five feet eight or nine inches in height. The witness would not make absolute identification that the woman he saw on the morning of August 5th was the same woman he had seen on the James premises on four or five previous occasions but she was of the same general appearance. He described her as being bareheaded and wearing a rose or rust-colored smock and her "stocking legs were visible to below her knees", and she was apparently wearing shoes. The color of the garment corresponded to Mrs. James' rose-colored pajamas described by her friend, Miss Lueck. The garment was belted at the waist and was not of the pajama or divided skirt type. He could not tell whether the garment was open in the front or the back, or whether it was a pull-over. If Mr. Dinsley is correct as to his date and if the woman he saw in Mrs. James' chicken yard where the dog was evidently barking at him, a stranger, was in fact Mrs. James, and his testimony is very convincing that it was Mrs. James, then of course the story as told by Hope cannot be true. Hope testified that he helped carry Mrs. James out of the house, a corpse, hours before Mr. Dinsley saw the "mature blonde" woman whom he described as having seen on the James premises. Mrs. James was decidedly of the blonde type. The description of the blonde woman he saw in the James' chicken yard, and her apparel, and the fact that the dog near her was barking at him, a stranger, is convincing proof that the woman there described was Mrs. James.

Considerable emphasis was placed on the fact that Hope called at the barbershop at intervals of approximately three weeks and talked with James on terms of friendliness. The evidence is that there was nothing about his visits to cause comment or excite the suspicion of the employees. On one or two occasions he and Hope walked to a cigar store at the corner. The inference drawn from Hope's visits by the prosecution was that Hope and James were conspiring to kill Mrs. James. Their conduct, such as it was, was open and without attempt at concealment, and if Hope's testimony is to be believed, it positively negatives any contention that he ever was conspiring to kill Mrs. James. His acquaintance with Mrs. James had not existed longer than two or three months. His testimony is very definitely to the effect that he was not given a hint nor was any suggestion made by James that he was planning to kill his wife until a very brief time before he was directed by James on the early morning of August 5th to carry the box containing the snakes into the dining room. The vague and inane expression attributed to James weeks before, to the effect that the snakes were to be used as the means of killing the wife of a man who had an extravagant and "troublesome wife" raised no suspicion in his mind that Mrs. James was the contemplated victim. This definitely appears throughout his testimony, except as to one isolated instance, which he fixes as having occurred Saturday, August 3d. On that day he was returning from Snake Joe's with two rattlesnakes. James joined him later, and on the way to their destination James, then driving, stopped at a drug store and sent him in the store to buy adhesive tape and to have the mystery prescription filled. His curiosity prompted him to inquire of the druggist as to the contents of the prescription, but the druggist refused to give him any information as to the nature of the compound. He made no inquiry of James, as to its use. James, with the rattlesnakes in the car, and prepared with adhesive tape and the mystery prescription, said to Hope that his wife had $5,000 worth of insurance and he was going to collect it. This startling statement seemingly made no impression on Hope. James said nothing more and Hope asked no questions. This exhibition of mental lethargy baffles the understanding.

Lois Wright, James' niece, with whom James had been convicted on three charges, by means of the dictagraph installed by Kynette, of incestuous relations, was called by

the prosecution and testified that she was working at James' barbershop beginning April or May, 1935. Her best recollection was that she first met Hope at her uncle's home, on a Sunday in July, 1935. Her aunt, Mrs. Murphy, was then at the James home. She had seen Hope at the barbershop on occasions. Sometimes he had barber work done and sometimes he sat in a waiting chair and talked with Mr. James. She had seen them walk out of the shop and around the corner, perhaps twice.

Sam Grant, a barber in the employ of James, called by the prosecution, said that he had seen Hope in the shop getting work done. He was a regular customer. He and James engaged in casual conversation. He had seen them talk in front of the shop on one occasion for a little while. He had seen others also converse with James in front of the shop. Hope was at the shop about every three weeks both before and after Mrs. James' death. No association is shown to have existed between Hope and James as to any unlawful enterprise, save the testimony of Hope, and the alleged confession.

A witness who gave assistance to the bureau of investigation and the police force, and who doubtless had considerable to do with convicting the defendant, was Mrs. Madge Reed who said she was living at an apartment house apart from her husband. While Mrs. James was attending the dental convention at Long Beach, James, at about one o'clock in the afternoon of July 10th, went to the Italian Village for lunch and while there met first a girl friend of Madge Reed who introduced him to her. She did not state the name by which he was introduced. They had something to drink and James became so far affected with liquor that he asked the girl friend to drive him home in his car. He told them he was from Kansas and was on a visit and lived with his sister on Verdugo Road. Whether he gave his true name or a fictitious name is not stated. The girl friend's name, after directions from the court to do so, was given as Merryl Barrows. The witness said she did not know her address or the street on which she lived and she had forgotten her telephone number. She had met her friend only once before at the Village. They got into James' auto at about 5 o'clock. The girl friend drove the car to Western avenue and got out and Madge Reed drove to the James home and upon entering the house James said he was going to sleep and went into the bedroom. He gave her one dollar and told her to take the car and get her dinner and when she returned he would be able to drive her into Los Angeles. When she returned from dinner James was still sleeping. In a short time Mrs. James, who had returned home in advance of her return schedule, entered the house. When she came in the door, she "hollered, 'Oh, honey' ", doubtless as a salutation to James. This exclamation of Mrs. James was stricken as hearsay. We think it has significance and should stand. Mrs. Reed was not acquainted with Mrs. James. Mrs. James, after a time, took her to a 'bus connection where she took passage to her home. The witness said she did not see James again until August 11th, five days after Mrs. James' death. Mrs. Reed said James called her up by 'phone on numerous occasions, the first time being the day after she was at the James' home. He apologized for taking her to his home. He didn't think his wife would be home as she was attending a convention at Long Beach and was not expected home for three days. He asked her to go to San Diego with him. He called her up the Saturday before Mrs. James' death, which would be August 3d. He suggested that she get a girl friend and the four would go out together. The name of the fourth party was not given by the witness. She did not hear from him again until August 11th, when he called by 'phone and asked her if she had been reading in the newspapers about his wife's death and she replied she had. He wanted to talk to her about what she had seen in the papers and wanted to go to her apartment, 525 South Coronado avenue, and she told him he "could not," but "he came up anyway." He told her about his wife and "how they were trying to frame him on the case; that as long as his wife was dead that he would collect the insurance and he would marry me and take me north." She left the apartment with him for a ride. He told her that if he was indicted he wanted to spring her as a surprise witness and he would give her $2,000 if she would testify. He wanted her to testify that she had met him and his wife five weeks previous at the Italian Village in the evening; that on the morning of her death she [witness] was out riding and she saw her standing on the porch and "she explained that she was not feeling well and that she had on yellow pajamas and she laid in the hammock and mentioned she had a sore on her leg." At this point it may be pertinent to call attention to the fact that

Mrs. James died not later than August 5th. An autopsy was performed on August 6th, and it is not probable that the funeral was held earlier than the second day after death. This would bring the time to August 6th or 7th. The autopsy showed drowning as the cause of death and there was no occasion to anticipate an indictment as the coroner's jury made no accusatory report and so far as the record shows there was no reason to fear criminal proceedings would be instituted and as a matter of fact no charges were made or indictment found until the dictaphone had been installed and a system of espionage had been adopted months afterwards which resulted in the incest and murder charges.

It will be recalled that the first time Dr. Wagner, the county autopsy surgeon, had any intimation that rattlesnakes had played any part in the death of Mrs. James was months afterwards and it was brought to his notice by one of the investigators. No suspicion that she had met her death by criminal agencies was given a thought until months afterwards as evidenced by the time that the body was exhumed for examination some nine months later. It does not seem probable or reasonable that James would have been discussing with Madge Reed the probability of an indictment five days after his wife's death in view of the autopsy surgeon's record and the slow progress made in developing the case. Continuing her story she said she and James had left her apartment and went to a room in a Hermosa Beach hotel. On the way they stopped a number of times for Mrs. Reed to make telephone calls. They registered (her handwriting) at the hotel. He talked about his troubles and she being a witness for him. He talked about insurance and said it was "a marvelous thing" to have and that they were trying to "frame" him on that point. She spent the night in the hotel and left the next morning for Los Angeles. On the way back he had her take notes so she would be advised as to what to say when she met James and his wife. She took Mr. Silverman's name (James' attorney) and phone number. The witness produced a card on which she made certain notes in James' presence. She said he gave her $60 to show that he really meant business. She added: "I was to get $2,000.00 whether I testified or not." The written matter on the card was done by her in ink and contained names and addresses. She got the card at the hotel where she said she and James stayed the night before. The writing was done while she was en route to Los Angeles. Upon arriving in Los Angeles she took a taxi for her apartment.

She was then passed for cross-examination. She knew nothing as to the whereabouts of her girl friend. Her girl friend brought James to her table at the Italian Village and introduced him to her and they had a few drinks. James said he felt he had had too much to drink and they consented to drive him home. On a Hermosa hotel registration card she wrote, on James' instructions, the names "Mr. and Mrs. Joseph Wright, San Francisco, California." She and James were shown a room by the man at the desk. They walked upstairs to a room but she didn't know what floor it was on. She had no baggage of any kind. They talked most of the night. She did not have any improper relations with James. Before retiring she took off her outer dress, shoes and stockings. She did not remember whether James disrobed or not. When she fell asleep James was sitting up talking. Asked if James went to bed she replied that she did not think it necessary to answer the question, and when instructed by the Court to answer, she answered, "I don't know." She said they were back in Los Angeles before eight o'clock the next morning. She admitted that she had lived at Wenatchee, Washington, and Salem, Oregon. She denied that she had had "some experiences" at Salem, Oregon. An objection was sustained as to whether she knew a dentist residing at Salem, Oregon. Her friend, Vera Russell, was living with her at Los Angeles and paying some of her expenses. She had no idea where she could be found. The witness admitted she had dropped into James' barbershop but said she could not remember the time. She said she had no recollection of seeing Lois Wright at the barbershop. She denied that she asked for and received money. This denial had reference to testimony given by James that she called at his shop the first or second day after July 10th, and claimed that she was out of pocket on account of taxi fare and other charges incurred by reason of driving James to his home, in the sum of $10, which James said he paid to her. She was then asked if she visited James' shop before or after the death of his wife and

her answer was, several months afterwards. She visited his shop after he had called her at a time when her mother was dying and she did ask him for money to visit her. To the next question she answered she talked to him on the 'phone. She further testified that inasmuch as she had given him the impression that she would commit perjury for him, and inasmuch as he would pay her whether she testified or not, she thought he "owed her this money." Asked as to whether she did not tell him that unless he gave her some money she would go to the newspapers and attempt to sell her story, her answer was, "I don't recall." She testified that just before the insurance trial in November, James offered her $100 to testify at that trial. Asked when was the last time she called at the barbershop, her answer was, "I don't recall." The only money she claimed to have received from James was the $60 he gave her on the morning following the night they sat up the greater part at a Hermosa Beach hotel.

Mrs. Madge Reed offered not a person in corroboration of her story and none was given save the admission of James as set forth in his testimony recounting meeting her at the Italian Village, situated on 8th street, near Hill, in the same general locality as James' barbershop, No. 522 West 8th street. Mrs. Madge Reed's testimony has been set forth as it appears recorded in the case. James admitted that he met Mrs. Reed one afternoon at the Italian Village where he went for lunch. His wife was attending the Long Beach convention. He said he was not feeling good and he drank some cocktails and stayed at the place until five o'clock and was somewhat under the influence of what he had drunk. He met Mrs. Reed, a stranger, and her friend, and after taking the cocktails he asked her if she would drive him home as he did not want to drive the car and she consented to do so. James said he went to sleep on the way. When he woke up at home, which was about midnight, his wife was bathing his face. Mrs. Reed came to his shop a day or two afterwards and said he had promised to give her $10. She said his wife came home while she was there and took her to a 'bus line but she took a taxi which cost her $3 and she had spent other sums and he owed her $10. He gave her $10. James testified that he never stayed all night with her at any time or place; he never saw her again. He denied promising her $2,000 or any other amount if she would testify in his behalf in the event he should be indicted. She called him by 'phone on several occasions and wanted to borrow money. She stated her mother was dying in Australia and she had to have $75 to go to her bedside, and he told her he didn't have it. She then began writing him letters—three in all, and in her last letter she demanded $250. As a threat she wrote him that she had a story for which she could get twice the above amount for publication in the newspapers, but she didn't want the notoriety and preferred to sell it to him. Much of his testimony she either admitted or evaded by saying she did not remember. She said she could not recall whether she threatened him with the sale of her story for publication unless he gave her money.

Several of James' employees who were in close personal contact with him during working hours immediately following the all-night drunken episode related by Hope in which rattlesnakes were tried and discarded as instruments of death, and drowning was substituted as a more effective method, were called by both sides to show the physical and apparent mental condition of James as he appeared at work the day on which Mrs. James died. Without exception, all testified that he arrived at the shop on each occasion at the usual hour, did his work in his customary way, appeared normal and no one detected the odor of liquor on his breath or observed the slightest evidence of intoxication in any respect. August 3d, the day Hope testified he brought in the second or third lot of snakes as herein related, which was Saturday, James was busy in the shop, and took but thirty minutes for lunch, paid off the help and closed the shop at the usual hour.

This brings us to a consideration of the question of motive which has as it foundation the life insurance policies issued upon the life of Mary James, in which he was the named beneficiary. Motive is an important factor in criminal cases, the degree of strength being relative to the facts and circumstances which make up the particular offense charged. Motive without substantial evidence supporting the incriminatory acts is not sufficient to sustain a conviction. In almost every crime a motive or an advantage to be gained by the

perpetrator, patent or discernible, may be shown as an urge for the commission of crime. In the instant case it is contended that the motive was the enrichment of the defendant by the death of his wife.

The defendant met Mary Busch, who was a beauty parlor operator, in early March, 1935. He had a beauty parlor stall or parlor, installed in the rear of his barbershop and she was placed in charge on a salary basis. He and Mary soon began keeping company and finally they assumed the relations of husband and wife. James, during this period, had pending in the superior court an action to annul a marriage consummated with another woman. The decree annulling said marriage had not been granted at this time, and he was awaiting the action of the court. He said he and Mary were fond of each other and had agreed to marry as soon as all legal obstacles were removed. The decree of annulment was finally made and they were married at Santa Ana, Orange county, July 19, 1935. Before the legal marriage they had been living together under a mock ceremony. The man who performed it was not a person authorized to solemnize marriages. James testified that inasmuch as he and Mary had agreed upon marriage, in order to give color to a marriage status and keep down talk or gossip, he had the mock ceremony performed. Mary did not know it was a mock ceremony at the time. A valid ceremony having afterwards been performed, there can be no doubt she knew in advance of the valid ceremony that the first was not valid. During the period when they were living together following the performance of the mock ceremony some of the policies were written on her life. That James was an open advocate of life insurance is proved beyond question by the testimony offered by the prosecution. He talked insurance openly. The several agents who had been his shop customers for long periods of time admitted they had frequently solicited his assistance in discovering and interesting suitable "prospects" for life insurance investments.

The earliest negotiations for insurance on the life of Mary James were had with Louis Berry, agent of the Mutual Life Insurance Company of New York. Mr. Berry testified that he had been soliciting James for insurance since he had become his customer, for about ten years. This was also true as to several other agents. In April, 1935, he told Berry that he would not be personally interested but he knew a girl that would be interested. He declined to give her name until the prospect was ready. The subject was brought up two weeks later in his shop by Berry, and James enquired the cost of a $5,000 policy on a twenty or twenty-five years endowment plan. The result was that James, after being solicited several times, called from the rear of his shop Mary Busch whom he introduced to Mr. Berry. Mr. Berry and Mary Busch left the shop together and talked over the insurance proposition without the presence of James. On May 7, 1935, Mary made application for a $5,000 policy in the Mutual Life Insurance Company of New York. A week before the application was returned James told Berry that the proposition was a little higher than one offered by the Prudential Life Insurance Company. Satisfactory terms were finally agreed on and she took the usual medical examination. The document was sent to New York and the company later asked for additional information which indicated that the issuance of the policy might be doubtful. After a delay of more than a month, however, Berry received and delivered to Mrs. James a $5,000 three-year premium term policy.

James, no doubt prompted by his recent experience as to the necessity of strict compliance with the rules governing insurance applications, on July 29, 1935, ten days after marriage, called the agent by telephone and enquired whether the validity of the policy was affected by reason of the application describing Mrs. James as a married woman at a time when she was a single woman. In her application she had classified herself as a married woman and named her estate as the beneficiary. James explained the marital predicament in which he and his wife had placed themselves and the agent took the matter up with the main office, and after more delay which provoked some complaint, a policy was issued in which James was made the beneficiary. She told the agent she had married since her first application, and the agent wrote in the name of her husband as the beneficiary at her directions. The policy was delivered by Berry to James at the shop on August 5, 1935, after the death of Mrs. James. Berry frequently enquired as to Mrs. James' health and was always told by James she was doing nicely except on one occasion early in July he said she was not well, and inasmuch as she had a health policy she was going to become fully restored to health

before returning to work. No claim was made for sick benefits. The first annual premium, amounting to $59, was paid by Mary Busch.

Berry had no conversation with James after his wife's death for quite a few days. James did not return to his shop for several days after her death. He asked the agent several times thereafter if the company was going to pay double indemnity in accordance with the finding of the coroner's jury, that death was caused by accident.

Berry testified that James had done his barber work for a number of years and had given him the names of many insurance prospects. He further said he had talked with Mrs. James with respect to the policy, both in and out of the presence of James.

Max Galatz, representing the Occidental Life Insurance Company of Los Angeles, one of the companies that brought an action in the superior court to cancel its policies, to which James cross-complained, testified as to two applications for policies made by Mary Busch, one a health and accident policy, in the sum of $700, and the other, a life policy in the sum of $5,000, on which policies were issued on her applications in the latter part of May, 1935, before marriage. The agent solicited Mary Busch in the beauty shop and had never been in the barbershop before and was a stranger to both James and Mary Busch at the time he began to interest them in insurance investments. His testimony is confusing in some particulars and discloses much uncertainty as to the substance and the order of events. He testified that he never had any conversation with James before he obtained the applications and both were obtained on the same day. Four or five days previous to the time of taking the application he met Mary in the beauty shop and had a conversation with her. James was not present. He was next asked: "Q. Was the defendant there at any time when you had a conversation with her [Mary Busch] before you actually got the application? A. No." He said he had a slight conversation with James during the interim from the delivery of the application to the issuance of policy. After the $700 application was completed, James, in the presence of Mary, said, "Will you insure her?" The agent's answer to this question is unintelligible. The thought attempted to be expressed seems to be that he told James it was necessary for him to have insurance in his own right over and above the amount provided in the policy in which he was beneficiary. The agent filled out the application form in his own hand in the presence of Mary Busch, and he asked James if he was the husband and Mary if she was the wife and each answered, "Yes." He told James, hoping, he said, to write him a policy in the amount of $5,000, that it would be absolutely necessary for him to have a greater amount of insurance on his life than he was writing for Mrs. James. James told him he had plenty of insurance. After instruction from the head office he went to James' barbershop and wrote a policy on his life in the sum of $3,000. The policies were delivered to James at a restaurant near his shop. The premiums were paid on each policy.

On cross-examination the agent testified that the first time he was in the shop was the time he called on Mrs. James in which he discussed health and accident insurance with her. James testified that the first time he ever saw Galatz was June 2d. He was cutting his hair and Galatz overheard Mrs. James ask Berry when her policy would be issued and Berry said he would be surprised if the company did not turn it down. As soon as Galatz got out of the chair he went into the parlor and began soliciting her for her insurance. This statement finds corroboration in the evidence. Galatz said he never discussed life insurance with Mrs. James. Answering the next question he said he discussed it with James in her presence. He was asked if he ever "discussed the subject of life insurance with Mrs. James, regardless of who was present," and he answered, "Yes." Following this he said he wrote her policy after talking to her and James; that he procured from her directly all the information attached to the $5,000 policy; all the answers to the questions were obtained from her directly. The witness being asked if he did not say to Mrs. James at the time he solicited her insurance, knowing of the delayed Mutual policy, that the Occidental, having its home office in Los Angeles, could deliver insurance much more rapidly than other companies, answered, "No." He did not recollect whether he told her the rates of his company were less than others or that she could save money by taking a policy in his company. He said he did not know of the delay encountered in issuing the Mutual Life Company policy. The witness denied that he ever discussed with James the subject of the payment by his com-

pany of the life policy but finally admitted that he did say to James, after Mrs. James' death, "What are you going to do about this insurance?" The company had refused to pay the face value of the policy and one of the grounds of refusal, it appears, was that the assured did not pay the premium. The agent testified that Mrs. James paid the health and accident premiums but James paid the premium on the life policy. All premiums were paid in the shop in the negotiations of the three parties and the agent based his statement that James paid them on the fact that James took the money out of the cash register. He could not say definitely that James did not hand the money to her and she in turn passed it to him. There is no doubt but that the policies were issued because of the active solicitation of the agent.

Gene Waddle, unit manager of the Occidental Life, one of the companies contesting payment, testified that James called him by 'phone and he afterwards called at his shop. James said he wanted to talk with him and asked him to walk up the street with him and he followed him into a lavatory in the rear of a liquor store and asked him if he knew Mrs. James had insurance with his company. Upon being told that he did, James said he was anxious to learn and his attorney had asked him to inquire, what would be the status of his wife's policy, if issued out of wedlock. James explained they had planned on marriage but Mrs. James had been called to Long Beach on some dental work, which delayed the marriage, but they had since married. No special significance is seen in the lavatory incident. It would be but natural that a policy holder or a person interested in a policy would care to know whether the existence of the circumstances above recited would render it void. The fact that a lavatory served as a place of privacy does not give any greater sinister significance to what was said than if the information sought had been given in the private office of the insurance company. There was nothing discussed that was not a matter of record, or was not known, or was not easily accessible to the insurance company's agents, and which would have inevitably developed upon the death of the assured. The information sought was as to the legal effect of admitted facts. James had asked the agent of the Mutual Life by telephone communication a similar question ten days after the ceremony was performed.

It will be recalled that the Mutual Life policy had not been delivered to James, tested by Hope's testimony, at the time the act of destroying Mrs. James' life was commenced and fully accomplished. According to Hope she was dead in the early morning hours of August 5th. The policy was delivered (agent's testimony) at the barbershop on August 5th. Of course, it was not delivered at the unseemly hours of 1:30 or 2 or 3 o'clock on the morning of August 5th. It was conclusively shown by the direct testimony of the agents who solicited the policies of insurance in which Mrs. Mary James was the assured that she was an active participant in procuring the same and herself suggested her husband as the beneficiary or consented thereto and there is no evidence of any coercion or over-persuasion on his part to induce her to name him as her beneficiary. There is evidence to the effect that he did introduce her to certain agents who had habitually importuned him to give them the names of prospective insurers, but her name, according to the agent's testimony, was given only after he had first obtained her consent.

There is no evidence in the record to indicate that James exercised any undue restraint over his wife. In fact, the evidence without conflict, is the other way. She seems to have come and gone as she pleased, and in every sense was a free agent. Her visit to Long Beach for several days, a very few days prior to her death, and her unexpected return home on account of her condition, and her visit to her doctor's office and his call at her home, and her activities at the beauty shop and free intermingling with the public, and her association with friends, positively rebuts any implication of undue domination over her acts or volition by James.

The insurance companies refused to pay the sums stipulated in the policies and brought an action to cancel the policies. A cross-action was filed by James to recover double indemnity amounting to the sum of $21,400. All actions were finally dismissed by the payment of the sum of $3,500 to James.

The circumstances bearing on the death of Winona James, a former wife of the defendant, and the issuance of the policies on her life in which the defendant was the named beneficiary, are correlative issues to the Mary James transaction. Winona James was found dead in a bath

tub in the cottage occupied by her and her husband, October 14, 1932, at Manitou, Colorado. The parties had set out soon after marriage for a visit to James' former home near Birmingham, Alabama. They went by way of Colorado Springs where they were to stop and negotiate the making of a lease of lands belonging to Mrs. James' parents to a tenant. While there they took the trip up Pike's Peak where the automobile disaster occurred which resulted in injuries to Mrs. James. Three weeks later she was found drowned in a bath tub at her home.

Mrs. Winona James was formerly a school teacher and latterly an accountant in an automobile business.

Evidence was admitted over the objection of the defendant tending to prove that the automobile incident which occurred in the jurisdiction of the state of Colorado approximately three years prior to the crime alleged in the instant case, and which resulted in serious injuries to his former wife, was caused in an attempt on the part of the defendant to take her life which purpose was finally accomplished some three weeks later by defendant causing her to be drowned.

The theory adopted by the prosecution in the instant case is framed and patterned after the theory announced in People v. Gosden, 6 Cal.2d 14, 56 P.2d 211, decided and published a short time before James was formally charged with murder. The facts in the two cases are similar in some particulars and unlike in other particulars which have to do with the principle or theory upon which evidence of another or other crimes are provable against a defendant on trial for a specific offense for the purpose of showing motive, intent, knowledge, absence of accident, or common plan or design. In the Gosden case the defendant's first and second wives, respectively, died from the administration of strychnine, a subtile poison. Defendant's knowledge of the effect of strychnine poison on the human system and the purpose or intent with which it was purchased by him, he, Gosden, claiming it was purchased for the purpose of exterminating rats, became important questions. There also existed a close similarity of the circumstances which attended the deaths of both wives. We held that sufficient reasons existed to justify the admission of proof as to criminal responsibility for the death of the first wife upon the trial of having murdered the second by means of strychnine poisoning.

In the instant case the theory of the prosecution was that James planned to kill his wife, first by procuring a rattlesnake and causing her to be bitten by it, but before its poison had accomplished his purpose he caused her to be drowned. As to the Colorado case the theory was that she was first made intoxicated, then hit on the head with a hammer and in an unconscious state abandoned to physical destruction in an unguided automobile sent dashing down the narrow, tortuous and precipitous Pike's Peak road. The motive attributable to each defendant is identical. The cause of death of Winona James is admitted to be drowning. The death of Mary James is claimed to have been caused by drowning. Both deaths are claimed to have been accomplished by the criminal acts of the defendant.

The cases which support the pronouncement that all that is necessary to admit proof of another crime where guilty knowledge or mistake or general plan or fraud or intent are the essence of the offense, is that a prima facie case be made out or that substantial evidence be given and there need be no showing beyond a reasonable doubt that the defendant committed the other crime, are not here questioned. In order to justify the admission of this character of evidence it should be of sufficient probative force to create a reasonable belief in the minds of the jurors that the other crimes were *committed* and the defendant committed them. Such evidence cannot be admitted if in character it is so vague and uncertain as to create suspicion only. The suggested procedure in some jurisdictions is that the relevancy of the offered proof should first be determined by the trial court upon offer made or by inquiry of the prosecuting attorney before the evidence is allowed to go to the jury. Vague and unsubstantial evidence of the commission of other crimes is clearly not admissible. State v. Hyde, 234 Mo. 200, 136 S.W. 316, Ann.Cas.1912 D, 191; State v. Meininger, 306 Mo. 675, 268 S.W. 71; Bell v. State, 208 Ind. 361, 195 N.E. 274; State v. Howard, 108 Vt. 137, 183 A. 497; State v. Jones, 27 Wyo. 46, 191 P. 1075; Sneed v. State, 143 Ark. 178, 219 S.W. 1019; Lund v. State, 207 Ind. 347, 190 N.E. 850.

The court is duty bound to carefully exclude all evidence as to other crimes

not relevant to the main issue and which would only tend to degrade or defame the defendant or in anywise prejudice the jury against him.

The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the state of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satisfied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the right of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charged in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf. Cal.Const., art. 1, § 13. The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought from Colorado as witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's Peak a short time before they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter, and counsel, in asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforeseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to the sobriety of Mrs. James is given added emphasis by the prominence this court has given the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury.

We have heretofore referred in general terms to the evidence which the prosecution holds to be sufficient to support the implied finding of the jury that the other charge of murder was committed by the defendant. As briefly as possible we will further consider the circumstances from which the prosecution draws inferences which it

claims satisfy the rule as to proof of other offenses and which, considered with the evidence relevant to the main case (limited to the purposes prescribed by law), constitute sufficient proof of defendant's guilt beyond a reasonable doubt.

Winona P. Wallace and James were married in July, 1932. She had been a school teacher before her marriage and later a bookkeeper for Howard Automobile Company. In 1932 C. A. Pries was engaged in selling insurance for the Prudential Life Insurance Company. He had been an acquaintance and friend of James and a regular patron of his barber shop for many years. Through the years he had suggested to Pries the names of persons who might become interested in the Prudential Insurance Company's plan of insurance. He had bought policies in his own name and had had a policy issued on his mother's life in the sum of $500 in which he was the beneficiary, long before Winona Wallace was thought of as a policy holder, and had advocated life insurance to others as a business investment and had advised an employee to consult Mr. Pries in matters of insurance. Some three or four weeks prior to May 20, 1932, he had talked with Pries as to a prospect he had in mind. He also had discussed insurance for himself. In keeping with his agreement, he invited Pries to his apartment where he met the insurance prospect, Miss Wallace. After discussing terms he (Pries) wrote an application for James in the sum of $5,000. After that transaction was completed James suggested that Miss Wallace take a like policy. Pries transacted all of the business connected with the Wallace policy with her. She answered all questions and paid the premium and James did likewise as to his policy. Pries advised the double indemnity policy, inasmuch as it was only one dollar more per thousand than the rate charged on straight accident insurance. When the naming of the beneficiary was reached James said that he and Winona were to be married within a month or two and asked if that fact would affect the naming of himself as beneficiary. The agent told him it was necessary that he should have a beneficial interest in the insured but the beneficiary could thereafter be changed. Miss Wallace's estate was made beneficiary and after marriage James was made the beneficiary. The change was executed by the insured. Both policies were personally delivered to the parties who caused them to be issued. Miss Wallace also carried a policy in the sum of $1,000, issued in 1924 by the Kansas City Life Company, in which her sister was the named beneficiary.

James testified that, after marriage, a salesman, representing Policy Holder's Life Insurance Association, called at his home and talked over with his wife a stockholders' insurance proposition which issued a $3,000 policy at the rate of $15 per thousand annually and, after talking it over, both concluded it would be a big saving to drop the Prudential policy and take a policy in the stockholders' company. She made application for two policies in the sum of $1,500 each, which were issued August 2, 1932. James was the beneficiary in said policies. There was no evidence of any attempt at secrecy in discussing any of the insurance policies or that any coercion or persuasion was used by James. In fact the evidence is without contradiction that in both cases the respective wives talked with the agents freely and separately and apart from the defendant.

The prosecution has given over-emphasis to a letter written by Winona's sister upon request of James and at the joint dictation of James and Pries, agent for the Prudential Company, signed by James and addressed to Dr. Hanford, who was the chief attending physicain during the time Mrs. James was confined at the Colorado Springs hospital. The letter was written wholly at the suggestion of the insurance company's agent who wrote the policy and it had to do with the death certificate signed by the coroner, Dr. Gilmore. The agent was of the view that the report was incomplete in that it did not report the holding of an inquest. Further, inasmuch as accidental drowning was not of itself a compensable accident, that there should be shown to entitle the claimant to double indemnity, in addition to death by drowning, merely an antecedent accident as the proximate cause of death. The understanding of the parties seems to have been that if an independent accident directly caused the drowning double indemnity was recoverable and this accepted view was termed by all as a "contributing cause" of death. The agent suggested to James that if the injuries to the head were the proximate cause of the drowning, such as causing a cerebral hemorrhage, or causing other symptoms, no doubt such as dizziness caused from sudden or unusual movements of the body following long confinement in bed by reason of head injuries, the coroner's report should

show it, as the company would require a report showing an accident as a "contributing cause" of death. Dr. Hanford, the physician who attended Mrs. James for several weeks in a Colorado hospital, upon the receipt of the letter took the matter up with Dr. Gilmore with the result that the completed report showed the "contributing cause". The amended report, after consultation with Dr. Hanford and others, satisfied both the coroner and the insurance company and double indemnity was paid to James at Birmingham, where he had gone to visit with his people. There was nothing in the letter or in the transaction itself that savors in the slightest degree of a criminal purpose. Further, it has no evidentiary relation to the main and important issue of the case. As a matter of fact no inquest was held. When the possibility of an inquest was mentioned James said he could not permit or bear to have an inquest held and requested the coroner, if possible, to forego an inquest. The coroner, after investigating and finding no suspicious facts or circumstances implicating James in the commission of a crime, dispensed with holding an inquest. This is taken by the prosecution as an attempt on the part of James to supress evidence. None of the several employees of the Pike's Peak Auto Company who were at the scene of the wreck in 1932 and who were brought to this state and testified at the trial to physical conditions and in contradiction to alleged statements made four years prior thereto as to what was done and said by James in explanation of the wreck, made known by complaint or accusation any suspicious circumstances or any incriminating fact of which they had knowledge either in September, 1932, at the time the wreck occurred, or in October after Mrs. James' death at a time when the matter was in the coroner's hands for investigation. No action was ever taken by the Colorado authorities.

James became a witness in his own behalf and much of his testimony on material matters is uncontradicted. He and his wife left Los Angeles the latter part of September, 1932, shortly after their marriage, for a visit to his old home in Alabama. Before leaving they secured a loan of $150 on the Kansas City policy. They anticipated an extended visit and he leased his shop during his absence on a commission basis. As before stated, his wife's mother had authorized James to attend to the leasing of property owned by her in Colorado for a term of one year to a prospective tenant. His wife also had relatives in or about Colorado Springs whom they had planned to and did visit. In keeping with their planned itinerary, they left Colorado Springs about noon on September 21, 1932, to make the trip to the summit of Pike's Peak. They spent some time at the summit and started down the mountain at about 5 o'clock, as the sun was dropping behind the peaks. James said his wife expressed a desire to drive down and he yielded to her request. After they had gone a few miles he was viewing the scenery and the setting sun through a pair of binoculars or field glasses. The road was narrow, steep and winding. Many sign posts warned sightseers to "drive in the second gear". While thus engaged in sightseeing, he felt the car make a lunge as though moving through the air. We will not attempt to describe the movements of a car or to lay down a rule of action which should be observed by the occupants of a car in moments of sudden, impending peril. It cannot be done. James said he was thrown from the car with great force as it plunged down the mountain side and lodged against a granite boulder. The car landed upright but the wheels were crushed and the body was resting on or near the ground. It was otherwise badly damaged. James said he was rendered unconscious for the time being by being whirled over the rough ground for a considerable distance. As soon as he was able he went to his wife's assistance. He found her bleeding very freely from the forehead and side of the head. She was partly in and partly out of the car. He was in a state of great mental perturbation suffering from shock and injury to the back and his right leg was rendered almost useless. It was then rapidly getting dark and he searched for his pistol to fire an alarm but it was gone. His purse was also missing and he was left penniless. He never recovered either. All that his wife could say was "get a doctor". He attempted to lift her out of the car but found he could not handle her. In attempting to extricate herself from the car she had projected her head without the car and it had come in contact with granite boulders in the descent. After orienting himself as best he could he placed a blanket under and over her body and started to go back to the summit, which was the nearest station, to summon help but found the grade was steep and,

as his injured leg impeded his progress, he changed his course and went down grade to Glen Cove, which, though somewhat further in distance was, because of his crippled condition, shorter in time. He reported the matter to the superintendent of the road and a crew of men in wrecking cars and with the necessary appliances went to the place where Mrs. James was left and in due time she was taken to the Beth-El Hospital, at Colorado Springs, where she was placed in the hands of two or three specialists in cranial surgery and two trained nurses. Telegrams were sent by James to Mrs. James' mother in Los Angeles, her father in Idaho, and to her sister. James found himself without money in the midst of mounting hospital, medical and nurse-hire charges. His father-in-law loaned him $100, one nurse was finally dispensed with, James and the father taking her place. The man in charge of his business at Los Angeles wired him $100. Mrs. James made good progress and after seventeen days, October 8th, her condition then permitting, and on her request, she was taken to El Cajon cottage on Capitol Hill at Manitou, a resort some six miles from Colorado Springs, to bring the costs within their means.

Mrs. James' wounds had bled profusely and her hair was described as a compact mass. James testified, and no attending or other physician was called to contradict the fact or the practice in such cases, that the attending physician had repeatedly given strict orders not to wet the hair or attempt to remove the dried and matted blood for fear of an infection. An operation had been performed. Mrs. James had become highly nervous and wrought up because of the refusal of her husband to wash the dried blood, which was crumbling in particles upon the bed clothing, from her hair.

On October 14th, James, after changing the bed linen, preparing breakfast for Mrs. James and putting the cottage in order, left at one or one-thirty o'clock in the afternoon to go to Colorado Springs to inquire as to the arrival of mail. He had been negotiating for several days with an insurance company for a loan of $250 on a policy of insurance and he expected a check from the company on that day. He also went to Colorado Springs to assure the hospital manager that his bill would be paid. It may be observed at this point that the check did come by mail a few days thereafter and was used to pay hospital and doctor bills and expenses of transporting his wife's body to Forrest Lawn, Los Angeles county, for burial. He had made a number of visits in anticipation of mail and on business matters in connection with his indebtedness as his creditors were pressing him hard for payment. He first went to the general store, which was a mile from his cottage, and there took a stage for Colorado Springs.

Alva E. Custer, the proprietor of the hotel at Colorado Springs where James had stopped during a part of the time his wife was at the hospital, was brought by the prosecution from Colorado and testified on behalf of the people. He had talked with James more or less about the accident and about his financial affairs during his stay at the hotel. Just before moving out of the hotel, James told him he was going to move his wife from the hospital to reduce expenses as he was then able to take care of her and did not have the money to keep her at the hospital and there was no use going deeper into debt. He said he had nothing to do but take care of her. He said the doctor had cautioned both him and Mrs. James against stooping over because it might cause dizziness and also against washing her head as it might cause infection. This conversation occurred more than a week before the witness heard of Mrs. James' death. The admonition of the doctor was elicited by the prosecution and no witness was called to refute it. It was repeatedly asserted by James. Custer saw James as he came to the hotel on the afternoon of the day Mrs. James died. He talked with him and inquired as to Mrs. James' condition. James said he regretted leaving her at the cottage but he had come to the Springs in anticipation of hearing from his insurance business and to see if the Company had left any word at the hotel.

Custer testified that James left the hotel on the day of his wife's death "mid-afternoon".

"Q. Three or four o'clock? A. Yes, that would be what I would think, around 4:00 o'clock.

"Q. About four o'clock? A. Yes."

The distance from Colorado Springs to Manitou was six miles up hill. The time element is important in fixing the time when the defendant arrived at El Cajon

cottage with Gerald Rogers, the deliveryman for Leonard's grocery store, who was with the defendant when the body of Mrs. James was first seen after death. Gerald Rogers fixed the time as "around 5 o'clock" in the afternoon. James, according to Custer, left his hotel about 4 o'clock. Custer did not know where he went immediately from the hotel. If he went to Manitou by foot he could not have made the distance in less than one hour and thirty minutes, according to Custer's estimate. If he went by stage, the way being evidently through a mountainous area and up hill, it would have taken him, at the rate of forty miles an hour, approximately twenty minutes to arrive at Leonard's grocery store where he made a purchase of provisions. James' cottage was another mile from the store. It is so improbable as to create a reasonable doubt that James could, within the time limits fixed by the witnesses, have gone from Colorado Springs by coach to Manitou, then walked to his cottage, drowned his wife, and walked back to the grocery store, purchased his provisions and returned in the grocery truck with the deliveryman, even though he had acted with unusual expedition. Such a theory has been advanced. If he drowned her it must have been before he went to Colorado Springs. The time element, it seems, would preclude any other theory so far as the evidence produced by the prosecution bears on the question. Gerald Rogers, who was with James when the body was discovered in the tub and assisted James in its removal, testified that the water half filled the tub, which was about four feet in length, and was lukewarm and the nude body was face upward and was quite warm. The water and the body were quite "soapy". The body lay with the head directly under the two water faucets, hot and cold, at the foot of the tub and her feet were extended over the rounded edge or side of the tub near the foot. The body was carried by James and Rogers to the bed and the coroner was immediately summoned. Gerald Rogers said that on several occasions James had ridden with him in his delivery truck making deliveries to his cottage. On the day in question, after making purchases of provisions, James remarked that he wanted to ride with him. This was around five o'clock. Shortly thereafter they arrived at the cottage. Both got out of the delivery truck, Rogers carrying the groceries, and entered the front door, James in advance. James looked into the bedroom but his wife was not in her bed. Rogers continued into the kitchen with the groceries. He next saw James coming out of the dining room into the kitchen. James then opened the bathroom door and called to Rogers, who looked into the bathroom and saw Mrs. James in the bathtub as above described. Her eyes were open but she was dead. Her mouth and nose were slightly below the surface of the water. A package of Pearl soap flakes which was kept in the kitchen had been removed and the bath water was heavily impregnated with soap and her body made slippery by it. Her nightgown was in a corner of the bathroom. The cottage was situated at the top of Capitol Hill and there were a number of cottages, both occupied and unoccupied, within half a block of the James cottage. There is nothing in the testimony as to the bathtub occurrence, save its tragic cast, which has any incriminating significance. It cannot be otherwise construed except by the indulgence of suspicion and surmise, or by reversing the rule of law as to the indulgence of presumptions and inferences by casting the burden on the defendant and resolving all inferences against him.

James said his wife suggested going to Manitou and renting a cottage. He wanted to take her to her cousin's home, the Yarnells', but she objected to going there. The defendant acted as her night nurse at the hospital. Mrs. James' father also helped to nurse her. At the cottage James personally prepared her meals, bathed her and attended to her needs. The defendant went to the store and postoffice every day to buy provisions and mail letters written by Mrs. James. On the day in question he prepared her lunch and performed the household duties and, about one o'clock, started for Colorado Springs. He called at the hospital and, having finished his business, he went to the hotel, where he had formerly stopped, to inquire for his mail. It was not earlier than 4:30 when he got back to Manitou. He went to the grocery store and made his purchase of groceries, riding home with the deliveryman as heretofore told. On entering the cottage he found she was not in her bed. It is not necessary to repeat the story substantially told by Gerald Rogers as it adds nothing to what has been told. James testified that Winona, whom the Superintendent of the Pike's Peak Automobile

Highway Company said had a strongly liquor laden breath, was a consistent abstainer from the use of liquor in any form and no evidence of any effects of liquor was reported by any of the physicians or nurses who attended her.

Another collateral issue brought into the case upon which prejudicial error is also earnestly urged by the defense is the testimony of Miss Yarnell, a cousin of Mrs. James, with respect to certain "advances" made to her by James. Miss Yarnell was a resident of Colorado Springs and she visited Mrs. James every evening when she was in the hospital and all but one or two when she was at the cottage. She drove James every day from the hospital to his hotel and frequently took him on drives about the city. She went to his room at the hotel and wrote all of his letters. She testified she had seen Mrs. James get out of bed and walk—the distance was not stated. She did not see her out of bed on any occasion at the cottage, but saw her sitting up in bed. She never heard her complain of dizziness. Her hair was matted with blood. The "advances" spoken of consisted of offers to kiss her a couple of times while driving. He attempted to kiss her in his room at the hotel but she told him to "cut it out". She continued to write his letters and to extend many favors to him. When he left with his wife's body for California she kissed him good-bye and he gave her some money for her many kindnesses, especially in driving him about the city. She visited Los Angeles some time afterward and she met and talked with him. The people rely on the Gosden case, supra, as an authority for the admission of the kissing episode above related. The Gosden case adopted a quotation from People v. Smith, 55 Cal.App. 324, 335, 203 P. 816, holding, to quote the exact words, that "evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse." Pierson v. People, 79 N.Y. 424, 435, 35 Am.Rep. 524, is also cited in the Gosden case as authority showing motive where the defendant married the wife of the deceased within one week after the husband's death. Under the facts of that case it was held that it might be inferred that Gosden's interest in the woman with whom he had illicit relations, antedated the death of his wife. It is a far cry from the cited case to the instant case, in which it was contended all along that the insurance money was the motive for the alleged murder, until, for the moment, the prosecution changed the motive to lustful or matrimonial reasons when, as a matter of fact, there is no evidence to sustain the contention that before, at the time of or since the death of defendant's wife there were either illicit relations or desire or design on defendant's part to make Miss Yarnell his wife. Her testimony and conduct exculpate both herself and the defendant. Other instances in which collateral matters, which had no more than a colorable claim to admissibility but which decidedly tended to degrade the defendant on trial, include the sordid story of Madge Reed. No one can conclude from her testimony that James was moved to kill Mrs. James because of any desire to make Madge Reed his wife. The fact stands out that he did not marry her or make any effort to marry her. These collateral matters, valuable only for prejudicial effect, should have been excluded.

There are two uncontrovertible obstacles which stand in the way of the prosecution's theory that James planned to kill his wife with the hammer which was left on the blood bespattered floor of the automobile, covered with blood. The hammer, James explained, was taken from the rear of the car the day before and used to change a tire. He had not yet returned it to its proper place. The question which presses for answer is why, if he took his wife up the mountain to kill her and planned to give the cause of death the appearance of an accident, did he not make certain that he had executed his murderous design? He was not pressed for time. In fact, he was at the scene of the accident for some considerable time. Again, how can the fact be accounted for on any reasonable theory that the deceased, who was attended by two or three physicians and two nurses, in the care of her father for a week or more, and daily visited by Miss Yarnell during her three weeks of illness and convalescent period, made no complaint and gave no hint that her husband had attempted her life? The prosecution suggest possible retrograde amnesia, loss of memory for a period just preceding a blow administered to the head, or, that Mrs. James, the former automobile company bookkeeper and school teacher, whom James testified never drank any kind of intoxicating liquor (and no one testified that she ever did), placed on a dangerous road, rendered herself unconscious

by voluntary intoxication as to everything that happened just prior to receiving the injury. Another question that cannot be satisfactorily answered is: why did not James, having planned to kill his wife with a hammer, after using it, throw the bloody instrument into the depths of the canyon or cavern for concealment, which the ruggedness of the country so abundantly invited? The inferences are that James was not drunk. The witness who detected a strong odor of liquor on Mrs. James' breath did not detect any on James'. The fact that the attending physician removed particles of granite rock, which were imbedded in the wound in the side of Mrs. James' head, is additional refutation of the theory that she was struck on the head with a hammer or blunt instrument in the hands of James. That her body was thrown against granite rock, both in the descent of the car and by its impact with the boulder which stopped its course, does not admit of doubt. The windshield was broken. The wound on the forehead contained no granite particles.

J. D. Rogers, and several other employees of the Pike's Peak Auto Highway Company, were witnesses for the prosecution. Rogers testified as to the safety of the highway and the infrequency of accidents occurring on it. The testimony of these witnesses as to alleged contradictory statements made by James four years in the past with respect to the proprieties with which he conducted himself in the circumstances of the situation, (largely mere matters of detail and order of events) bear the infirmities of uncertain memory which might be expected. It is claimed that they were inconsistent with and contradictory of other statements as to the manner of and the cause of the car going off the road and as to James' acts immediately thereafter. Rogers testified that he found in the rear of James' car a pint or quart bottle of liquor about two-thirds full. He thought it bore a Mexican or foreign label. James testified that he purchased three pint bottles of liquor on a physician's prescription which he was taking to his aged mother, residing in Alabama, who needed stimulants. Alabama was strictly closed to the sale of liquor. We will not undertake to discuss the probative value of such testimony. The uncertainty and weakness of testimony given in an attempt to recall statements and conduct, estimates as to distance and the situation of objects which are not sufficiently important or exceptional as to make a lasting impression on the mind at the time they occurred, is to be expected. The important question in the case is—was it shown by material, substantial evidence that James attempted to kill his wife on the automobile trip to the summit, and that he failed to execute his premeditated purpose? He set out soon after the accident to bring assistance and witnesses to the scene. Rogers testified that he saw footprints along the side of the track of an automobile for some distance before it appeared to leave the grade. The footprints were not examined until a crew of seven or eight men had been at the scene of the accident for three hours. He said there was some dust in the roadbed which was graveled. Rogers could not say the footprints he saw fitted James' shoes. He thought they were made by a man. A number of people and automobiles had been on the road on that day, James being the last to check out. Rogers' testimony on many subjects of inquiry shows much uncertainty as to the exact fact. James claimed that he put one of the robes under Mrs. James and about her body, but Rogers said he found none and took one or two from the back of the car and himself placed it under her body. He did find one in the fore part of the car. He did not observe James showing signs of injuries but he said he did hear him moaning once or twice. He mentioned what he felt were failures to properly provide for Mrs. James' comfort before he left for assistance in the stress of the situation. James' testimony is that Mrs. James was bleeding very profusely and he was fearful she would die before he could summon medical aid. It was asserted in argument to the jury that the defendant was a "cunning and artful plotter". If he had deliberately planned the murder of his wife with a hammer on Pike's Peak it would seem to have been more in keeping with the prosecution's characterization of him if he had done the things the prosecution denounced him for failing to do and arranged things in orderly fashion in order to deceive the officers he went to summon and, in so doing, taken pains that no tell-tale evidence such as the instrument of death should be a witness against him.

We are of the view that if the proof as to the Colorado murder had been placed before a court exercising civil jurisdiction upon the same evidence adduced upon the

trial, the court would clearly be compelled to grant a motion, if made, to direct the jury to return a verdict for the defendant.

There was admitted into evidence, against the objection of the attorneys for the defendant, a purported confession made by James. The objection was based on the ground that the confession was not shown to have been made voluntarily and free from duress, menace, fraud and without hope of favor or reward, as provided by law, but was exacted by a course of cruel and insufferable treatment, participated in by a dozen or more investigators connected with the office of the district attorney, police and deputy sheriffs of the city and county of Los Angeles and persisted in to the point that the defendant was rendered too weak to withstand further physical beatings and mental torture with which he was threatened. The defendant was taken into custody on Sunday morning, April 19, 1936, about nine o'clock, some days after a dictaphone connection had been installed in his residence. The investigation squad actively engaged on the case consisted of J. C. Southard, in command, Charles Griffen, chief assistant of the bureau of investigation, Deputy Sheriff Williard Killion, and Investigators Everett Davis, Gray, Scott Littleton, Harry Dean, John L. Martin and Earl E. Kynette. All of said officers were unquestionably working together actively day and night with the definite purpose of forcing the defendant into a confession.

On Sunday morning April 19, James was taken from his home at 3886 La Salle avenue by Southard, Griffen and Dean, investigators, to a private house next door, 3882 La Salle avenue, occupied by the officers for spying and dictaphone purposes, where the dictaphone's part in the case was explained to him. This was done for its psychological effect. Southard said he took "quite a crowd" with him at the time he and the officers took James to the house and exhibited to him the dictaphone apparatus. A number of newspaper men, District Attorney Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Davis and Dean were among the crowd present. He was then taken to the office of Lieutenant Morgan, where he was questioned for more than an hour. He was next taken to the district attorney's office (Sunday forenoon) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. Asked if James was informed that a charge of murdering his wife was under investigation, Southard answered: "I believe not." Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate, James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts "to go to hell". They kept right on questioning him. Mr. Williams, a deputy district attorney, Griffen and several other investigators were present. Southard said *it could have been possible* that they told him they had the goods on him. The arrangement under which James was "worked on" was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs on four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. The alleged confession began to break, after days of unremitting effort, at 1:45 o'clock in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

The law prescribes the places in which persons charged with crime may be detained. A private house located in a residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. Grave abuses may be practiced against persons thus illegally held in secret confinement. Pen.Code, § 1597 et seq. Every police officer who, having arrested any person upon a criminal charge, *wilfully* delays taking such person before

a magistrate for examination is guilty of a misdemeanor. Section 145, Pen.Code. In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week-end, and then Mr. R. E. Parsons, be contacted. Neither appearing to be immediately available, the inquisition, in which a number of the investigators took part, was vigorously and unremittingly pressed, without delay, through many hours. It was not a proceeding authorized by statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace-officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before the magistrate." Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon *request* of the defendant, the magistrate *must* require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the wilful disregard of their duties. Pen.Code, §§ 145, 147 and 149.

Early in the confinement of the defendant, Officer Southard committed an admitted battery upon him. He and Officer Griffen were "working" on the defendant when Southard struck him, according to his admission, in the face or on the side of the head. We quote the incident as related by the assistant chief of the bureau of investigation of the district attorney's office, Charles Griffen. Officer Griffen and Officer Southard were the principals in directing the investigation. He and Southard began their four-hour assignment of questioning at four o'clock Monday morning., Everett Davis was present. They had not met with anticipated success. Griffen introduced the subject by saying that the defendant had been giving answers (no doubt unsatisfactory to them) all morning and Jack (Southard) said: "Your wife Mary was a very sweet girl, very nice woman; she was well thought of by her friends; seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." James replied: "She was not very much. She was a whore when I married her." Griffen said that Southard was sitting in a chair opposite to James and he reached over and slapped him. Griffen then said to Southard: "Take it easy, Jack." The remark reputed to James was a strange statement for a man under investigation for the murder of his wife, before hostile inquisitors, to make to his accusers. James testified that he had told Southard and Griffen "a hundred times", as they repeated Hope's rattlesnake story and the murder of his wife to him and used violent means to compel him to adopt it, that he didn't know what they were talking about and that it was because of his refusal to affirm Hope's story that he was struck. Griffen said that after James was "slapped" they continued to question him but he saw no other violence inflicted upon him. Griffen questioned him the next night until one o'clock a. m. During all the time he was being held incommunicado he did not see James sleep. Griffen volunteered the statement that during all the time he was in custody he was in "much better shape physically and mentally" than any man who worked on the case! This evidence was stricken out but other officers testified substantially to the same thing. James had then been questioned, admittedly for forty-eight hours. There is evidence that it was longer. Several of the officers testified that he was cool and collected at all times and he answered all questions at great length and gave them information they did not formerly have. Griffen said James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock, five other officers were with James. At 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Grif-

fen and Southard followed. At noon he was taken to the district attorney's office. Griffen did not recall whether James, when at the district attorney's office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. On Tuesday he saw the defendant from seven o'clock to one p. m. At eleven o'clock he gave instructions to "book him" at the county jail, where he was committed to the "High Power Tank".

Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing. Several times he fell asleep from fatigue and exhaustion. Southard's statement as to what he said to James about his wife being such a beautiful little girl, etc., was given in the same words as Griffen's story. James' reply, being somewhat different in substance, we repeat it: "'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her. She was only a little whore before I married her,' and I lost my temper and slapped him." The defense contended that no such words were ever uttered by James at any time with respect to his wife and it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to the state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which ired Southard to the point of physical violence. Southard had been an investigator for eight years and was seasoned to his task. His act was inexcusable and was in violation of section 149 of the Penal Code, which provides that: "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." The defendant was under no compulsion of law or duty to answer the officers in any particular manner or at all. Several apparently disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest. He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia. The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face but, in the main, their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which anyone at all observant should have seen. James said he was practically made hard of hearing by the head beating he had received from Southard and Griffen, and that his body was black and blue from the waistline upwards. Despite the admissions of the several officers who were most active in conducting the plan of continuous questioning, that James fell asleep several times while being quizzed, from sheer fatigue and exhaustion, nevertheless several of said officers testified, as astounding as it seems, that James was at all times exceptionally cool and calm and showed no signs of mental distress or fatigue, and was actually *in better physical condition than any one of his inquisitors.* And this, too, in spite of the fact that the questioners worked in pairs on four-hour shifts while James admittedly was carried through a sleepless ordeal of not less than forty-eight hours, but more probably sixty hours, with as many as eight or ten investigators plying him with questions. As an example of the evasiveness which characterized the testimony of the investigators generally, we quote from Jack Southard, acting chief of inspectors, as to James' physical appearance at the time he delivered him, after several days of private custody by said officers, to the proper place of detention, the county jail.

"Q. Did you notice any marks or bruises upon his face or head when he was taken into custody? [delivered into legal custody at the county jail.] A. Not that I *recall.*

"Q. Well, you did notice marks and bruises upon his head when you took him to the county jail, didn't you? A. No, I don't *believe so.*

"Q. Weren't both of his ears bruised and swollen at that time? A. *They were not.*

"Q. Neither *one of them?* A. That I *wouldn't say;* one may have been; I *wouldn't be positive.* I know that *both* were not.

"Q. As a matter of fact you know that one was, don't you? A. I do not. I saw that one in court.

"Q. You saw the bruises here when he was in court? A. The left ear was a little bit swollen at the top. * * *

"Q. He was pretty well worn out when he got to jail, wasn't he? A. I couldn't tell you." (Italics supplied.)

He fixed the time he observed the bruises he was then testifying to as of the day he was before the grand jury on the incest charge. The foregoing equivocal testimony as to bruises that were visible on the defendant's body is characteristic of the testimony of the officers in whose personal custody the defendant was held for approximately two weeks. Why he was thus held incommunicado has not been and cannot be accounted for by any theory, except the practically admitted one of forcing the defendant, by the use of physical and intense mental punishment, into making a confession corroborating the unnatural, weird and astounding statement which was in the hands of the investigators and commonly referred to as Hope's story or confession. On cross-examination Southard was asked these pertinent questions to which objections were sustained on the ground that they were immaterial:

"Q. Now, Mr. Southard, when you arrested the defendant why didn't you take him before a magistrate? [Objection sustained.]

"Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it? [Objection sustained.]"

Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

Officers, Killion, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, "Why don't we go out and get something to eat, and I will tell you *the story.*" The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. The reference to "the story" explains the purpose uppermost in the minds of Killion and Gray and accounts for James being in their exclusive custody at the midnight hour instead of being in jail. Killion's reply to James' proposition was, "All right." Killion and Gray then took the defendant to a restaurant at 5th and Figueroa. Killion said he once wrote shorthand. The notes he used to refresh his memory were, to use his words, "some in shorthand, and some in longhand, and some in scribbling". They seem to have been entered in desultory order in a book and covered thirty-one pages, all of which he said he took during the time he and

Gray had James at the restaurant. They had a steak dinner and Killion bought James a cigar and James said, "Now, you want to have this story", and Killion said, "Yes". James said, "All right; there is no hurry, is there?" Killion wanted him to go back to the office (where the district attorney, his deputies and the investigators were waiting) but James said, "No, this is all right, isn't it?" Killion replied, "Sure, it is all right." James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission.

The story which Killion reported as James' confession at the midnight dinner contains a great many of the things Hope testified to with added wickedness, equaling, if they do not surpass, the rattlesnake horrors. James is reported as saying that he and Hope were to split the insurance money. Hope asked James to let him "bump Mrs. James off". Hope also suggested a fake holdup in which he was to shoot her. Hope told Mrs. James he was a medical student and could produce a miscarriage and Mrs. James wanted him to relieve her pregnancy. Hope had asked James why he didn't kill his wife and get the insurance inasmuch as she was sick and dying. Hope said he would get a rattlesnake "that would kill her quick". He and Hope got drunk frequently. Finally James realized that they were doing wrong and he said to Hope, "We are both nuts". Hope said he had to have some money. Hope proposed getting a spider. He brought some spiders home and James threw them out. Hope then began a quest for snakes. On Saturday night Hope and Mary talked about an operation, but both got drunk and Hope left. Hope came back Saturday morning (two days before her death) half drunk and he and Mary got drunk. Hope said he was going to do the work and at one o'clock James drove away in his car. He knew Hope was going to kill Mary with the snakes within an hour. He came back in two hours and Mary was pretty sick in bed. She didn't know what had happened. She was very drunk. He spoke to her and she said she was very sick but she would be all right tomorrow and she kept calling for him. James said the letter written by Mary to her sister was at his dictation; that he got her drunk and had her write it. Hope left, and James drank all Sunday. Hope came back at six o'clock Monday morning, and asked if Mary was dead, and James said, "No, she is all right", and Hope inquired if the snake had bitten her and James said he didn't know. He said she was all right. Hope looked at her leg, which was black, and he told James that he had turned the snake out, and he asked "what will we do". James said, "I am going to get drunk". Hope told James to go ahead (and get drunk) and he would finish the job and James asked him how he was going to do it and Hope said, "I will set the house on fire and in that way we can get [rid of] everything". Hope said they could not quit now—"they would know about the snakes".

James said he felt like taking a drive and went out Wilshire Boulevard and then to his shop, and Hope came into the shop, Monday, August 5th, between twelve and one o'clock, and they went to Melody Lane for lunch. It will be recalled that two or three of James' former workmen testified that James was out for lunch not longer than twenty of thirty minutes and appeared perfectly sober and normal. At lunch Hope said, "Well, I got rid of her", and James asked if he had burned the house, and Hope answered no, that he drowned her in the bathtub, and James said, "Well, you are the craziest son-of-a-bitch I ever saw". They had a big argument during which James said, "Don't you know they will throw me in jail tonight? I had a wife drown in Colorado in a bathtub and I know I will be in jail." Hope told him his wife was too sick and drunk to know when he put her in the tub; he said he "put a belt around her arms, and tied her", and James talked about the Colorado wife. James then said, "Well, I went in with you, and I will take the rap. I have no defense". James then gave him $30. Hope told James he had cleaned up the house, burned the blankets, sweaters,

etc., and had thrown the body into the fish pond. Hope said he had taken all the evidence to his home and destroyed it. James said to him, "You damned fool, did you burn up that stuff", and Hope said, "Yes". James said the woman, Hope's girl or wife (he didn't know which), will "spill everything" and Hope said not to worry about her, "he had enough on her to hang her". Hope said she knew everything but she would be afraid to talk. James volunteered that he had a notion to kill Hope but he was afraid if he did the woman would talk and he "didn't want to have to kill them both". Hope assured him that he had enough on that woman to keep her from talking. Hope said while he was in the Verdugo home trying to have the snake bite her, some people came but he had the blinds down and the doors locked. James said that was probably the time Ethel Smith and her party were there. Hope had told James if he could "kill Mary as he had", they could get double indemnity on the insurance and they "would split it 50-50."

James was afraid of what Hope had done and when he went home Monday night he took the Pembertons with him. The various sums of money Hope claims James paid him, $100, $30, $25, and $100, were restated. James said he made up his mind to kill Hope, but Mrs. Hope knew as much as Hope, so he did not execute his intention. James told Hope he would share $5,000 with him as soon as the insurance companies paid. Hope came to James one night about two weeks before James was arrested (this would be in April, 1936) and was "beefing" about money and James said to him, "We played and lost" and "I am not going to be chiseled any more for money". Hope said if he didn't give him some money he would "squeal". James replied, "All right, squeal, go ahead and squeal." (It appears that Hope became insistent for money about the time the lawsuit involving the payment of the insurance money was filed.) At this point, according to Killion, the restaurant confession was concluded by James in the following language: "Now, that is the story, and I never would have told it, if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk."

The record shows that at least three members of the district attorney's staff and some ten or twelve investigators and officers had to this point been making continuous and vehement efforts to get a confession from James. Immediately James was taken to the district attorney's office by automobile where District Attorney Fitts, Chief Deputy Attorney Stewart, Chief Blummer, Officers Griffen, Jack Southard, Davis, Killion, Gray and Miss Adams, the statement reporter for the district attorney's office, were assembled. Hope was also present. It was then around two o'clock in the morning. James was greeted as follows: Mr. Fitts: "Mr. James, the boys have told me that you told the story." Mr. James: "They have got it". It was suggested by the district attorney that he begin in his own way and relate the story. James answered that it was a very long one and it would take three or four days to tell it. He began by telling of Hope coming to his house under the influence of liquor July 3rd or 4th, saying he was broke, without work, and his "gal" had thrown him out and he didn't have a place to sleep. James said he and his sister, Mrs. Murphy, were doctoring chickens sick with roup. Hope was drunk and James would not let him stay that night, gave him a dollar to get a bed and told him to come back sober, and he could stay until he got on his feet. He came back the next day and stayed two nights, occupying the sleeping porch. The third night he did not appear. Mrs. Murphy, a telephone operator of Morris, Alabama, and sister of James, was visiting him. She met Hope and prepared the meals. Mrs. James was then attending the Long Beach dental convention. Mrs. Murphy corroborated James as to Hope coming to his home drunk and entering the garage where they were doctoring sick chickens and James giving him a dollar and sending him away for the night. Hope said James first discussed the killing of his wife when she was in Long Beach. Hope knew her life was insured and said: "She is going to die anyway; why don't you kill her?" James said he couldn't do it and Hope said he would "take her up here and shoot her in a holdup". James replied that a lot of people had been hung for that. Hope then said he had been working with "a bunch of racketeers" and he had a white powder in a box that would kill in five minutes by breaking the skin on the hand and rubbing it into the wound. He wanted to try it on one of James' chickens, but James told him it was ridiculous. Hope then said he would do the job himself with a couple of snakes. It was agreed that James would give him half the insurance money. James gave him $20.

When Mary came back from Long Beach she was pregnant and sick and she finally decided she could not go through with child delivery, and wanted James to take her to a doctor. James said he did not want her to abort. She said, "Hope tells me he is a doctor. Why don't you let him take care of it?" Hope disappeared and did not return for two weeks. Hope had told her he was a medical student and she asked James if he was and he said yes. Hope talked with her and it was agreed that he would take care of her. The abortion was to be performed Sunday morning, August 4th. James said if Hope put Mary's foot in a box in which there was a snake or snakes he never saw it. They had agreed to let the snake bite her. Hope would never tell where he got the snakes. Some of his snakes wouldn't strike and those that would were not venomous. Hope put rats, chickens and a rabbit in the box and nothing happened. In fact he put a rabbit in the box with one of the snakes and the next morning the rattlesnake was dead and the rabbit was walking around. He laughed at Hope and told him to lay off. Hope took his car one morning from the place where James was having it greased. He was gone three days and came back drunk. He said he had been to Phoenix, Arizona, to get black widow spiders. This was before he brought the third lot of rattlesnakes. He said, "All you have to do is throw them in bed with her and they will bite her". James said he laughed and threw his "damned spiders" out. Hope came over to his shop and James said, "Hope, you are nuts and so am I. Forget about it". He said he would. When James next saw Hope he was drunk. James said Hope was nuts when drunk. He said to James, "Come out here, I have a tip where I can get hot snakes". James told him he didn't want him to get any more snakes as they would get them in trouble. Hope said James was not going to walk out on him. He wanted to make some money. James gave him $6 on Saturday night and he got two hot snakes. His wife was with him and knew "to a certain extent" what they were to be used for. Hope took James home and they both got drunk. Mrs. James drank with them. "She dearly loved booze. No matter *how sick* she was she loved a drink." It may be parenthetically remarked that much of James' statement made after his midnight dinner as offered by the prosecution, reads as if he was intoxicated when he made it—particularly the last quotation as well as other parts. The snakes were in the box which Hope put in the garage and said he would be back in the morning. Before leaving Hope talked over with Mary the performing of the abortion on the next day. She was happy to have it done. James never quit drinking all night long and was quite tight when Hope arrived next day at eleven o'clock. James gave Hope $100 and left about one o'clock and returned about four o'clock Sunday afternoon. Hope told him she would die in "an hour, or fifteen minutes". James went in to see her. Hope had her full of liquor. Hope was very drunk himself. Two or three bottles were in the room. Hope took care of taping her eyes and mouth and tying her arms.

At this point Officer Killion interrupted by asking James if Hope told him (James) when he was about to leave, if he was going to do the work, and James answered that he did and he told Hope he couldn't have anything to do with it because she had been too good to him and he just couldn't have "anything to do with *that part* of it." James had previously said that he had opposed Mary going to a doctor for the performance of an abortion as he felt her health would not stand it. From the subject matter both before and following the "work that was to be done," the reference is clearly to the abortion that was to be performed. Continuing, James said he was very drunk and got into his car and just drove around. When he came back about four o'clock he asked Hope how Mary was but Hope was so drunk that he didn't know what he was about. Mary was in bed covered up and made *no* complaint as to illness. Hope took the car and returned at six o'clock the next morning. He did not take the snake with him. When James came back, Hope told him he had put Mary's foot in the box and the snake had bitten her three times, but it had no effect on her. He further states that he had inoculated her in the leg and had performed the abortion. She complained of her leg hurting her. James said he was all upset and he and she sat and drank all night. He didn't think she felt any snake bite.

Hope came in at six o'clock the following morning and Mary's foot and ankle were swollen. James said she was all right, nothing the matter with her and after talking over her case, James asked,

"What are you going to do about that? We had better call it off." Hope said we had gone too far, they will know it's a snake bite and she is going to talk. James asked, "What are we going to do with her?" and Hope said, leave it to him, he would take care of her. James again asked, "What are you going to do with her?" and Hope said, "She smokes a lot of cigarettes and lots of people die by smoking in bed. I'll burn the house up." James said he kept taking a few drinks and finally got in his car and left about six o'clock. He said he was drunk and was trying to get sober. He ate breakfast and went to work at 8:45. About one o'clock, Hope came into his shop and said, "Everything's all right." He and Hope had lunch and on the way back James asked him if he burned the house and Hope said no, he threw her in the bathtub and drowned her. James said, "You damned fool, that's the worst thing you could have done. I had a wife drown in a bathtub in Colorado Springs a little while ago." Hope didn't know that. James said, "Well, you really played hell, but it's too late now." James asked if he left her in the bathtub and Hope said no, he threw her in the fish pond. James said, "That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a god-damned fool of yourself and me both, but I'll take the rap. There ain't enough men in the District Attorney's office to make me talk; and there wasn't, if he had not told it. You never would have got me to talk. So of course I arranged with this couple to go home with me."

James was asked if he killed his wife in Colorado, and he answered that he did not; or his nephew to whom he had been kind and helpful and who held a policy of insurance in which James was the beneficiary. The nephew was killed in San Francisco in an automobile accident at a time when James was living in Los Angeles and he could not have had any part in it. Hope was asked specific leading questions during the closing period of his alleged voluntary confession and his answers were in accordance with the leading form of the questions asked. The purported confession which James claims he was forced to tell depicts a carnival of drunken debauchery. James said he was not beaten or struck in the presence of the District Attorney or his deputies, but when he was taken back to the private place of detention, without the hearing of any person save his accusers, he was beaten when he refused to answer, and also for refusals to give answers which were not acceptable to his questioners. Southard admitted that in the early stages of his confinement he refused to answer certain questions. In fact Southard said he told Mr. Fitts on one occasion to "go to hell". It is quite evident that he changed his mind after spending two days in private detention and the balance of the time in the "High Power Tank".

The foregoing is an epitomization of the incoherent, contradictory, disconnected, incredible and irrational story which the prosecution introduced as the voluntary statement of James. It is fairly comparable to Hope's story.

We now come to the proceeding in which it is claimed that James admitted or affirmed the truth of Hope's story by failure or refusal to deny the same under the well-known rule that where one is directly charged with the commission of a crime, silence on his part or failure to deny the accusation may be received in evidence against him.

On May 2d, at 11:45 a. m., the defendant was taken into the "Chaplain's" room at the county jail and Hope's confession or statement was read to him. Mr. Lynch, the statement reporter of the sheriff's office, reported the full proceeding. James was brought into the room by Officer Killion. Mr. Williams, Deputy District Attorney, was seated directly opposite James at a table about three and a half feet in width. Officers Southard, Griffen, Killion and Gray were seated across the table from James. Hope was also present. The reporter's notes do not show that the defendant was advised by anyone as to his rights and no showing was made that he was not under duress or as to what was done or said by way of inducement or fear of punishment immediately prior to the statement. Hope was present and the proceedings were begun by Mr. Williams asking the defendant the following question:

"Q. James, do you know this man, Chuck Hope? A. Yes, I know him.

"Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, etc. [Here follows two pages of a summarization of Hope's accusatory statement which was read to the defendant.]" At the conclusion of the statement Mr. Williams added:

"He makes that statement. Have you got anything to add to it?

"By Mr. James: A. Nothing.

"Q. Nothing—that is all."

It certainly would require a reversal of the cardinal rules of criminal law that all inferences and presumptions and intendments of law are to be resolved in favor of innocence, to hold, in the face of James' experiences as shown by the record, that a failure of the accused to *add* to the accusations made by Hope should be taken as an implied admission of guilt. The defendant had been confronted with the accusations of Hope at every hour of the day and night for several days and he refuted them until he finally yielded at the midnight supper. Would the average person have done otherwise than to have refused to attempt to *add* to Hope's story of monstrous deeds? In all fairness, should not James have been advised as to the legal effect of his failure to *add* anything to Hope's story?

It will be noted that the statement to Killion and Gray was not taken in stenographic form. Killion said he took it in shorthand, longhand and by "scribbling". It is in narrative form and bears no semblance to a stenographic report and is in the third person. When immediately taken before the district attorney no effort was made to advise the defendant of his rights. In fact it is admitted that he requested that one or both of his attorneys be communicated with. If either or both were not available at the particular time, it was sufficient notice to the prosecution that the defendant was asserting his statutory rights which could not be nullified by unduly hastening an inquisition not provided by law. It is always the duty of the law's representatives to give all reasonable assistance to the enforcement of an accused's statutory rights.

It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. It is the claim of the defense, and ample evidence supports the contention, that the alleged confession followed a long course of deprivation and physical mistreatment of a prisoner held incommunicado. It was only when the time was deemed ripe for a confession that a reporter was called to report the proceedings and in no instance were the preliminary things done and said, which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. The law casts the burden upon the prosecution to show that the confession of guilt was freely and voluntarily made without the exercise of duress, fear, force, or physical or mental cruelty, or hope of reward, or immunity from punishment. Notwithstanding the crime charged may be, as denominated by Lord Hale, the most detestable in nature, such as charged in the instant case, and loudly cries imposition of the extreme penalty of the law, if legally proved, the integrity of the law, founded on experience and enacted for the safety and protection of society and the individual alike, must, in all cases, be maintained by a compliance with the procedure prescribed by the sovereign will.

Facts and circumstances in an involuntary confession, when found to be true, are admissible. People v. Castello, 194 Cal. 595, 229 P. 855. The reason of the rule is that, inasmuch as the theory upon which involuntary confessions are excluded is their possible falsity, if the confession discloses incriminating facts which are shown to be true, the reason of the rule ceases to exist, and so much of the confession as discloses the facts and the facts disclosed are competent. Thus it may be proved that the defendant made an involuntary confession showing where stolen goods were concealed and that the goods were found there, but a further statement "I buried it there" is inadmissible, being part of an involuntary confession. People v. Murphy, 47 Cal. 103; People v. Hoy Yen, 34 Cal. 176; People v. Ah Ki, 20 Cal. 177. The foregoing rule has no application to the instant case as every material fact herein is disputed and no physical fact, such as pointed out in People v. Castello, supra, and the other cited cases, exists in the instant case. Therefore, they are not applicable here.

It is true that several officers testified in terms of conclusions that no violence was inflicted upon the defendant or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have

been present at the times physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the People was not met. The case of People v. Dye, 119 Cal.App. 262, 269, 273, 6 P.2d 313, 316, is directly in point here. Dye was convicted of murder of the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was held in custody by the officers at a private residence. Precisely the same kind of methods—though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

In discussing the methods by which the confession was procured, the late Justice Conrey said in part: "It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy * * * including a direct charge, which defendant denied * * *. During the night the defendant became weary and sleepy [in the instant case he became not only sleepy but fainted], but the questioning went right on. Officer Gray admitted that twice he told defendant 'to sit up in his chair'; that the defendant 'may have been nodding; he was not asleep.' In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning, and the method thereof, were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment, that the confession was finally obtained * * *. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant, and the unlawful failure to take the defendant before the magistrate (Pen. Code, §§ 821, 824, 849, and 145), the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats, or actual violence. [In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.]"

After discussing the fundamental rules governing the voluntary character of confessions, the decision turns to the claim that the confession having been made a few days after the effect of improper methods had ceased to operate on the defendant's mind, the evidence thereby became admissible. The decision continues: "It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt." (Citing a number of decisions of our own and appellate court decisions.)

The following pertinent paragraph concludes the discussion: "'The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined, by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." (Opinion written by Mr. Justice Sloss in People v. O'Bryan, 165 Cal. 55, 130 P. 1042.)' People v. Wilson, 23 Cal. App. 513, 524, 138 P. 971, 975."

Article 6, § 4½, State Constitution, has no remediable application to the case. Without the alleged confession, Hope being an accomplice, his testimony stands uncorroborated unless there is other evidence which tends to connect James with the commission of the offense. Section 1111, Pen.Code. This court will not attempt to speculate as to which one, as between James and Hope, a jury would credit or, if it should credit Hope, whether it would find sufficient corroboration in "such other evidence" as would tend to connect James with the commission of an offense carrying with it the death penalty. Section 1111, Pen.Code. This would be to speculate solely as to what a jury might

do in the consideration of an entirely different state of facts.

The defendant at the outset, and as soon as official pressure was removed, entered his plea of not guilty and protested his innocence as against suspicious circumstances which may have been the fortuitous or unaccountable acts of chance, or may have been the brood of a wicked and designing mind. Indisputably a financial advantage accrued to James by the death of his wife. He was the beneficiary named in the policies of both wives. Both died from drowning. The death of the first was not confused with any considerable number of theories. The death of the second would indicate, if the prosecution's theories are sound, that the perpetrators of the crime became distraught with a strange, fiendish obsession for indulgences in absurd, unusual and unnatural ways, as weird in phantastic conception as the boiling cauldron's "hellish brew" about which witches danced in frenzied glee as they foretold the unhappy doom of Macbeth, and were not ruled by the normal and natural and less involved ways, in order to profit by the death of another.

It would add nothing to the strength of the prosecution's case to review the great mass of testimony given by the defendant on direct and cross-examination. It will suffice to say that he denied categorically and in detail Hope's rattlesnake stories and every incriminating charge and testified that no rattlesnake was ever on his premises of which he had knowledge. Eliminating the story of Hope, a self-insistent accomplice, and the purported confession of James from the case, there is no person left who claims to have ever seen rattlesnakes in James' garage or on his premises. Hope testified that he had rattlesnakes in his garage in a glass-faced box and another box one foot and a half in length and a foot wide for almost a month. James had occasional visitors and the entrance to his yard was usually through the back way into the garage. Mrs. Murphy, James' sister, a mature woman and a telephone operator, who was at his home for two or three weeks and was helping him doctor chickens for the roup when Hope entered James' premises for the first time and addressed James as "Doctor", testified she never saw or heard of a rattlesnake being on the premises. Mike Allman, a reptile showman, is the only other witness who gave any testimony on the subject. His testimony has been set out herein and it is absolutely self-nullifying, contradictory and so uncertain that no court would accept it as sufficient to establish the identity of a man on trial for his life, or even to create a serious suspicion that the identifying witness himself was serious as to his ability to identify the person in question. Three snake men testified they bought from and sold Hope snakes. None knew James in any snake transaction. Hope sold some of the snakes and he said he deliberately threw two of them into the highway. He told the sellers he wanted "fighters"; he wanted to pit them against dogs and game cocks—to win back money he had lost playing poker.

James related his marital relations with his wife and the happy circumstances in which they lived, which was corroborated by the testimony of their close friends, Mr. and Mrs. Pemberton. The testimony of his employees and all persons in a position to know of their relations is that he treated his wife affectionately at all times. Her last letter to her sister telling her of her sickness assures her sister that she is kindly treated. He testified to his wife's pregnancy and her tendencies to nausea and the many symptoms which attend maternity. He described his leaving home Monday morning at the usual hour. His wife had not had a good night and he advised her to remain in bed all day. He took his breakfast down town to avoid the odor of food in the house. Hope was at the house. Hope later 'phoned to him from down town and told him his wife wanted him to bring home some cottage cheese. James also told how his wife was attired when he left on the morning of August 5th, which corresponded with the attire worn by the blonde woman whom Dr. Alfred Dinsley, a neighbor, saw come out of James' chicken house and stand some twenty-five feet from him, while the dog was barking at him, *on the morning of August 5th at 9:25 o'clock.*

After unsuccessful negotiations with the insurance company, James told the agent of the company that he was going to sue the company for the insurance money and the agent said the company did not think he would sue because the coroner's jury didn't completely exonerate him of his wife's death, and it felt that a murder charge should be placed against him

if he sued. James replied: "I am going to sue them and I will do it if they break my neck." He did file suit.

The inadmissibility of the confession may be placed entirely upon the testimony of the witnesses relied upon by the prosecution.

James testified on the trial as to the ordeal to which he claimed he was subjected before the confession was made to Killion and Gray, and shortly thereafter to the district attorney and the officers in the rooms of the district attorney's office. He said he had been questioned for hours by the district attorney and the officers before he was taken to the restaurant. This is admitted. He said he was made sick and weak. His testimony is that he had told the prosecuting officer time after time that he didn't know anything about Hope's story and about eleven o'clock, after hours of questioning, the district attorney said: "You have heard the story over and over and we are going to clean it up and you had just as well tell me now, because we will be sitting here until Monday morning." He said he still persisted that he didn't know anything about the story; that he had never heard of rattlesnakes; that he didn't understand the story. At twelve o'clock midnight all the officers—some fifteen or twenty of them had been there all evening—cleared the room and sent Jack Southard in to talk to him. Southard told him what he was going to do if he didn't admit the things they wanted him to admit. He said he didn't know the story. He had heard the officers repeat it over many times. When they told him they were going to take him back to the private house and what they were going to do to him—that he had been lying all evening to Fitts—he told them if they wouldn't do it he would try to tell the story as he had heard it. When he tried to tell the story and got "off the story" or omitted to include some portion of it, one of the officers would prompt him by saying, "Didn't this or that happen", and in every instance he accepted their suggestion. The report on the long examination conducted by District Attorney Fitts, from 1:30 in the morning to 2:30 or 3 o'clock, shows that Killion, Gray and Griffen were present and quite often prompted James in relating the restaurant story already referred to. The questioning on this day began at the district attorney's office at two o'clock p. m., May 2nd, and lasted until three o'clock the next morning. On that day he was taken out of his tank and driven to his Verdugo home in company with two or three investigators where he was later met by others. This is admitted. What followed has been told.

District Attorney Fitts did not take the witness chair. It was stipulated that he would testify substantially as Deputy District Attorney Stewart had testified. Mr. Stewart's testimony was brief. He testified that no threats, inducements or promises were made or violence used in his presence or to his knowledge, except the Southard slapping episode. Neither was present at all times during the long hours that the officers were attempting to force a confession. He, as did other officers, testified to the calm, cool and self-possessed demeanor of the defendant at the times he was present. Also that James requested that he be given something to eat just before being taken to the restaurant.

James testified at great length at the trial and we will not attempt to make a complete resume of his testimony. He denied the rattlesnake story and all evidence given by Hope and the officers which tended to connect him with the death of his wife, including the testimony of Madge Reed, which has been sufficiently discussed. His dealings with the insurance companies, which were openly made with the several agents, have been set forth by the prosecution's witnesses and it is not necessary to again refer to them. Every incriminating fact and circumstance which was brought to his attention was denied. We will briefly refer to his testimony, which is corroborated in several important matters by Mrs. Murphy, who was at his home within a few days of the death of Mrs. James, and by other witnesses. She was in the garage and the back yard much of her time working with the chickens. She saw no snakes.

James testified that Hope came to his shop Saturday, August 3rd, at ten or eleven o'clock. Saturday was a very busy day in the barber-shop. He told James he had lost his job and wanted to go to Long Beach to cash his pay-check. Hope borrowed James' car and went away. While he was gone he filled a prescription, written by the attending physician, which James gave him to have filled for his wife. At 5:30 he came in the shop and handed James his keys. The next morning, Sunday, at eleven a.m., he came to James' house. He told James he had come to per-

form an abortion on his wife. James said to him his wife told him about it Friday night and he didn't want Hope to tell him anything about it. James said he begged his wife not to submit to an abortion. He wanted her to go to the hospital where he was regularly paying a hospital tuition. She refused to go to the hospital. He told Hope an operation was against his will. James said he had left his earnings in the cash drawer and he drove to Los Angeles to get them. Hope was at the house when he left. He returned at one o'clock and Hope left in James' car. He was to return it that night, but he did not come back until 6:30 Monday morning. James was angered at Hope, and Hope admitted he upbraided him for keeping his car all night. Mrs. James was restless during the night and James left home at the usual hour without breakfast and advised Mrs. James to remain in bed. She said she was as comfortable up as in bed. The Jameses were to dine with the Pembertons that evening, but Mrs. James was not in condition to go and it was arranged that the Pembertons were to dine with the James with the result already told.

Several persons were in the immediate vicinity of the fish pond at about nine o'clock on the morning of August 5th, but no one saw her body on the yard walk. Mr. W. D. McGregor had an appointment with the next door neighbor, Mrs. Pauline Cruickshank, and by mistake entered the James' premises. He rang the James' door bell three or four times, picked up a note and stuck it in the door, and walked about the premises quite a while, but did not see Mrs. James' body. Mrs. Cruickshank was in her yard next door from eight to nine o'clock in the morning but nothing unusual attracted her attention. She said her vision was cut off from the particular locality. The testimony of Dr. Dinsley, who saw the woman described by him on the James premises, did not see Mrs. James' body on the cement walk. The testimony as to the place where Mrs. James' body lay, being more or less hidden from view at certain points, was a disputed matter. Some of the witnesses testified that if Mrs. James' body was at the place described, it would have been visible from almost any point of the yard. Others contended that the shrubbery would have hidden it from view at given points. It is Hope's story that her body lay in the front yard on the sidewalk, from about 6:30 or seven o'clock in the morning until eight o'clock in the evening. If his testimony is true, the weight of probability is that it would have been seen by some one of the several persons who were on and near the premises.

James said he introduced Hope at the breakfast table on Sunday morning, at which Mrs. Murphy, Lois Wright, Hope and himself were present, as Dr. Smith. He said he did so at Hope's request, as Hope said he was keeping his identity concealed inasmuch as he was having trouble with an alimony proceeding. James testified that Hope had told him that he had been, for some time, a medical student and had worked with "dope". On cross-examination James said before he left his home on the morning of August 5th, Mrs. James said she wanted to see Hope and he and Hope went into the house and she told Hope she "had not menstruated yet" and he said "she would and he would stay there with her".

The attorneys for the defendant on motion for new trial, in addition to numerous assignments of error, including erroneous rulings on the admissibility of evidence and the giving or refusing to give requested instructions, filed affidavits setting forth irregularities of the trial which they averred were highly prejudicial and deprived the defendant of a fair trial. While some of the assignments as to erroneous rulings on matters of evidence are not without merit, we deem it unnecessary to consider each assignment specifically. We are of the view that the rulings against the defendant were in several instances too narrowly restricted. That said investigators, and particularly Officer Southard, were not only adverse witnesses, but were positively hostile to the defendant, incontrovertibly appears from the record. Rulings in such a case as this one should be liberal to the end that the motives, purposes and good faith of the parties may be subjected to a most searching examination.

Counsel for the defense complain as to misconduct on the part of counsel for the People as to their arguments to the jury in assuming facts as actually proved, which were highly controversial matters, and also as to the vehement and scathing manner in which the defendant was arraigned as to matters which were not germane to the main issue. It is not necessary to devote time to other assignments in view of the major errors which

in our opinion compel a reversal of the case.

The affidavits of R. E. Parsons and Wm. J. Clark, Esqs., defendant's attorneys, aver various acts of misconduct. They are predicated in the main on the dramatic manner in which two live rattlesnakes were brought into the courtroom in a glass-covered box some five feet in length and placed in front of the jury. The snakes as carried down the aisle shook their rattles furiously. It is not necessary to describe the consternation into which the crowded courtroom was thrown. There are some things of which the court will take judicial notice and this is one. The inside of the box contained smears of venom where the snakes had struck the sides of the box. This was called to the attention of the jury. The averments are that spectators rose to their feet, some gasped from nervous fear and persons nearest the aisles shrank away. Many uttered audible exclamations of fright. Counsel incorporates in his affidavit as descriptive of the scene the following account taken from the Los Angeles Herald-Express, a newspaper of large circulation:

" 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Judge Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

" 'Paraded across the courtroom in a velvet covered venom-splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden haired wife, Mary'."

The Los Angeles Examiner, another newspaper of wide circulation in Los Angeles, made the following comment:

" 'Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual'."

Affiants have also incorporated in their affidavits various excerpts which purportedly express the prejudice aroused in the minds of named jurors against the defendant by the exhibition of the snakes. This, we cannot consider for obvious reasons.

Appellant further complains that the jury was permitted to go at large and mingle freely with the general public, which harbored a strong feeling of prejudice against the defendant before the trial was commenced, and affiant seriously considered making a motion for a change of venue. When the jury was selected affiant suggested to the trial judge that the jury be placed in the hands of the sheriff but the request was not granted. This was a matter within the discretion of the court. The jury was admonished by the learned trial judge on each adjournment not to read any comments made as to the guilt or innocence of the defendant and not to be influenced by anything whatsoever but the evidence and instructions in arriving at their verdict. Be this as it may, it is the contention of appellant that the metropolitan newspapers, before and during the trial, daily printed sensational and prejudicial articles which were circulated in the streets by news-criers and at newsstands which painted the defendant in such hideous colors, to which were added daily adverse comments and overheard street condemnations, as to make it improbable, if not impossible, for an average person to have calmly and dispassionately withstood withering onslaught and considered the evidence uninfluenced by the hostile opinion of an overwrought and frenzied public, which was unquestionably communicated to the jury in every form of modern news transmission.

It is further averred that an article signed by Scott Littleton, staff investigator for the district attorney's office, was published in a nationally known magazine which was widely circulated in Los Angeles during the trial of the case, purporting to give in detail the methods by which the confession was obtained and matters which did not appear in evidence, all of which were highly prejudicial to defendant. If true, said article is conclusive evidence of the illegal methods employed in obtaining the alleged confession. Said article also contains information which would materially aid the defendant in another trial in break-

ing down the contention of the prosecution. It is also averred that Madge Reed, whose attempt to extort money from James appears in evidence and who admitted that she gave him the *impression* that she was ready to commit perjury for money to aid him in his defense if he was prosecuted, has since written letters to the insurance company contesting payment of a policy issued on the life of Mrs. James, and also to the investigators, which have lately come to the knowledge of the defense and which are wholly inconsistent with and at variance with her testimony given at the trial.

By what has been said in considering the case we are not to be understood as vindicating James or in any way absolving him of any criminal connection he may be shown to have had with his wife's death in conformity with the rules of law. Our concern in the matter is that the rights and guarantees which the Constitution and statutes vouchsafe to every person accused of crime shall be fully accorded such person in the form and in the manner provided by the rules which wisdom and long experience have formulated as affording the best and surest protection against criminal acts which the human mind has been able to devise without encroaching on the right to enjoy life and liberty unless, adjudged by the fundamental rules of law under which we have long existed, such citizen or individual has forfeited his rights to the one or the other. The physical consequences that may befall James, or any individual, is not more important to the welfare of state than the uniform application of the law to all cases in which human life and liberty are involved.

Some of the major grounds on which I base my dissent are as follows:

1. The inherent improbability of Hope's rattlesnake story.

2. There is no sufficient corroboration of the testimony of Hope that James ever saw any rattlesnakes on his premises or elsewhere.

3. The uncontradicted testimony of the witness, Dinsley, that he saw a woman, who could have been none other than Mrs. James, in her chicken yard, hours after Hope said she was dead. This testimony is corroborated by the fact that several persons were within the James' dooryard at about nine o'clock in the morning and nobody saw her body on the cement walk.

4. The letter found written by Mrs. James to her sister on the morning of August 5th is persuasive evidence that it was written during the daytime of that day and long after the hour that Hope said she had died.

5. There is an abundance of testimony that an abortion was attempted and that Hope permitted himself to be known as "Dr. Hope".

6. The abortion story is further corroborated by the dilemma in which Hope found himself and, according to his own statement, he advised James to take Mrs. James to a *hospital*. That the person whom they were attempting to kill should be taken by them to a hospital to be restored to health is too absurd to require comment.

7. The testimony of Hope to the effect that Mrs. James was in a sodden state of intoxication at the time of her death is rebutted by the chemical analysis made of her stomach which showed that it contained no alcohol. Serious contradiction and inconsistencies appear in the record which make the testimony of Hope extremely doubtful in many respects.

What has been said by way of disagreement with the main opinion is not to be understood as an imputation that the officers who participated in the prosecution of James did not believe that he was guilty of the crime charged. The case, as a matter of fact, is so mixed with horrifying incidents as to create a prejudice against the person so charged, which may, unwittingly, influence the judgment of partisans to accept surmises and suspicions and conjectures as proof of substantial facts which they fall short of supporting. The zeal of the officers in an effort to convict has led them far beyond the boundary lines prescribed by the Constitution and the statutes, which cannot be justified on the grounds that the end justified the means.

Other grounds compelling a retrial have been heretofore considered.

In my opinion a new trial should be granted.

I concur: CURTIS, J.

13 Cal.2d 262

RODMAN v. SUPERIOR COURT IN AND FOR NEVADA COUNTY et al.

Sac. 5269.

Supreme Court of California.

April 7, 1939.

1. Bail ⇐79(2)

Substance rather than form is regarded in ruling on a motion to exonerate bail.

2. New Trial ⇐27

Under statutory forms of procedure, errors of form as to matters of pleading or procedure ordinarily are not grounds even for granting a new trial. Const. art. 6, § 4½.

3. Bail ⇐80

The fact that defendant had been tried, convicted and was before the court for sentence was equivalent to a surrender of defendant to the court by bondsman as required for purpose of a motion to exonerate bail. Pen.Code, § 1300.

4. Bail ⇐79(2)

Where bondsman's motion to exonerate bail was refused on ground motion was not in proper form, particular form desired should have been indicated and bondsman given an opportunity to comply. Pen.Code, § 1300.

5. Bail ⇐73

Where record clearly indicated that trial judge and all other interested persons knew that cash bail had been deposited by a bondsman and not by defendant, and bondsman's motion to exonerate bail was refused on sole ground that motion was not in proper form, erroneous order applying cash bail to defendant's fine was not justified on ground that no evidence had been offered to show the bail money had been deposited by third parties rather than by defendant. Pen.Code, § 1297.

6. Bail ⇐73

Under statutes relating to the deposit of money instead of bail, money deposited by a bondsman and not by defendant was required to be repaid to bondsman upon surrender of defendant to the court, and could not be applied to defendant's fine as could money deposited by defendant. Pen.Code, §§ 1295, 1297, 1302.

7. Certiorari ⇐29

A writ of certiorari may be granted only where inferior court acted in excess of its jurisdiction, and not where the court's act was merely an error in the exercise of jurisdiction.

8. Bail ⇐73

The authority of a court to apply cash bail deposited by a bondsman to the payment of a fine imposed on a defendant depends wholly upon statute, since a court has no inherent power to do so.

9. Bail ⇐73

A court has no power, except as authorized by statute, to allow a deposit of money in lieu of bail.

10. Certiorari ⇐28(2)

Where a statute authorizes prescribed procedure and the court acts contrary to the authority thus conferred, the court acts in "excess of jurisdiction" and certiorari will lie to correct the excess.

[Ed. Note.—For other definitions of "Excess of Jurisdiction," see Words & Phrases.]

11. Bail ⇐79(2)

Where court erroneously ordered cash bail deposited by a third person to be applied to the payment of defendant's fine, contrary to the statute requiring cash bail deposited by third persons to be repaid to such persons, action of the court was in "excess of jurisdiction," and hence reviewable on certiorari. Pen.Code, §§ 1297, 1302.

In Bank.

Petition for certiorari by Eli Rodman against the Superior Court of the State of California, in and for the County of Nevada, Honorable Raglan Tuttle, Judge, and R. N. McCormack, County Clerk, to review an order directing the application of money deposited as bail towards the payment of a fine.

Order annulled.

Prior opinion, 82 P.2d 200.

George R. Andersen, of San Francisco, for petitioner.

Vernon Stoll, of Grass Valley, for defendants.

HOUSER, Justice.

In substance, the essential facts which appear in a petition that has been presented to this court for the issuance by it of a writ of certiorari are that in a criminal action that was pending against one Yuen, and others, in the Superior Court of this state, in and for the county of Nevada, in

accordance with an order theretofore made by said court, the petitioner herein deposited with the sheriff of that county the sum of $500 cash bail for the sole purpose of insuring the appearance in court of one Circle, who was one of the defendants in the action. Circle did appear at the trial of the action and was convicted of the commission of the offense of which he had been charged. Thereafter, in due course, on his appearance before the court for the special purpose of having sentence pronounced against him, and before judgment was so rendered, in part the following colloquy occurred in open court between the judge of the court and Mr. Andersen, who was counsel for defendant Circle, and who also represented the several bondsmen:

"Mr. Andersen: Before the Court formally pronounces judgment, I desire to have the bail exonerated, your Honor.

"The Court: Mr. Circle,—.

"Mr. Andersen: Will the Court direct a minute order to that effect?

"The Court: Your motion is not made in the proper form.

"Mr. Andersen: Representing the bondsmen, I desire, on their behalf, to have the bail exonerated.

"The Court: That is not a proper motion, not in the proper form. * * *"

After pronouncing judgment in the action, the judge continued as follows: "It is further ordered, that the County Clerk, in respect to each defendant, apply the money on deposit as bail in satisfaction of each of said fines, and refund the surplus, if any, to the defendants or other person who made such deposit, as provided in Section 1297 of the Penal Code of California. The defendants are ordered into custody."

Thereupon the following respective statements and conduct occurred in open court:

"Mr. Andersen: May I direct the Court's attention to the order of the Court made with respect to the bail in this of People v. Yuen case? Your Honor is probably not familiar with the amendment to section 1297 of the Penal Code, under which the Court would probably want to amend its own order.

"The Court: With respect to Yuen?

"Mr. Andersen: With respect to Yuen and all of the defendants. The bail receipts here are not in the name of any of the defendants. The Code provides that in any such case the bail may not be forfeited.

"The Court: I have the latest Code in there (indicating the Judge's chambers).

"Mr. Andersen: I think if the Court would look at it, the Court would change the order.

"The Court: I believe it provides that the surplus is to be returned.

"Mr. Andersen: None of the bail will be forfeited, your Honor.

"The Court: I will look at that.

"Mr. Andersen: May we do that now?

"The Court: Very well, we will take a recess.

"(Thereupon, the Court, the District Attorney and Mr. Andersen retired to the Judge's chambers, thereafter returned and the following proceedings ensued:) The Court: There may be some merit in your contention with reference to the amendment of Section 1297, Mr. Andersen, but I will not decide that at this time; that is, with reference to the forfeiture of the money."

The lawfulness of the order, by which the fine that was imposed upon the defendants in the criminal action was directed to be paid out of the money that had been deposited by third persons as bail for the appearance in court of the said defendants, is the subject of these proceedings.

However, preceding a determination of the question of whether the trial court was possessed of authority to direct the disposition of the money that had been deposited by a bondsman as bail for the appearance of Circle, it would seem advisable that attention should be directed to each of several minor points which has been advanced by the respondents:

[1-4] It may be remembered that at the time when the petitioner herein presented to the trial court his request or motion that the bail be "exonerated", the response which was made thereto by the trial judge was that the "motion is not made in the proper form". That was the sole reason assigned by the trial court for its refusal to "exonerate" the bail; and, in this proceeding, the respondents re-assert that position, and urge that it should prevail as a sufficient reason for a refusal of this court to make an order by which an annulment of the order here in question would result. In that connection, it first may be not inappropriate to again suggest the application of the rule that in the administration of justice, substance, rather than mere

form, should be regarded. In this state, the common-law forms of procedure have been either abandoned or, at least, have suffered a considerable modification in their strictness, with the consequence that their importance even in matters of pleading has been greatly decreased; and, with reference to statutory procedure, by constitutional provision, ordinarily no error "as to any matter of pleading, or * * * procedure" constitutes a sufficient ground even for the granting of a new trial. Section 4½, article 6, Constitution. Other than that the request or the motion should have been preceded by an offer on the part of the bondsman to surrender the defendant into court, no suggestion is here made as to the "form" which should have been observed. Mundell v. Wells, 181 Cal. 398, 184 P. 666, 7 A.L.R. 383. See sec. 1300, Pen.Code. But, obviously, the fact that the defendant already had been brought to trial, had been convicted of the offense of which he had been charged, and at the instant when the motion was made was before the court for the very purpose of having judgment pronounced against him, should have been considered the equivalent of a surrender by the bondsman of the person of the defendant. Besides, it would seem apparent that, other than the implied requirements which may be indicated by the provisions of section 1300 of the Penal Code, had any particular "form" ever been prescribed, either by statute or by judicial direction, a fair regard for the rights of the applicant for "exoneration" should have prompted an indication of its existence, together with the giving of a reasonable opportunity to the bondsman to amend his application, or otherwise to avail himself of the use of the required procedure. It is manifest that to permit a mere failure on the part of the bondsman to perform that which either might or would have been readily done by him, or that which, in substance, might have been regarded as an idle act, to defeat his asserted rights in the premises, would give rise to a sad commentary on the vaunted procedure respecting the administration of substantial justice. At any rate, this court cannot knowingly lend its official sanction in such a cause.

[5] On the part of the respondents, it also is urged that at the time when the order here in question was made, no evidence was introduced in behalf of the bondsman "showing that the bail money had actually been deposited by third parties", and that as a consequence thereof, "the court could do nothing other than order the forfeiture". In that regard, it need only be said that such contention is lacking in substantial merit. Prior to the institution of the instant proceeding, the record of the proceedings herein discloses the undeniable fact that no question with respect to the facts was ever suggested either by the judge of the trial court or by any interested person. Apparently everyone that was at all connected with the matter was thoroughly conversant with all the facts; and, as hereinbefore has been stated, the only ground upon which reliance was placed by the trial judge for his refusal to make the requested order was that the motion was "not made in the proper form".

Regarding the merits of the motion, it appears that in criminal cases, with respect to "deposit instead of bail", section 1297 of the Penal Code provides as follows: "When money has been deposited, a receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the county clerk must under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant. *If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall, upon surrender of the receipt, be returned to the holder thereof.*" (Italics added.) The italicized portion of the law just quoted constitutes a part of an amendment that was enacted by the legislature in 1937. Furthermore, section 1302 of the Penal Code provides as follows: "If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed, in the manner provided in the last two sections, the court must order a return of the deposit to the defendant or to the person or persons found by the court to have deposited said money on behalf of said defendant, upon the production of the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate."

[6] From a casual reading of those statutes, it would seem manifest, consider-

ing the facts of the instant case, that the deposit not having been made by the defendant, but by a bondsman, eventually the latter was entitled to have his money returned to him. However, it is contended by the respondents that the provisions of section 1295 of the Penal Code qualify that which would seem to be the plain language of section 1297. But this court is unable to agree with the respondents in that regard. All that the pertinent language of section 1295 purports to provide is that after a defendant has been admitted to bail, either he or any other person may deposit the required amount of the cash bond with the clerk of the court; thereupon "upon delivering to the officer in whose custody defendant is a certificate of the deposit, defendant must be discharged from custody".

The decision in the case of Mundell v. Wells, 181 Cal. 398, 184 P. 666, 7 A.L.R. 383, which is relied upon by the respondents in support of their position, was rendered long before the amendment was made to section 1297, and has application to the particular facts of that case and the law as it existed at the time when the said decision was rendered. In the face of the plain provisions of the statute as amended, it is clear that any declaration of the law contained in the cited case that ordinarily might be appropriate to the situation here disclosed, but which declaration of the law is in conflict with the express terms of the amended statute, has no controlling force in the present controversy.

[7] Finally, as an objection to a determination of the legality of the order in question, the respondents herein urge the point that a "writ of review is not a proper proceeding in this case". In that regard, the respondents contend that, even if it be admitted that section 1297 of the Penal Code requires the trial court to pay the deposited bail to the person holding the receipt therefor, certiorari will not lie to review the action of the trial court in erroneously ordering it applied in satisfaction of a fine, for the asserted reason that at most the action of the trial court was simply an error in the exercise of jurisdiction and was not in excess of its jurisdiction. In other words, the respondents rely on the well-settled rule that before a writ of certiorari may be granted, it must be shown that the inferior court acted in excess of its jurisdiction, and that the writ may never be granted where the inferior court merely commits error in the exercise of its jurisdiction. See cases collected 4 Cal.Jur. sec. 4, p. 1022. However, an examination of the facts of the instant case leads to the conclusion that a proper situation is presented which will justify the issuance of the writ.

[8, 9] Primarily, it should be noted that courts possess no inherent power to appropriate to the payment of a fine that has been imposed on a defendant, any money that theretofore may have been deposited by a bondsman for the purpose of insuring appearance of the defendant for trial in the action in which such fine has been imposed. Such authority is of purely statutory origin, and necessarily is limited by the terms of the enabling statute. Isbell v. Bay Circuit Judge, 215 Mich. 364, 183 N.W. 721, 16 A.L.R. 971. In that connection, it also may be observed that: "In the absence of a statute permitting it, the authorities have no power to receive or order a deposit of money by a prisoner in lieu of bail"; (44 L.R.A.,N.S., 1150) and that: "In the absence of express statutory authorization a judicial officer, or other officer empowered to admit to bail, persons accused of crime, has no right to accept a deposit of money in lieu of bail or as a substitute for a recognizance." Ann.Cas. 1913D, 194; see, also, Snyder v. Gross, 69 Neb. 340, 95 N.W. 636, 5 Ann.Cas. 152.

[10] If it be assumed that the statute —section 1297 of the Penal Code—limited the court's authority to paying the deposited bail to the petitioner, it is obvious that such statute limits the jurisdiction of the court, as that term is used in the rule hereinbefore stated, and that the court's action in ordering the bail applied in satisfaction of the fine was in "excess" of jurisdiction, and was not merely an error in the exercise thereof. An examination of the numerous cases which deal with this problem impels the conclusion that some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess. In Spreckels S. Co. v. Industrial Acc. Com., 186 Cal. 256, 199 P. 8, the point is discussed at some length. There the statute specifically designated

what award the commission should make to partial dependents in the event of the death of an employee. The commission made an award larger than that permitted by the statute. This court held that such action could be corrected by certiorari. In 186 Cal. at page 260, 199 P. at page 9 it is stated: "The difficulty arises from the different shades of meaning which the word 'jurisdiction' has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed. A good illustration of a want of jurisdiction of this latter sort is the imposing by a court upon a person convicted of crime of a sentence in excess of that permitted by the statute. The court had jurisdiction to sentence the convicted person, but it did not have jurisdiction to impose a sentence not permitted by law; that is, it acted in excess of its power in so doing. Such excesses of jurisdiction can be reviewed on *certiorari*. The code section so provides (section 1068, Code Civ. Proc.) * * *. Upon the facts found the statute prescribed the amount to be allowed as a death benefit, and the Commission in allowing a different amount, rendered an unlawful award, and one in excess of its authority."

Substantially the same rule was announced in Baker v. Superior Court, 71 Cal. 583, 12 P. 685. In that case a trial court purported to extend a litigant's time to plead for a period in excess of the time authorized by the code. With reference thereto this court stated (71 Cal. page 584, 12 P. page 686): "It is clear that the order, so far as it attempted to extend the time to plead more than 30 days, was an excess of jurisdiction." It was held that certiorari was the proper remedy to correct the action of the trial court. This rule was also reiterated in Gibson v. Superior Court, 83 Cal. 643, 24 P. 152; see, also, Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174; Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112.

The very point involved in the instant case was considered by the District Court of Appeal in Hudson v. Police Court of Oakland, 39 Cal.App. 149, 178 P. 172, a case arising, incidentally, before the recent amendments had been made to Penal Code, section 1297. In that case, after bail deposited by a third person had been ordered applied to the satisfaction of a fine, the third person sought to have the action of the trial court reviewed by certiorari. It was held (39 Cal.App. page 150, 178 P. page 172): "that that part of the judgment of the judge of the police court which we are asked to annul was beyond its jurisdiction, and it is therefore ordered that it be annulled as prayed in the petition."

[11] From the foregoing it follows that, since the statute herein involved limits the power of the trial court, the action of that court contrary to such limitation was in excess of its jurisdiction, and that certiorari is the proper remedy to secure a review of such action.

The order in question is annulled.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



13 Cal.2d 248

ARELLANO et al. v. CITY OF BURBANK.

L. A. 16923.

Supreme Court of California.

April 6, 1939.

Rehearing Denied May 4, 1939.

1. Appeal and error ⇐930(1), 996

All reasonable inferences are to be indulged in support of conclusion of jury on conflicting evidence and when two or more inferences can be reasonably deduced from certain set of facts or circumstances, reviewing court cannot substitute its deductions for those of jury.

2. Municipal corporations ⇐755(1)

To warrant recovery against city under Public Liability Act, injury to plaintiff must have resulted from dangerous or defective condition of public street, city council or other governing board or some officer or person having authority to remedy condition must have had notice or knowledge there-

of, and must have failed or neglected to remedy condition within reasonable time after acquiring knowledge or receiving notice or must have failed to take such action as might be reasonably necessary to protect public against such condition within reasonable time. St.1923, p. 675, § 2.

3. Municipal corporations ⇐755(1)

Whether requisite conditions under Public Liability Act are present so as to impose liability on city for injuries sustained because of dangerous or defective condition of street should usually be determined from facts of particular case. St.1923, p. 675, § 2.

4. Automobiles ⇐259

A city having been fully cognizant of hazard existing at street intersection had legal duty to take proper steps to eliminate such condition and city's failure to take such action constituted negligence within Public Liability Act for which negligence city was liable for death and injuries to automobile occupants at such intersection. St.1923, p. 675, § 2.

5. Automobiles ⇐308(11)

Where there was no visible warning to driver of automobile traveling into intersection straddling car tracks that beyond intersection street was divided by unpaved railway right of way, that concrete curb dividing right of way from street abruptly commenced or that pole was located on right of way near curb, and driver at night turned abruptly to avoid pole and struck curb, in action against city for death and injuries sustained by automobile occupants, driver's contributory negligence was for jury. St. 1923, p. 675.

6. Negligence ⇐136(9)

It is only where inference of negligence is irresistible that it becomes duty of court to decide upon it as a matter of law, and when facts or inference to be drawn from them are in any degree doubtful, only proper rule is to submit whole matter to jury under proper instructions.

7. Death ⇐33

The Public Liability Act authorizes recovery against city for wrongful death. St. 1923, p. 675.

8. Death ⇐97
New trial ⇐74, 157

The amount of damages for wrongful death is committed first to sound discretion of jury and next to discretion of trial judge who in ruling upon motion for new trial may consider evidence anew, determine anew the facts and set aside verdict if it is unjust.

9. Appeal and error ⇐1004(3)

On appeal, decision of trial court and jury as to amount of damages recoverable for wrongful death cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest passion, prejudice, or corruption on part of jury.

10. Death ⇐99(1)

$5,000 for death of a girl was not excessive.

11. Trial ⇐295(1)

Alleged error in instructions was not reversible where, taken as a whole, instructions fully and fairly presented issues to jury and alleged error was so slight as to be entirely harmless and resulted in no prejudice.

12. Automobiles ⇐308(6)

Where there was no visible warning to driver of automobile traveling into intersection straddling car tracks that beyond intersection street was divided by unpaved railway right of way, that concrete curb dividing right of way from street abruptly commenced or that pole was located on right of way near curb, and driver at night turned abruptly to avoid pole and struck curb, in action against city for death and injuries sustained by automobile occupants, city's negligence in failing to eliminate or warn of condition was for jury. St.1923, p. 675.

EDMONDS, HOUSER, and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Mike Arellano and others against the City of Burbank and another for death and injuries sustained in an automobile accident. From a judgment for plaintiff, and from an order denying motion for new trial, the named defendant appeals.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

Rehearing denied; EDMONDS, SHENK, and HOUSER, JJ., dissenting.

Prior opinion, 81 P.2d 599.

Ralph W. Swagler, City Atty., of Burbank, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for Pacific Electric Ry. Co.

Mills, Hunter & Dunn, Paul J. Quigley, Edward C. Mills, and Harold J. Hunter, all of Los Angeles, for respondents.

CURTIS, Justice.

This cause was transferred to this court after decision by the District Court of Appeal to give further consideration to the contention of the appellant that the decision of the District Court of Appeal was in conflict with certain prior decisions of that court and particularly the decisions in the cases of Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207, and Robertson v. City of Long Beach, 19 Cal.App.2d 676, 66 P.2d 167. After a careful study of those decisions, we find no conflict between them and the decision of the District Court of Appeal in the present action. While the collision in each of these cases occurred upon a street in which there was a "jog" or "offset" at the intersection of said street, in the Waldorf and Robertson cases, the driver of the automobile, after crossing over the intersection, collided with the curb and sidewalk in front of the abutting property which extended beyond the property line on the opposite side of the cross street. In other words, he ran over and upon the curb and sidewalk along the property which formed the "jog" in the street. It was held that the curb, sidewalk, and the parkway with the trees growing in the parkway, in front of that portion of the property included within the jog or offset, "constitute a barrier or warning sufficient to avert disaster and as readily visible to the alert driver as a sign informing him of the condition" in the street. In the present action the driver did not collide with the jog in the road, but drove across the intersection onto the unpaved right of way of the railway company, and there was no curb, sidewalk, or parkway, or other barrier to warn him of the changed condition in the highway. The curb referred to in the present action was not across the course which the automobile was traveling as it was in each of the two cases cited by appellant, but was parallel to said course and only a surface of some eight inches square was visible to the driver. Due to the fact that the street west of the crossing was only 40 feet wide, it was necessary for the driver to operate the automobile along or near the car track. This course when continued beyond the crossing brought him onto the unpaved portion of the railway right of way, and as we have just stated, there was no barrier of any kind whatever to inform him of the changed condition in the street. As stated in the opinion of the District Court of Appeal, "when dealing with cases falling within the provisions of Public Liability Act of 1923, each of such cases must depend upon its own state of facts". As the factual situations in the Waldorf and Robertson cases were fundamentally different from that in the instant case, the decision in those cases should not control the present decision. We, therefore, adopt the opinion of the District Court of Appeal, written by Presiding Justice York, as the opinion of this court. It is as follows:

"This is an appeal by the City of Burbank from a judgment in favor of respondents, Mike Arellano and Frances Arellano, father and mother of Valentina Alma Arellano, for her death, and in favor of respondent Tomasa Dorothy Arellano for personal injuries resulting from an automobile accident which occurred at the intersection of Glenoaks boulevard and Providencia avenue in the City of Burbank at 8:20 o'clock on the evening of October 5, 1935.

"At the intersection where the accident occurred, Glenoaks boulevard and Providencia avenue cross at right angles, Providencia running northerly and southerly and Glenoaks easterly and westerly. Abutting the easterly side of the intersection is the westerly end of the Pacific Electric Railway Corporation's forty-foot right of way extending easterly. For some distance west of the intersection, Glenoaks is fifty feet wide; at the east side of the intersection, Glenoaks divides and abuts the Pacific Electric right of way on the north and south thereof, being forty feet wide on the north side and forty feet wide on the south side of the said right of way. Pacific Electric Railway Corporation maintains an electric car track along Glenoaks west of and across said intersection, continuing on the said forty-foot right of way easterly of said intersection. The streets within the intersection, as well as Glenoaks to the west thereof, are paved with a surfacing of the same substance, color and appearance and the top of the rails of the car track is flush with the surface of the pavement. The forty-foot right of way east of the intersection is not paved, and for about six feet immediately east of the intersection, the top of the ground is about level with the top of the rails and then drops off to about the top of the ties, or six inches below the rails. Westerly along Glenoaks from the intersection, the southerly rail of the

car track is seventeen feet and three inches north of and parallel with the south curb of Glenoaks, and continues in a straight line across the intersection and upon the right of way.

"East of the intersection and dividing the right of way from the southerly portion of Glenoaks there is a concrete curb which abruptly ends at the east side of the intersection, presenting to the west a face eight inches wide at the bottom, eight inches high and reducing to six inches at the top. This curb does not extend across Glenoaks at the easterly side of the intersection, and the end of the said curb is about three feet and nine inches to the north of the projected line of the southerly curb line of Glenoaks west of the intersection. About three feet and nine inches to the north of this dead end curb is a pole sixteen inches in diameter painted dark for about eighteen inches from the ground and for ten or fifteen feet above that point has been painted with aluminum paint which has lost its lustre so that the pole appears drab or dull gray. To the east of this pole other poles and posts are located extending easterly in the direction of the car tracks. To the north of this pole, at the east side of the intersection, the car track extends into an open space free from posts or poles and across which there is no curb, thereby presenting to one approaching from the west an apparent unobstructed continuation of the boulevard and car track to the east of the intersection. In other words, the situation is such that a person driving easterly on Glenoaks with his left wheels 'straddling' the car track would collide with the unpaved right of way and drop down upon the railway ties, unless he turned either right or left around the end of the unpaved right of way and thereby reached the north or south lane of Glenoaks boulevard.

"At the intersection in question boulevard stop signs were maintained regulating traffic on Providencia avenue, but no such signs were maintained on Glenoaks and there were no speed signs on Glenoaks west of said intersection at the time the accident occurred.

"On the evening of October 5, 1935, the employees of a dehydrating plant located in Burbank had planned a surprise party at the home of Joe Suppon, one of their foremen. Urban Goebel, an employee of the plant, called for Howard Wills, another employee, and after driving around in Goebel's car for about three-quarters of an hour, they proceeded to the Suppon home, where they met the two Arellano girls, who were also attending the party. Since it was early, i. e., around 8 o'clock, and the other guests had not arrived, the two boys asked the girls to take a ride with them around the block and return later to the party. Urban Goebel was driving the car, next to him sat Valentina Alma Arellano, and to her right sat Howard Wills with Tomasa Dorothy Arellano sitting on his lap. Some fifteen or twenty minutes later, as they traveled easterly on Glenoaks, the car 'straddling' the southerly rail of the Pacific Electric Railway car track, they approached Providencia avenue, passed through the intersection and, as Goebel turned abruptly to the right to avoid the tall pole on the railway right of way, his left front wheel struck the projecting end of the curb at the south side of the said right of way, causing him to lose control of his car. The car continued at an accelerated speed for a distance of two hundred thirty feet easterly on Glenoaks boulevard, where it struck a pole in the parkway resulting in the death of Valentina Alma Arellano and Urban Goebel, and the serious injury of respondent Tomasa Dorothy Arellano.

"The instant action was instituted under the so-called Public Liability Act of 1923 (Stats.1923, chap. 328, p. 675), section 2 of which provides that municipalities 'shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets'. A directed verdict was rendered in favor of the Pacific Electric Railway Corporation, and from the judgment against the City of Burbank for $5,000 for the death of Valentina Alma Arellano, and $10,000 for the injuries sustained by Tomasa Dorothy Arellano, this appeal is prosecuted.

"Appellant urges (1) that bottleneck conditions of streets are not embraced within the term 'dangerous or defective condition of public streets', as used in said Public Liability Act; (2) that the driver of the car was guilty of negligence as a matter of law and such negligence was the sole proximate cause of the accident; (3) that the Public Liability Act does not authorize recovery for wrongful death, and that the damages awarded therefor were excessive; (4) that it was prejudicial error to charge the jury on general negligence and without regard to the limitation of duty imposed upon the City of

Burbank under the Public Liability Act; (5) that the third amended complaint failed to state a cause of action and it was error to deny appellant's motions for nonsuit and for directed verdict; (6) that the verdict is not supported by the law or the evidence.

[1] "As is usual in cases of this character, the evidence respecting the circumstances surrounding the accident is conflicting. The jury having determined that the accident occurred through the negligence of appellant, the rule of law is well settled that all reasonable inferences are to be indulged in support of the conclusion reached by the jury; that when two or more inferences can be reasonably deduced from a certain set of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the jury. Gorman v. City of Sacramento, 92 Cal.App. 656, 660, 268 P. 1083.

[2, 3] "To warrant a recovery under the Public Liability Act (Stats. 1923, p. 675), the following conditions must exist: '(1) The injury to the plaintiff must have resulted from a dangerous or defective condition of a public highway, street, * * *; (2) the city council or other governing board or some officer or person having authority to remedy the condition must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy the dangerous or defective condition within a reasonable time after acquiring knowledge or receiving notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against the dangerous or defective condition within a reasonable time after knowledge or notice.' 9 Cal. Jur.Supp. 627, citing Bosqui v. City of San Bernardino, 2 Cal.2d 747, 759, 43 P.2d 547; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286. Whether or not the requisite conditions are present should usually be determined from the facts of the particular case; the factors which contribute to produce a result are so varying that no hard and fast rule may find practical application to the great majority of cases. Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207.

"In connection with its first point, appellant urges that 'the case at bar is analogous in principle to the physical conditions that prevail as described by the court in the cases of Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207; Robertson v. City of Long Beach, 19 Cal.App. 2d 676, 66 P.2d 167.' These two cases are analyzed by the Supreme Court in the recent decision in the case of George v. City of Los Angeles, 11 Cal.2d 303, 79 P. 2d 723, 726, where it was said: 'In each of these cases the injury was caused by a collision of an automobile with a "jog" or "offset" in the street along which the automobile was being operated. It was held in the Waldorf Case, and followed in the other cited case, that there is no law of this state which requires a municipality to maintain barriers or warning devices at "jogs" or "offsets" in the streets of the municipality; that in almost every city of size in the state, some streets are laid out and improved without uniformity as to width or direction, resulting in "jogs" or "offsets" and that where there is nothing in the construction of such a street to conceal its real condition, no liability attaches to the municipality for injuries arising out of such construction.

" 'The factual situation in each of these two cases differs materially from that existing in the present action. It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923, each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases. Rafferty v. City of Marysville [207 Cal. 657], supra, at page 660, 280 P. [118] at page 119; Waldorf v. City of Alhambra [6 Cal.App.2d 522], supra, at page 526, 45 P.2d [207] at page 208; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643. In each of the Waldorf and Robertson Cases, as we have seen, the claimed dangerous condition was a "jog" or "offset" in the street at its intersection with a cross-street, where the abutting property extended beyond the property line on the opposite side of the cross-street. The abutting property was surrounded by a curb some six inches in height, and there was also a sidewalk and parkway within the curb line. These, the court held, constituted barriers or warnings sufficient to avert disaster and readily visible to the driver of an approaching automobile.

* * * By reason of the marked difference in the factual situation in the present case from those shown to have existed in the case of Waldorf v. City of Alhambra, supra, and Robertson v. City of Long Beach, supra, we are unable to agree with the respondent city that the decisions in those cases are determinative of the issues involved in the instant case. As the complaint in this case set forth facts showing the existence of a dangerous and defective condition in Allesandro street, together with notice of such condition by the officers of the city and their failure to remedy such condition, it met all requirements of the statute, and was not vulnerable to a general demurrer. The court, therefore, erred in sustaining said demurrer.'

"The intersection of Glenoaks boulevard and Providencia avenue reveals a much more complicated situation than a mere 'jog' or 'offset' in the street. Admittedly, there is a jog in Glenoaks boulevard, but added to that is the unpaved railway right of way commencing at the easterly side of the intersection, as well as the fact that the northerly curb of the paved portion of Glenoaks lying southerly of and adjoining the unpaved right of way came to an abrupt stop presenting at a point within the intersection a face eight by eight inches which any driver, even though using ordinary care, might easily overlook because of its inconspicuous aspect to one approaching the intersection from the west. There is evidence in the record that the driver turned abruptly to the right to avoid hitting the tall pole on the railway right of way and in so doing he struck the unprotected and inconspicuous end of the curb and thereby lost control of his car. There is no 'jog' or 'offset' in the car track at this point; continuing from the west, it traverses the intersection and then passes in a straight line over the unpaved right of way to the east of the intersection. There is also evidence in the record that at the time of the accident there was no visible warning to the driver of a machine traveling easterly into the intersection, 'straddling' the car track, that he could not continue to drive his automobile along the car track and upon the right of way, but that he must turn either to right or left to avoid disaster. Because of the lack of visibility at the time of day when the accident occurred, the small projecting end of the curb would appear to one approaching from the west to be a part of the unpaved right of way.

[4] "Minutes of the city council of Burbank introduced in evidence disclose that on February 20, 1934, Howard I. Stites, city manager and city engineer in charge of repair and maintenance of streets and highways, knew and recognized the hazard to traffic which existed at this intersection and had then reported 'that deeds for right of way are being secured to widen the roadway there and lessen the traffic hazard at that corner'. Called as a witness, Mr. Stites was asked if 'on February 20, 1934, when you appeared before the council as the city manager and as the city engineer and discussed the obtaining of an easement over the right of way of the Pacific Electric Railway Corporation, it was for the purpose of widening or setting back those curb lines, was it not?' He replied: 'It was.' In September, 1934, appellant acquired an easement over two triangular strips of land embraced within the railway right of way and lying along the northerly and southerly sides of said right of way at its junction with the easterly line of the intersection. Mr. Stites testified that this deed was secured from the railway company for the purpose of widening the street, doing away with the bottleneck condition and setting back the curbs. The minutes of October 23, 1934, reveal that the traffic hazard which then existed at this intersection would be removed upon completion of the contemplated improvement. However, the matter was allowed to rest and nothing was ever done to warn the motoring public that a dangerous condition existed at this corner. It was a year after the deed had been secured that the accident which is the basis of this action occurred. Having been fully cognizant of the hazard there existing, it was the legal duty of the appellant to take proper steps to eliminate such hazardous condition. Its failure 'to take such action as may be reasonably necessary to protect the public against such dangerous and defective condition' (Stats.1923, p. 675, § 2), constituted negligence as contemplated by said Public Liability Act.

[5, 6] "The contributory negligence of the driver of the car involved herein was pleaded as a defense by appellant. The jury having found to the contrary, it is beyond the power of this court to interfere, taking into consideration all of the facts and circumstances disclosed by the record. 'It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law;

and, where the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions.' Van Praag v. Gale, 107 Cal. 438, 40 P. 555, 557.

[7] "With respect to appellant's third point: In both Bennett v. Kings County, 124 Cal.App. 147, 12 P.2d 47, and Edwards v. San Diego, 126 Cal.App. 1, 14 P.2d 119, which were actions brought under the provisions of the Public Liability Act, damages for wrongful death were allowed. In the Bennett case, referring to said act, the court at page 150 of 124 Cal.App., 12 P.2d page 48, said: 'The first point raised is that the demurrer to the complaint should have been sustained. It is contended that the statute upon which this action is based (Stats.1923, p. 675, § 2) is in derogation of the common law, and must be strictly construed, and that since it does not specifically give a right of action to the heirs of a deceased person, such an action cannot be maintained. It is argued that those cases where such an action has been permitted or which have been treated as if such right existed are not in point, since this particular question was not therein raised. See Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540. A part of the act in question reads: "Counties * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways. * * *"

"'Aside from the consideration of any other statutes, we are unable to see why the "injuries to persons," referred to in this statute, do not include such injuries as may be caused to persons by reason of the death of others as well as injuries to persons directly involved not resulting in death. We think the injury suffered by these plaintiffs is covered by the statute, and that the demurrer was properly overruled.'

[8-10] "As to appellant's complaint that the damages awarded for the wrongful death are excessive, the amount of damages in this kind of an action is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts and set aside the verdict if it is not just. 'Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice or corruption on the part of the jury.' Gorman v. County of Sacramento, 92 Cal.App. 656, 667, 268 P. 1083, 1088, and cases there cited. There is nothing in the record presented here which even suggests passion, prejudice or corruption on the part of the jury.

[11] "Appellant in its supplemental opening brief claims error by the trial court in giving three certain instructions to the jury on the question of general negligence. In its closing brief, appellant admits that some of these individual instructions were proposed by it, and then calls attention to a fourth instruction which it also proposed but which it now claims was erroneously modified by the trial court. Taken as a whole, the instructions which were given fully and fairly presented the issues to the jury, and if any such error existed, it was so slight as to be entirely harmless and resulted in no prejudice to appellant's cause.

[12] "From what has heretofore been said, it is apparent that there is no merit in appellant's fifth point. The third amended complaint was sufficient as against a general demurrer, and there was no error on the part of the trial court in denying appellant's motion for nonsuit and for directed verdict.

"The verdict is amply supported by both the law and the evidence."

The judgment is affirmed; the appeal from the order denying motion for a new trial is dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.

EDMONDS, Justice (dissenting).

In my opinion the facts of the present case are not essentially different from those which were shown in the cases of Waldorf v. City of Alhambra, 6 Cal.App. 2d 522, 45 P.2d 207, and Robertson v. City of Long Beach, 19 Cal.App.2d 676, 66 P.2d 167. In each of those cases the appeal challenged a determination of the trial court that the plaintiff's complaint failed to state a cause of action. The facts alleged in each complaint were substantially the same. An accident had occurred at night when an automobile collided with and overran a curb on the far side of an intersection at which point there was a "jog" or "offset" in the course of the street. It was held in each case that the

facts alleged were not sufficient to state a cause of action against the defendant city under the Public Liability Act. (Stats. 1923, chap. 328, p. 675; Deering's Gen. Laws 1931, Act 5619, p. 3052.) The reasoning of the court in the Waldorf case, which was quoted and relied upon in the Robertson case, is as follows: "Nor do we think that the city is chargeable with liability in failing to maintain barriers, lights or warning signs or notices at the point of 'offset' or 'jog' in the street. In almost every city of size in this state some streets are laid out and improved without uniformity as to width or direction, resulting in so-called 'jogs,' 'offsets,' or 'goosenecks,' some ending at cross streets and some even forming cul-de-sacs. We are convinced that the law does not require a municipality to maintain either barriers or warning devices at 'jogs' or 'offsets' of the construction, nature, and appearance of that described in the complaint herein. To the prudent operator of a motor vehicle, acting within the scope of the law governing his own conduct in traversing a public street in the nighttime, the pavement, curb, sidewalk, and the parkway with the trees or poles therein constitute a barrier or warning sufficient to avert disaster and as readily visible to the alert driver as a sign informing him of the condition; there being nothing to conceal the real condition nor to deceive the operator of an approaching automobile while driving at a lawful rate of speed and with due caution." 6 Cal.App. 2d pages 526, 527, 45 P.2d at page 209.

The physical facts in the present case come within this description of an ordinary street in any city. At the time the accident occurred, the course of Glenoaks boulevard jogged to the right (instead of to the left as in the Waldorf and Robertson cases) at its intersection with Providencia avenue, and beyond the intersection it is divided by the Pacific Electric's unpaved right of way. The commencement of the right of way on the far side of Providencia avenue was made plainly apparent by numerous poles and posts and by the dark surface which continued beyond the white concrete pavement. One large pole (16" x 16") which stood on the right of way beyond the end of the pavement and almost directly in the path of the automobile which Urban Goebel was driving, had been painted with aluminum paint and appeared "drab or dull gray". On this pole was suspended a railway crossing wig-wag signal facing Providencia avenue. Directly opposite, three posts marked the line between the pavement and right of way on the north side of the railroad track. One of these posts was painted white. Approximately in the center of the intersection and 25 feet above the street, a 600 candlepower street light was suspended. On the northwest corner of the intersection was a service station illuminated by lights totaling 1100 candlepower.

The four occupants of the car were riding in the front seat. The night was clear and the street was dry. Each of the two survivors of the accident lived two and one-half blocks from the scene and were well aware of the jog in the street. The driver of the automobile, who was killed, lived approximately a mile from the scene of the accident. In crossing the intersection the automobile swerved to the right, striking the end of a curb which formed the southern boundary of the right of way, and then, out of control, continued 232 feet, where it collided with a pole on the sidewalk.

The opinion of my associates distinguishes the two previous decisions upon the ground that "The curb referred to in the present action was not across the course which the automobile was traveling as it was in each of the two cases cited by appellant, but was parallel to said course and only a surface of some eight inches square was visible to the driver." It is also said that "there was no curb, sidewalk, or parkway, or other barrier to warn him [the driver] of the changed condition in the highway". This distinction overlooks the existence of physical conditions which constituted just as visible a warning to the oncoming motorist as did the "curb, sidewalk, and parkway" in the Waldorf case or the curb, sidewalk and empty lot in the Robertson case. Certainly a group of posts and poles, some of which were painted a light color, at an intersection illuminated by a powerful street light, are as plainly visible as a concrete curb and sidewalk of approximately the same color as the street pavement.

The opinion of the District Court of Appeal which is now adopted by this court, suggests that the west end of the curb which marked the southern boundary of the right of way might be easily overlooked by a motorist approaching from the west. But this curb, although small in itself, was a part of the physical conditions

which were made apparent by other objects plainly indicating that the street did not continue beyond them. There was, therefore, no dangerous or defective condition of streets within the meaning of the statute upon which the plaintiffs rely and, as I read the record, the defendant's motion for a directed verdict should have been granted by the trial judge.

For these reasons, according to my view of the case, the judgment should be reversed with directions to the trial court to enter judgment for the defendant.

We concur: HOUSER, J.; SHENK, J.



32 Cal.App.2d 77

CHAN BUCK SUN et al. v. HAINES et al.

Civ. 6006.

District Court of Appeal, Third District, California.

April 4, 1939.

Hearing Denied by Supreme Court June 2, 1939.

1. Corporations ⇐274

The trial court, having found corporation entitled to credit for money advanced to lessee of its farm and sum received by latter on levy of execution under judgment against corporation in total amount exceeding latter's indebtedness to lessee for proceeds of sale of fruit produced by latter, properly held that lessee could recover nothing in action to enforce stockholders' liability for corporation's indebtedness. Civ.Code, § 322.

2. Appeal and error ⇐907(3)

Where bill of exceptions contains no evidence adduced at trial, appellate court must presume that testimony adequately supports trial court's findings.

3. Landlord and tenant ⇐34(3)

A lessee could not rescind lease contract without offering to restore money which he borrowed from lessor to farm leased ranch and satisfying crop mortgage given canning company by lessee in violation of contract. Civ.Code, § 1691.

4. Landlord and tenant ⇐331(2)

A lessee suing for proceeds of sale of fruit produced by latter on leased ranch could not recover damages for lessor's failure to deliver stated quantity of pears to local canneries pursuant to contract, in absence of evidence that sale thereof to local cannery would have brought higher net price.

5. Appeal and error ⇐1151(3), 1169(8)

A judgment for defendant in lessee's suit to enforce stockholder's liability for money received by lessor corporation as proceeds of sale of fruit produced on leased farm will not be reversed or modified on ground that trial court neglected to credit plaintiff with interest on amount found due him on certain date, where plaintiff subsequently collected more than such amount with interest by levying execution on judgment against corporation and there was no evidence that such collection was not made within limitation period. Code Civ.Proc. §§ 336, 685.

6. Judgment ⇐585(3)

A judgment against corporation for amount due lessee of its land as proceeds of sale of fruit produced thereon under original lease contract was not res judicata with respect to terms of modified contract or otherwise in lessee's subsequent suit to enforce stockholder's liability for corporation's indebtedness to plaintiff. Civ.Code, § 322.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Chan Buck Sun and others against Bessie Haines, B. B. Krasnow and others to enforce defendants' liability as stockholders of R. Krasnow & Sons, Incorporated, for money received by such corporation from sales of fruit produced on its farm leased to named plaintiff. From a judgment for defendant B. B. Krasnow, named plaintiff appeals.

Affirmed.

Thomas B. Leeper, of Sacramento, for appellant.

James C. Nichols, of Stockton, and Thomas O'Hara, of Sacramento, for respondent.

PER CURIAM.

The plaintiff has appealed from a judgment which was rendered against him in a suit for stockholder's liability for money received by a corporation as proceeds of sales of fruit produced on its farm pursuant to the terms of a lease thereof. A former

judgment in favor of the plaintiff for the sum of $21,913.41 was rendered against the corporation. This suit was brought in July, 1929, under section 322 of the Civil Code, which was repealed in 1931 (Stats. 1931, p. 444). It was partially tried in 1931, and was completed November 13, 1937. The case was not dismissed for failure to prosecute the suit with diligence, because the trial was actually commenced in 1931. It is contended the judgment which was rendered against the corporation in 1929 is res judicata and controlling upon the stockholders in this action with respect to the terms of the contract and the amount of stockholder's liability, and that the findings of the court in this case fail to support the judgment. The cause appears to have been abandoned against all stockholders of the corporation except B. B. Krasnow, in favor of whom the judgment was rendered. The appeal is presented on a bill of exceptions. The evidence is not before us.

The record shows that R. Krasnow & Sons, Inc., a Delaware corporation, owns 71 acres of farm land at Hood in Sacramento county. November 15, 1926, the corporation leased the land to the plaintiff for three years upon terms which provide that the lessee shall cultivate, produce, harvest and deliver to the lessor at the plaintiff's sole cost and expense all fruit grown thereon. The lessor was required to grade, wrap, pack and box all fruit, charging the lessee with his proportion of the cost thereof. The lessee was to receive sixty per cent of the net proceeds of sales of fruit. It was agreed the lessee might sell his share of the fruit to canneries of his own designation, only through the agency of the lessor, who should receive "standard commissions and charges therefor". All money advanced by the corporation to the lessee for machinery expenses of farming and harvesting crops, was to be deducted from the lessee's share of the proceeds of sales, together with interest thereon at the rate of 7 per cent per annum.

July 13, 1927, the plaintiff, as party of the first part, and R. Krasnow & Sons, Inc., a corporation, as party of the second part, executed an instrument modifying some of the terms of the original lease. These two documents must be construed together. This second instrument also provides that the lessee shall cultivate, farm, produce and harvest all fruit on said ranch at his own cost and expense, and that all fruit shall be marketed only through the agency of the corporation. The third paragraph provides in that regard: "The said party of the second part [corporation] shall have full control of the said crops, and of the times when, the places where, and the parties to whom, and the price for which, said crops shall be sold or disposed of, and the manner and means of transportation thereof."

The terms of the original contract remained in force with respect to the shares of the crops which were to belong to the respective parties. The plaintiff was to receive the proceeds of the sales of sixty per cent of the fruit produced. It is provided, however, that the plaintiff shall be paid by the corporation per box for his sixty per cent of all pears produced and sold in the year 1927 the sum of "$1.75 f. o. b. at Hood, California, from which shall be deducted 10% commission, 50c packing charges per box, and 5c loading charge per box". From plaintiff's share of the net income of sales, the corporation was authorized to retain all money advanced by the corporation to the plaintiff on account of farming enterprise.

On the same day that the amendment to the contract was executed a second modification of the contract was also executed which merely provides that sixty tons of fruit produced from the ranch "shall be sold and delivered to canneries in the vicinity of the ranch in shares as per lease and the remainder of the crop shall be shipped to eastern markets. The price to be paid by lessor for the share of the lessee is to be One and 75/100 Dollars ($1.75) per box f. o. b. cars at Hood, as per contract, less commissions and charges mentioned in lease."

[1] At this trial the court found that the plaintiff produced 21,327 boxes of pears; that he is entitled to the proceeds of the sale of sixty per cent thereof, which is 12,796 boxes, at the specified contract price of $1.75 per box, less 72½ cents per box, which includes 50 cents for packing, 5 cents for loading and 10 per cent, or 17½ cents per box as stipulated commissions; that the plaintiff is therefore entitled to credit for 12,796 boxes of pears at $1.02½ per box, aggregating the sum of $13,116.21; that in addition thereto plaintiff is entitled to a further credit of $847.92, being 60 per cent of the proceeds from the sale of plums and cherries also produced; that the total sum to which the plaintiff is entitled to credit

is $13,964.13. But the court found that the plaintiff was indebted to the corporation in the sum of $12,000 for money advanced, which sum is not disputed; that the plaintiff received the aggregate sum of $3,468.70 by levying an execution to secure payment of the judgment of $21,913.41 which he previously recovered against the corporation for the same indebtedness; that the total amount for which the corporation is entitled to credit is $15,468.70, which more than pays the indebtedness due to the plaintiff.

The court therefore properly held that the indebtedness of the corporation was fully paid, and that the plaintiff was entitled to recover nothing in this action against the stockholder B. B. Krasnow.

Two contentions, chiefly, are made by the appellant, upon which a reversal of this judgment is sought: First, that the amendment to the contract with respect to the agreement of the plaintiff to accept the gross sum of $1.75 per box for his share of the fruit sold, was rescinded; and, second, that the judgment against the corporation, which was rendered January 16, 1929, is res judicata as to the terms of the contract and therefore is determinative of the amount which plaintiff is entitled to recover from the stockholders in this suit.

It is true that the fifth paragraph of the first amendment to the contract of July 13, 1927, provides in part: "The term of this agreement shall be from the 13th day of July, in the year 1927, to the 15th day of October, in the year of 1927, and thereafter until all indebtedness of every kind and description is paid by the said party of the first part to the said party of the second part (R. Krasnow & Sons, Inc.), and all obligations of every kind in favor of the said party of the second part fully performed and discharged by the said party of the first part, and also thereafter, unless three days' notice in writing is given by either party to the other electing to terminate this contract."

[2] The court found that on October 5, 1927, the appellant did serve the corporation with written notice that he rescinded the contract on the ground that the corporation failed to "deliver sixty (60) tons of said pears to the canneries as mentioned in said agreement".

The court, however, further found in that regard that prior to the service of said notice of rescission all of the pears had been sold and shipped to an eastern market; that the plaintiff "had prevented and excused" the corporation from delivering said sixty tons of pears to the local cannery; that the plaintiff had previously mortgaged the crop to the Bayside Canning Company, contrary to the terms of the contract, and had otherwise breached its terms and thereby waived his right to rescind the contract, and that "said agreements were never rescinded, but remained in full force and effect".

Since the bill of exceptions contains no evidence adduced at the trial, we must assume that the testimony adequately supports the findings that in spite of the written notice the plaintiff waived that notice and "prevented and excused" the corporation from delivering sixty tons of pears to the local canneries; that the plaintiff was in default and forfeited his right to rescind the contract before the notice was served, and that the contract was not in fact rescinded.

[3, 4] Moreover, this is not a suit for rescission of the contract. It is an action for stockholder's liability based upon the validity of the contract. The plaintiff could not rescind the contract without offering to restore the money which he borrowed to farm the ranch, and without satisfying the mortgage which he had executed in favor of Bayside Canning Company. Section 1691, Civ.Code. If the plaintiff assumes that the contract was rescinded, and that the corporation's failure to deliver sixty tons of pears to local canneries was an element of damage, there is absolutely no evidence that the sale of sixty tons of pears to a local cannery would have brought a greater net price than $1.02½ per box which the plaintiff received.

[5] The appellant contends the judgment should be reversed or modified because the court neglected to credit him with legal interest on $1,964.13 found to be due October 5, 1927. The record does not sustain that contention. We assume the court did not compute interest on the above sum found to be due to the plaintiff for the reason that the evidence shows it was completely satisfied by the money which was subsequently collected on execution in the former case. The court did find that the aggregate sum of $3,468.10 was collected by the plaintiff by means of the levying of an execution. This record does not show when that money was collected on execution. But $1,964.13 with compound

interest at 7 per cent for eight years would aggregate less than the amount which was collected by execution. The former judgment upon which the execution was issued was rendered January 16, 1929. In the absence of evidence to the contrary, we may not assume the sum of $3,468.10 was not collected for more than six years after the former judgment was rendered. The statute of limitations would expire within five years of the rendition of the judgment. Section 336, Code Civ.Proc. An execution could not thereafter issue except upon special proceedings under section 685 of the Code of Civil Procedure. No such proceedings appear in the record. Even though the court failed to allow plaintiff interest on the amount found to be due in 1927, there is nothing in the record which will warrant this court in assuming it would overbalance the sums for which the corporation was entitled to credit. It follows that we must assume the court correctly determined that the plaintiff is entitled to recover nothing by this action.

[6] The appellant's theory upon which a reversal of the judgment in this case is founded is that the former judgment in the suit against the corporation is res judicata and binds the stockholders. The former judgment against the corporation was based solely on the original contract of November 15, 1926, which provided that plaintiff should be entitled to sixty per cent of the fruit produced and the same proportion of the proceeds derived from the sales thereof. It did not take into consideration the amendment of July 13, 1927, which changes the entire basis of plaintiff's share of the produce and limits him to only sixty per cent of the pears produced at the fixed price of $1.75 per box, less 10 per cent commissions, 50 cents per box for packing, and 5 cents per box for loading. It does not appear that the modified contract of July 13, 1927, was ever called to the attention of the court in the suit against the corporation. At least the findings in that case do not take it into consideration. The court in this case specifically finds that the former judgment made no allowance to the corporation for the agreed commissions, packing and loading charges allowed by the amended contract. Assuming that the findings of the court in this case are amply supported by the evidence in that regard, we must presume the former judgment is erroneous unless it is res judicata of the issues involved in this case and therefore binds the stockholders with respect to the construction of the contract.

In this suit for stockholder's liability under the provisions of section 322 of the Civil Code, as it existed prior to 1931, the previous judgment in the suit against the corporation is not res judicata with respect to the terms of the contract or otherwise. The court had an absolute right to ascertain and determine the liability of the stockholders in this suit, regardless of the conclusions of the court in the former suit against the corporation. It is said in Goddard v. Security Title Ins. & Guarantee Co., Cal.Sup., 83 P.2d 24, 29: "In the prior action the plaintiff sued the corporation; here he sues the stockholders. It was an established rule in California that the peculiar type of stockholders' liability formerly in force in this state, upon which this action is founded, made stockholders directly and primarily liable for the obligations of the corporation, and independently of it. If this liability is primary and independent, it follows that even a judgment on the merits in an action against the corporation is not res judicata in a subsequent action against the stockholders, and it has been so held in many cases. See Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335; Paladini, Inc., v. Superior Court, 218 Cal. 114, 21 P.2d 941; 9 Cal.L.Rev. 495; 2 So.Cal.L.Rev. 370."

The preceding case from which we have quoted is conclusive of the chief contention of the appellants in this action. The court in the present case against the stockholders was authorized to consider all competent evidence to ascertain and determine their liability, independently of the judgment in the former case against the corporation. That judgment is not res judicata of the issues in this case.

The findings in this case are entirely reconcilable and adequately support the judgment.

The judgment is affirmed.

SULLIVAN v. McKINLEY et al.*

Civ. 10897.

District Court of Appeal, First District, Division 1, California.

March 30, 1939.

Hearing Granted by Supreme Court May 29, 1939.

1. Municipal corporations ⇐111(1)

No ordinance is valid unless and until the mandatory prerequisites to its enactment and performance are substantially observed.

2. Municipal corporations ⇐885

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, time for establishing an increase in wage rate of municipal employees is before passage of annual salary ordinance.

3. Municipal corporations ⇐885

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, once budget is approved by board of supervisors, the fiscal terms of annual appropriation ordinance and annual salary ordinance are automatically fixed beyond power of change by any amendment.

4. Municipal corporations ⇐885

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, any effort of board of supervisors to increase the wage scale in annual salary ordinance over amount provided in approved budget is void.

5. Municipal corporations ⇐885

Where city charter provided that all increases in salaries shall be determined at time of preparation of annual budget estimates and adoption of annual budget and appropriation ordinances, and approved budget provided for $9 a day to auto and car painters of Municipal Railway Department, $1 per day increase in wage rate to such painters provided in annual salary ordinance was ineffective, notwithstanding appropriation made available to Municipal Railway Department was sufficient to pay increased wages.

*For subsequent opinion see 92 P.2d 892.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Petition for writ of mandate by Edward Sullivan against Howard M. McKinley and others as members of and constituting the Civil Service Commission of the City and County of San Francisco and another. From an adverse judgment, defendants appeal.

Judgment reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Allen G. Wright and Wright & Wright & Larson, all of San Francisco, amici curiae.

John J. Dailey, of San Francisco, for respondent.

TYLER, Presiding Justice.

Petition for writ of mandate on behalf of certain auto and car painters of the Municipal Railway Department. After issue joined, a trial was had which resulted in a judgment directing the issuance of a peremptory writ of mandate against the defendants granting the demands of petitioner. From the ruling in the court below, this appeal is prosecuted. The record reveals the following facts:

Petitioner, together with eight other individuals, is employed as an auto and car painter in the Municipal Railway Department, which is a division of the Public Utilities Commission of the city and county of San Francisco. During the fiscal year 1936-37, the wage of petitioner and his eight coworkers as auto and car painters in said department was fixed and established at $9 per day. Pursuing the steps necessary to provide the funds needed to carry on the various functions under the control of the Public Utilities Commission for the fiscal year 1937-38, that body prepared budget estimates for the different utilities under its jurisdiction, one of which was that of the Municipal Railway. The budget estimate recommended by the Public Utilities Commission for the class of car and auto painters carried the rate of $9 per day, and the estimated amount necessary to pay for such number of employees at the indicated rate was $22,599. This budget estimate originating with the Public Utilities Commission was joined with the budget estimates

coming from other departments and offices of the city government by the Controller, and formed the consolidated budget estimate of all municipal divisions for transmission to the Mayor. The Mayor then gave consideration to the consolidated budget estimate, in which was that of the Municipal Railway. When he came to the item of "car and auto painter", he accepted the recommendation concerning the number of employees, their daily rate of wage, and the amount necessary to be appropriated in order to satisfy the same, as theretofore set forth by the Public Utilities Commission, and ordered his recommendation to be entered in the proper sheet. The Mayor, after completion of the numerous budget estimates as contained in the consolidated budget estimate, transmitted his recommendations thereon to the Board of Supervisors for its consideration and action. With the consolidated budget, as recommended by the Mayor, went a proposed appropriation ordinance to the said Board of Supervisors. The legislative division then reviewed the recommendations of the Public Utilities Commission and the Mayor. This resulted in the board's adopting the figures set out by the Commission and the Mayor in reference to car and auto painters. On Monday, May 24, 1937, the budget for the fiscal year 1937-38 was adopted by the Board of Supervisors. Shortly thereafter, to-wit, on June 2, 1937, the annual appropriation ordinance for the fiscal year 1937-38 was adopted by the Board of Supervisors and approved by the Mayor.

Under date of June 15, 1937, E. G. Cahill, the manager of utilities, Public Utilities Commission, addressed a letter to the Mayor requesting that the daily rate of wage of car and auto painters be fixed at $10 instead of $9 a day. The Mayor and the Board of Supervisors in the annual salary ordinance 1937-38, which was adopted on the 28th day of June, 1937, provided for nine car and auto painters, Municipal Railway, at $10 per day instead of the $9 rate theretofore established in the budget and appropriation ordinance. The question to be determined is whether the Board of Supervisors and the Mayor, in fixing in the annual salary ordinance a rate of wage for auto and car painters different from that in the budget estimate of the employing department, and in the recommendation of the Mayor, and in the budget of said Board and Mayor, violate the terms of the organic law. The trial court found that the adoption of the budget estimate of expenditures for the year 1937-38, incorporating the wage rate to be paid petitioner and his associates, did not control, and they recovered the amount contained in the salary ordinance.

Two questions are raised on the appeal. The first concerns the admissibility into evidence of the letter dated June 15, 1937, whereby E. G. Cahill requested a change in the rate of pay of petitioner and his co-workers, it being the claim of appellants that there were no provisions under the charter permitting Mr. Cahill to send the communication; the second, that the legal effect of the evidence adduced before the trial court does not justify its findings.

The city and county of San Francisco as a municipal corporation operates under a freeholders' charter. Section 69 of said instrument reads as follows: "* * * The budget estimate for every department and office of the city and county, whether under an elective or an appointive officer or a board or commission, and separately for each utility under the control of the Public Utilities Commission, shall be filed by the executive of such department with, and shall be acted upon by, such board or commission. All budget estimates shall be compiled in such detail as shall be required on uniform blanks furnished by the controller. The Public Utilities Commission and the board of education must hold public hearings on their respective budget proposals. Each such elective and appointive officer, board or commission shall, not later than the 15th day of February of each year, file with the controller for check as to form and completeness two copies of the budget estimate as approved * * *."

Section 70 of the charter, among other things, provides: "(4) A schedule of positions and compensations showing any increases or decreases requested in the number of positions or rates of pay."

[1] The budget estimate for the fiscal year 1937-38 for the Municipal Railway did not show any increase in the rate of pay for the position of car and auto painter. The evidence shows without conflict that the budget estimate for the Municipal Railway, as prepared in conformity with the terms of section 70 of the Charter and as approved by the Public Utilities Commission for submission to the Mayor, stated

the amount to be paid was $9 a day out of a fund of $22,599. No ordinance is valid unless and until the mandatory prerequisites to its enactment and performance are substantially observed. The evidence adduced before the trial court shows a failure of the responsible authorities to do the things essential within the time prescribed by the basic municipal law for the creation of an increase in wages, and establishes without conflict a wage rate of only $9 a day for the indicated positions.

Section 71 of the Charter provides: "All increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, and no such increase shall be effective prior to the fiscal year for which the budget is adopted. * * *"

[2-5] The time for establishing an increase in wage rate of municipal employees, such as the petitioner and his eight companions, is before the passage of the annual salary ordinance. And the instruments within which the increase of the rate of wage is to be expressed are (1) annual budget estimates, (2) annual budget, and (3) appropriation ordinance. Once the budget is approved by the Board of Supervisors, the fiscal terms of the annual appropriation ordinance and the annual salary ordinance are automatically fixed beyond the power of change by any amendment. Any effort of the Board of Supervisors to increase a wage scale in the annual salary ordinance over the amount provided in the approved budget is void. The Mayor must submit his proposed budget to the Board of Supervisors each year not later than the 1st day in May. (Charter, sec. 72.) After public hearing and not earlier than the 15th day of May, nor later than the 1st day of June, the Board shall adopt the proposed budget as submitted or as amended, and shall pass the necessary appropriation ordinance. If in that period the Mayor should request the Board to increase any salary or wage schedule, the Board could provide for such increase by amending the proposed budget accordingly, provided the Mayor's request was made on the proper recommendation of the department or office concerned. But each increase though so requested could not be made in the annual salary ordinance unless previously made in the proposed budget, for the reason that the annual salary ordinance is limited by the provisions of the approved budget.

It must be remembered that the budget found on the estimates submitted by the Public Utilities Commission, approved and recommended by the Mayor, and adopted by the Board of Supervisors, was finally approved on May 24, 1937; that the appropriation ordinance providing the funds to meet the items in the aforesaid budget was adopted by the Board of Supervisors on June 1, 1937, and approved by the Mayor on the 2d day of June, 1937; that these instruments, together with the estimates furnished by the commission, did in no instance provide a daily wage rate of $10 for the petitioner and his associates, but did on the contrary provide a rate of $9 a day. It must also be remembered that the annual salary ordinance which carried the wage rate of $10 a day for the interested persons was passed twenty-six days later, on June 28, 1937, and represented an increase in wage rate of $1 a day, together with shorter hours. From what we have said it is obvious that the payment of an increase in the wage rate of petitioner and the other car and auto painters is a direct and positive disregard of the terms of section 71 of the charter.

Our conclusion renders unnecessary a disposition of the question of the authority of Mr. Cahill to send to the Mayor his request for the increase in pay. Respondent claims that the increase in the wage rate of himself and his associates did not necessitate an increased appropriation. The fact remains, however, that it is an increase in rate of wage in a manner not authorized by the city charter, and the mere fact that the appropriation made available to the Municipal Railway Department was sufficient to pay the wages of petitioner and his associates is unimportant.

For the reasons given the judgment is reversed.

We concur: KNIGHT, J.; WARD, J.

31 Cal.App.2d 747

PEOPLE v. POLLOCK.

Cr. 1669.

District Court of Appeal, Third District, California.

March 29, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Homicide ⇐218

The sufficiency of foundation proof which will authorize admission of dying statements is for the trial judge.

2. Homicide ⇐331

The ruling of the trial court with respect to sufficiency of foundation proof for admission of dying statements will not be disturbed on appeal unless there is an apparent abuse of discretion.

3. Homicide ⇐203(3)

Evidence that deceased, who was fatally stabbed in affray and was practically disemboweled and was suffering great agony, stated that he "didn't expect to live," was sufficient proof of deceased's knowledge of impending death to warrant admission of alleged dying declarations that "they got him this time" and that he was going to die from his wounds.

4. Homicide ⇐203(3)

Statements of deceased that "they got him this time" and that "he was going to die" from his wounds, without charging accused with stabbing him or relating details of affray in which deceased was stabbed, were mere declarations of facts which did not require strict proof of realization of impending death to be admissible.

5. Homicide ⇐211

The rule regarding the preliminary proof necessary to entitle dying declarations to be admitted in evidence applies to manslaughter as it does to murder.

6. Homicide ⇐203(3)

In determining frame of mind of declarant regarding his belief with respect to impending death as respects admissibility of dying declarations, court may consider declarant's physical condition, nature and seriousness of his wounds, his knowledge of his grave condition, his conduct, language and statements.

7. Homicide ⇐203(7)

As respects admissibility of dying declarations, it is not necessary that declarant shall believe he will die immediately provided he assumes he will not recover from his injuries and that death is impending.

8. Homicide ⇐204

As respects admissibility of dying declarations, duration of time which elapses between the declaration and actual death of declarant furnishes no criterion for admission or rejection of such evidence.

9. Criminal law ⇐706

In homicide prosecution, permitting district attorney to ask accused whether he told wife that if he had "to go to San Quentin" he was going to kill deceased's baby was not prejudicial misconduct, since it was relevant on issue of malice and accused's consciousness of guilt. Pen.Code, § 188.

10. Homicide ⇐7

Malice is a necessary element of the crime of murder. Pen.Code, § 188.

11. Homicide ⇐156(1)

In second-degree murder prosecution, evidence of malice and of intent with which crime was perpetrated was relevant. Pen. Code, § 188.

12. Criminal law ⇐204

After reversal of first judgment of conviction of manslaughter, it was necessary for accused on second trial on charge of murder in second degree to specifically plead former acquittal of the higher offense in order to take advantage of such defense, and, where he failed to do so, he waived such defense.

13. Criminal law ⇐1137(2)
Homicide ⇐158(1)
Witnesses ⇐269(4), 388(5)

Where district attorney, invited by interrogatories propounded by accused's counsel in examination in chief, on cross-examination asked accused's wife if husband told her that if he had to go to San Quentin he would go and kill deceased's baby, and if she had told another substantially the same thing, questions propounded were not prejudicial, since they were competent in laying foundation to impeach witness and as showing malice and consciousness of guilt of offense with which accused was charged. Pen. Code, § 188.

14. Witnesses ⇐319, 379(1)

A witness may not be impeached upon irrelevant and collateral matters, but he may be impeached by evidence that he has made at another time inconsistent and con-

tradictory statements regarding a material issue in conflict with his testimony at the trial. Code Civ.Proc. § 2052.

15. Criminal law ⇐369(1)

Generally, evidence of commission of or threat to commit an offense other than the one for which defendant is being tried is not competent.

16. Criminal law ⇐365(1), 369(2), 371(1, 12)

Evidence which is relevant to prove any material issue on trial as part of the res gestæ, or which tends to establish guilt of defendant by proving a material fact or helps to disclose motive or intention with which act was performed, is admissible even though it tends to prove an attempt or threat to commit another offense.

17. Criminal law ⇐1171(3)

District attorney's comments regarding reluctance of witnesses to testify to circumstances of affray in which deceased was fatally stabbed, which comments were reasonable inferences drawn from the conduct of witness on the stand, were not reversible error.

18. Criminal law ⇐730(8)

Where court instructed jury to disregard alleged prejudicial remarks of district attorney, who stated that he had struggled in vain with witnesses to get facts from them at coroner's inquest and at preliminary examination and jury could readily see from witnesses' conduct that they were not willing witnesses, district attorney's statements were harmless.

19. Criminal law ⇐485(1)

In second-degree murder prosecution, hypothetical question propounded to physician to determine effect on deceased of wounds received in affray, which question enabled witness to conclude that person whose lung was punctured from stab in the back would find breathing capacity restricted and that lung would collapse and there would be loss of vitality, was sufficient as against contention that it did not contain all facts necessary.

20. Criminal law ⇐1169(9)

In second-degree murder prosecution, answer of physician to a hypothetical question that one whose lung was punctured from a stab in the back would find his breathing capacity restricted, and that the lung would collapse and cause loss of vitality, was not prejudicial, irrespective of the sufficiency of the form of the question, since the response was a mere declaration of common knowledge.

21. Criminal law ⇐304(3)

It is common knowledge that one whose lung was punctured from stab in back would find breathing capacity restricted, and that lung would collapse and that there would be a loss of vitality.

22. Criminal law ⇐485(1)

In propounding hypothetical questions, great care should be taken to accurately relate the facts disclosed by the evidence.

23. Criminal law ⇐485(1), 1170½(1)

Where expert testified that incision penetrated through abdominal wall and through part of the intestinal tract of deceased whose death was due to peritonitis due to intestinal perforation, and it was shown that deceased was entirely disemboweled, hypothetical question, which enlarged facts in reciting that intestines were perforated in three or four places, was sufficiently accurate or at least not prejudicial.

24. Criminal law ⇐1186(4)

The determination of motion for new trial and pronouncing of judgment in a criminal case are procedural in their nature and, in absence of miscarriage of justice, may not be disturbed on appeal even though they occur after statutory lapse of time prescribed therefor. Pen.Code, §§ 1191, 1202; Const. art. 6, § 4½.

25. Criminal law ⇐1186(4)

Where verdict was returned October 19 and motion for new trial was filed on following day and denied on November 15, which was more than the statutory 15 days after return of verdict, on which date accused and counsel appeared and judgment of conviction was pronounced without objection to jurisdiction or motion in arrest of judgment, delay in passing upon motion for new trial and pronouncing judgment did not invalidate judgment. Pen.Code, §§ 1191, 1202; Const. art. 6, § 4½.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Charles Pollock was convicted of manslaughter, and he appeals.

Affirmed.

T. F. Peterson, of Eureka, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was charged with murder of the second degree. He was twice convicted of manslaughter. The first judgment was reversed for failure to prove the venue of the crime. People v. Pollock, 26 Cal.App.2d 602, 80 P.2d 106. The defendant failed to plead former acquittal of the higher offense of murder. But respective counsel erroneously conceded he could not be convicted of an offense higher than manslaughter. The second jury, therefore, again found him guilty of manslaughter. The defendant made a motion for a new trial. The determination of that motion was delayed for twenty-five days after the rendering of the verdict. On the same date that the new trial was denied the court pronounced judgment of conviction against the defendant. The defendant and his attorney were then present in court. No objection to those proceedings was made. There was no motion in arrest of judgment. For the first time, on appeal, the jurisdiction of the court was challenged on the ground that the determination of the motion for new trial and the pronouncing of judgment were delayed beyond the limitation of time prescribed therefor in section 1191 of the Penal Code.

December 31, 1937, the defendant, Charles Pollock, Alexander J. Frazier, and several other half-breed Indians were celebrating New Year's Eve at a cabin near Miranda in Humboldt county. They had been drinking wine and all of them were somewhat intoxicated. Both the defendant and Alexander Frazier were quarrelsome under the influence of liquor. Charles Pollock was a powerful young man weighing 175 pounds. His adversary weighed but 127 pounds and was afflicted with rheumatism. Toward midnight an altercation arose among the revelers and a conflict ensued. It finally ended in a fatal encounter between the defendant and Mr. Frazier. The cause and the circumstances of the affray are rather uncertain, due, no doubt, to the characteristic reluctance of Indians to testify against individuals of their own race. During the fight the defendant gained possession of a knife from his friend Leo Svendson, with which he viciously stabbed and slashed Frazier so seriously as to result in his death seventeen hours later. The left lung of the deceased was punctured by a stab in the back. He received a gaping slash nearly a foot in length from a point under the arm around and cross a part of his chest. A three-inch incision penetrated his abdomen, through which opening his bowels emerged. He received other serious cuts on his hand and elsewhere. He was later removed by the officers to the Eureka Hospital, where he received a transfusion of blood and other medical care. He died from his wounds the following afternoon.

The defendant, in company with his wife, visited a nearby gas station about 1:30 a. m. following the affray. He was then in a furious temper, declaring that he had done a good job and threatening to return "to finish the job" and to kill Mr. Frazier's baby.

A reversal of the judgment is sought upon the grounds that the court erred in admitting in evidence a purported dying declaration of the deceased without first requiring adequate proof that it was made under a sense of impending death; that the court erred in admitting in evidence the defendant's extra-judicial statement of facts without an adequate showing that it was voluntarily made; that the court erred in admitting in evidence certain alleged hearsay declarations for the purpose of impeachment; that the court erred in overruling objections to incompetent hypothetical questions based on incomplete recitations of facts; that the district attorney was guilty of prejudicial misconduct in his argument to the jury; that the court erred in giving to the jury and in refusing certain instructions, and that the court lost jurisdiction to deny the motion for new trial and to pronounce judgment by its failure to do so within fifteen days after the return of the verdict as required by section 1191 of the Penal Code.

The foundation for the admission in evidence of the alleged dying declaration of the deceased was adequately established to show that it was made under a sense of impending death. Moreover, our attention is not called to any statement which the deceased made that is prejudicial to the defendant. He did not even charge the defendant with cutting him. He related no details of the conflict which resulted in the fatal stabbing. All that he said was that "they got him this time" and that "he was going to die" from his wounds.

[1, 2] The evidence shows without conflict that the deceased was fatally cut in the affray. A deep stab in the back penetrated his left lung. He was slashed across the chest. There was a deep cut nearly a foot in length from beneath the left arm around and across the left chest. His right hand was badly cut. Numerous other incisions existed upon the body. A deep cut three inches in length between the navel and the lower rib had literally disemboweled him. His bowels lay in a mass on his lap. Some of them were seriously cut. He had been taken to the Eureka hospital for treatment. The physician knew he was fatally injured. He died within seventeen hours of the time he was stabbed. A blood transfusion occurred about an hour before he died. While he was being wheeled to the operating room, and while he was moaning, writhing in pain and suffering great agony, he told his wife that he did not expect to live. He did not say how soon he expected to die. But it is apparent from his serious condition, and from what he said, that he had abandoned hope of living and that he believed his death was imminent. At least there is substantial proof of that fact. It is the province of the trial judge to determine the sufficiency of the foundation proof which will entitle dying statements to be admitted in evidence. Unless there is an apparent abuse of discretion in that regard, the ruling of the court will not be disturbed on appeal. 1 Wharton's Crim. Ev. 527, sec. 275b; People v. Ybarra, 17 Cal. 166.

The record discloses the following examination of Mrs. Frazier with respect to her husband's condition:

"Now just tell the jury please and Judge Falk what Mr. Frazier said concerning his condition, physical condition, and whether or not he expected to live. * * * A. Well, he told us that they got him this time; * * * that he didn't expect to live. * * *

"Q. And did he tell you whether or not he expected to pull through? A. He told us that he didn't expect to live."

[3, 4] It is evident he had abandoned hope of living. It is reasonable to believe that anyone of ordinary intelligence who was disemboweled and in the serious condition Mr. Frazier was after the affray, would realize he could not possibly live. When he said that "he didn't expect to live" he evidently knew death was impending. We are of the opinion the preliminary proof was sufficiently established to entitle even a dying confession to be admitted in evidence. The statements in question amount to no more than mere declarations of facts or circumstances, which do not require the same strict proof of realization of impending death.

[5-8] It is suggested that since the defendant was on trial for manslaughter as distinguished from murder, the dying declarations were hearsay and inadmissible in evidence. The rule regarding the preliminary proof necessary to entitle dying declarations to be admitted in evidence applies to manslaughter just as it does to murder. 1 Wharton's Crim.Ev., 10th ed., 539, sec. 276. In determining the frame of mind of the declarant regarding his belief with respect to impending death, the court may consider his physical condition, the nature and seriousness of his wounds, his knowledge of his grave condition, his conduct, language and statements. 1 Wharton's Crim.Ev., 10th ed., 535, sec. 275c. It is not necessary that the injured person shall believe he will die immediately, provided he assumes he will not recover from his injuries and that death is impending. The duration of time which elapses between the declaration and the actual death of the person furnishes no criterion for the admission or the rejecting of the evidence. People v. Ybarra, supra. Numerous cases have sustained the admission of dying declarations under circumstances no more serious than those which appear in this cause. People v. Shortridge, 179 Cal. 507, 177 P. 458; People v. Lee Sare Bo, 72 Cal. 623, 14 P. 310; People v. Ybarra, supra. In the case of People v. Gray, 61 Cal. 164, 44 Am.Rep. 549, it is said that proof of a sense of impending death need not be proved by express statements to that effect, but may be determined from the condition of the injured person and from the surrounding circumstances which are disclosed in the preliminary showing. In the present case we are of the opinion the evidence that the statements of the deceased were made in view of impending death is adequate to support his declarations; that the challenged statement does not amount to a dying confession and is, therefore, not subject to the same strict rule relied upon by the appellant.

[9, 10] It was not prejudicial misconduct for the district attorney to ask the defendant on cross-examination if he did not tell his wife that "If you had to go to San Quentin you were going to kill the

(Frazier) baby?" To that question the defendant replied, "No sir." The question and answer were received in evidence without objection. That question was relevant. The district attorney in good faith believed defendant had so stated to his wife at the gas station shortly after the affray occurred, while he was still under the influence of great anger. The statement implied that he was conscious of his own guilt when he assumed he might have to go to state prison for the crime he had committed. It also furnishes some evidence that he assaulted and slew Frazier with an abandoned and malignant heart, and that he was anxious to inflict as great injury upon the Frazier family as possible by killing their baby. Evidence of malice, as defined in section 188 of the Penal Code, and the intention with which the assault was committed were competent. These elements were proper issues to be determined in the case. Malice is a necessary element of the crime of murder.

[11, 12] The defendant was on trial for murder of the second degree. Evidence of malice and of the intent with which the crime was perpetrated were proper issues to be determined. After a reversal of the first judgment of conviction of manslaughter it was necessary for the defendant to specifically plead former acquittal of the higher offense in order to take advantage of that defense. He failed to do so. Respective counsel erroneously conceded that he could not be convicted of an offense greater than that of manslaughter. Based upon their stipulation the court so instructed the jury. Under the circumstances of this case the jury might have properly convicted the defendant of the crime of murder of the second degree. The rule is well established that after the reversal of a judgment of conviction of an offense less in degree than, and included within the higher crime with which one is charged, upon a retrial of the case, the defendant must specifically plead acquittal of the higher degree of the crime, or he waives that defense. The verdict of guilty of a lower degree included in a greater crime does not automatically acquit an accused person of the higher offense unless he specifically claims that result by pleading "once in jeopardy" or "former acquittal". People v. Grill, 151 Cal. 592, 598, 91 P. 515; People v. Fry, 137 Cal.App. 525, 532, 31 P.2d 204; People v. Solani, 6 Cal.App. 103, 91 P. 654; In re Moore, Cal.App., 84 P.2d 57; 7 Cal. Jur. 995, sec. 132; 4 Cal.Jur. Ten Year Supp. 526, sec. 132. The questions of malice and intention with which the crime was committed were therefore proper issues to be determined.

[13] Nor did the court err in overruling defendant's objection to a similar question propounded on cross-examination to the wife of the defendant. She was asked if her husband had not told her at the gas station just after the cutting affray took place that "If I have to go to San Quentin I will go and kill the (Frazier) baby". To that question she replied "No sir". She was asked if she had not told Mr. Woodruff, the proprietor of the gas station, substantially the same thing, and urged him "Not to let Mr. Pollock go away because he was going to kill the (Frazier) baby". She denied those statements. On examination in chief of Mrs. Pollock, the attorney for the defendant first asked these very questions. The inquiry regarding those statements was, therefore, invited by the interrogatories propounded by the defendant's attorney. They were competent and material in laying the foundation for impeachment of Mrs. Pollock. The district attorney was in good faith in asking the questions. He thereafter called Mr. Woodruff, and asked him, "Did Mrs. Pollock say to you, 'don't let him go over and kill the baby, he has been threatening to do it?'", to which he replied, "Yes, she told me that". He also said that the defendant stood 25 or 30 feet from them when Mrs. Pollock made that statement. The form of the questions is not criticized. There is no question regarding the time, place and parties who were present when the statement was made. There is no prejudicial error in that ruling.

[14] While it is true that a witness may not be impeached upon an irrelevant and collateral matter, he may be impeached by evidence that he has made at another time inconsistent and contradictory statements regarding a material issue in conflict with his testimony at the trial. Sec. 2052, Code Civ.Proc.; 27 Cal.Jur. 146, sec. 122; People v. Nyland, 41 Cal. 129. In the case last cited the court said: "There was no error in allowing the prosecution to show by other witnesses that Mrs. Nyland, the wife of defendant, had given a different account of what occurred at the time of the robbery from that testified to by her while on the stand."

[15, 16] As a general rule evidence of the commission of, or threat to commit, an offense other than the one for which the

defendant is being tried, is not competent or admissible, since proof of another crime ordinarily has no tendency to establish the offense charged, and it is likely to be unjustly prejudicial. But that rule is subject to a well-established exception, to the effect that evidence which is relevant and competent to prove any material issue of the case on trial, as a part of the res gestae, or which tends to establish the guilt of the defendant by proving a material fact involved therein, or helps to disclose the motive or intention with which the act was performed, is admissible, even though it tends to prove an attempt or a threat to commit another offense. 13 Cal.Jur. 703, sec. 84; People v. Prantikos, 164 Cal. 113, 127 P. 1029.

In the present case the defendant relied on the doctrine of self-defense. He claimed he was not the aggressor in the affray. The alleged statement that if he had to go to San Quentin for slaying Alexander Frazier he would go back and kill his baby, furnishes some evidence of his consciousness of guilt of the offense with which he was charged. It also supplies evidence of the animus, malice and ill-will which he possessed toward the deceased. That statement tends to indicate that he stabbed Frazier as a result of an abandoned and malignant heart. It suggested a desire to inflict as great injury upon the Frazier family as possible. It was part of the res gestae of the offense with which he was charged. It tended to establish a material issue in the case. That statement was not first elicited by the prosecution. Upon the inquiry of defendant's attorney, the defendant first voluntarily asserted that he made no such statement. In the defendant's presence his wife denied that she communicated that fact to either Mrs. Frazier or to Mr. Woodruff. It was material and competent to impeach Mrs. Pollock by calling Mr. Woodruff who testified that she told him substantially that very thing that her husband had threatened to go back and kill the baby and she tried to persuade Woodruff not to permit him to do so. The rulings upon those challenged questions do not constitute error.

[17] We find no reversible error in the conduct of the district attorney in his arguments to the jury. His comments regarding the reluctance of several witnesses to testify to the circumstances of the affray were merely reasonable inferences drawn from the conduct of the witnesses on the stand. From the fact that they were present in the cabin at the time the stabbing occurred warranted him in arguing that they appeared to be suppressing facts within their knowledge.

[18] In response to the assertion of counsel for the defendant that the district attorney vouched for the testimony of the witness, Stevenson, by placing him on the stand, the prosecuting officer did say he had struggled in vain to get the facts from the witnesses at the coroner's inquest and at the preliminary examination. On application of the defendant the court instructed the jury to disregard those remarks. They were improper, but they were harmless. The jury could readily see from their conduct they were not willing witnesses. The statements do not constitute reversible error. The case of People v. Adams, 92 Cal.App. 6, 267 P. 906, relied upon by the appellant in this case, is not in conflict with what we have previously said regarding the alleged misconduct of the district attorney. In that case the prosecuting officer deliberately and repeatedly stated to the jury that he was present when certain transactions occurred regarding which witnesses had testified, and that he personally knew that the facts related by them were true. After the court had ruled out such statements and had admonished the prosecuting officer he persisted in repeating them. That case, and the other ones relied upon by the appellant are readily distinguishable from the facts of the present suit.

[19-21] We are of the opinion the court did not err in overruling objections to hypothetical questions asked of Doctor Wallace, the county physician, for the purpose of determining the effect upon the deceased of the serious wounds which he received. It was contended the questions did not contain all of the necessary facts upon which a physician could accurately determine the effect of the injuries upon the deceased. After the first question was asked, further facts were elicited by specific inquiries from the doctor. The challenged question might have been more specific, but we are of the opinion it was sufficiently accurate to enable the doctor to say with assurance that a person so afflicted would labor for breath and that he would not be able to carry on a fight requiring great energy and vigor. Answering the first challenged hypothetical question, the doctor concluded that one whose lung was

punctured from a stab in the back would find his breathing capacity restricted; that the lung would collapse and there would be a loss of vitality. That response amounted to a mere declaration of what is common knowledge. That ruling was neither prejudicial nor erroneous.

[22, 23] Another hypothetical question to which the appellant objected involved the effect of the slit in the abdomen which caused the bowels to emerge from the cavity. It is contended that question misstates the facts in reciting that the intestines were perforated in three or four places. We are of the opinion the facts were enlarged in that respect. The evidence is uncertain in that regard. Great care should be taken to accurately relate the facts disclosed by the evidence in propounding a hypothetical question. But the challenged question was sufficiently accurate in that regard. The result of the puncturing of the intestines in one or more places under the circumstances of this case could not possibly materially change the effect which followed or the conclusion of the physician regarding that result. Doctor Burre, upon whose testimony the hypothetical question was based, said that the incision beneath the navel "penetrated through the abdominal wall *and through part of the intestinal tract*". He also testified that death was due to "peritonitis, *due to intestinal perforation*". The victim was entirely disemboweled. His bowels emerged from the abdominal cavity and lay in his lap. There can be no possible doubt of the fatal result of such serious wounds as were inflicted on the deceased. The objection to that question was properly overruled. At least the evidence was not prejudicial.

The case of People v. Salaz, 66 Cal.App. 173, 225 P. 777, 779, upon which the appellant relies, is clearly distinguishable from the present case. In that case the physician testified positively from the facts related in the hypothetical question, based on the nature of the wounds received, that the man who did the shooting was "not immediately in front, but what we might call diagonal towards the left and in front of deceased". Clearly that reply was speculative. It was not within the realm of expert testimony. In the present case the physician merely testified to the loss of vitality and the probable inability of a man to carry on an aggressive encounter with a stab in the lung, a gaping slit across the chest and an opening in the abdomen which literally disemboweled him. If that was not a legitimate subject of expert testimony the conclusion of the witness was self-evident and harmless.

After carefully reading the charge to the jury as a whole, we are convinced there is no prejudicial error in any of the challenged instructions. The jury was very fully and fairly instructed on all the essential issues of the case.

[24, 25] The determination of a motion for new trial and the pronouncing of judgment in a criminal case are procedural in their nature, and, in the absence of a miscarriage of justice, may not be disturbed on appeal, even though they occur after the statutory lapse of time prescribed therefor. There is no miscarriage of justice in the present case, and the delay in denying the motion for new trial and in pronouncing judgment therefore do not constitute reversible error.

The verdict was returned against the defendant October 19, 1938. The following day the defendant filed a written motion for new trial, which was then argued and submitted. November 15 the motion for new trial was denied. On the last-mentioned date the defendant and his attorney appeared in court and judgment of conviction was then pronounced against him. There was no objection to the rendering of judgment for lack of jurisdiction or otherwise. No motion in arrest of judgment was made. The extension of time for passing on the motion for new trial and for pronouncing judgment was not prejudicial to the defendant.

It has been repeatedly held that the failure of the court to pass on a defendant's motion for new trial within the time allowed by the statute is mere error of procedure; that the court is not thereby deprived of jurisdiction to deny the motion and pronounce judgment, unless the error results in a miscarriage of justice. People v. Ramos, 80 Cal.App. 528, 531, 251 P. 941; People v. Von Moltke, 118 Cal.App. 568, 572, 5 P.2d 917. Numerous California authorities have held that the failure of the court to pronounce judgment within the limitation of time prescribed by section 1191 of the Penal Code does not automatically entitle the defendant to a new trial under the provisions of section 1202 of the Penal Code, nor does such delay render the judgment void for lack of jurisdiction. A judgment so pronounced may not be re-

versed on appeal unless the delay results in a miscarriage of justice, for the reason that the pronouncing of judgment is a mere matter of procedure which will not warrant a reversal under the provisions of article 6, section 4½, of the Constitution of California. People v. Zuvela, 191 Cal. 223, 215 P. 907; People v. Farber, 19 Cal.App. 2d 189, 64 P.2d 1138; People v. Rubens, 11 Cal.App.2d 576, 587, 54 P.2d 98, 1107; People v. Stroff, 134 Cal.App. 670, 26 P.2d 315; People v. Miller, 130 Cal.App. 191, 19 P.2d 814; People v. Carter, 130 Cal.App. 95, 19 P.2d 843; People v. Howard, 10 Cal.App.2d 258, 52 P.2d 283; 97 A.L.R. 805, note.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 21

NIDER v. HOMAN, Com'r of Public Safety, et al.

Civ. 2261.

District Court of Appeal, Fourth District, California.

March 29, 1939.

Hearing Denied by Supreme Court March 26, 1939.

1. Prohibition ⇐6(2)

Prohibition would not lie to restrain commissioner, by whom charges of misfeasance and malfeasance in office were filed against the city physician of the city of Fresno, from sitting as a member of the commission to try the charges. Code Civ. Proc. § 1102; St.1921, p. 1823; p. 1828, § 9; p. 1832, § 22.

2. Prohibition ⇐10(1), 11

Prohibition lies only when a court, board, or tribunal proposes to act in excess of its jurisdiction, and mere error does not warrant issuance. Code Civ.Proc. § 1102.

3. Municipal corporations ⇐159(2)

Where charter of city of Fresno empowered city commission to try charges of misfeasance and malfeasance in office filed by one of its members against city physician, and under charter three of the five members could try the charges, commission had jurisdiction to hear case, notwithstanding that presence of allegedly disqualified member by whom charges were preferred, sitting at the trial, might be serious error. Code Civ.Proc. § 1102; St.1921, p. 1823; p. 1828, § 9; p. 1832, § 22.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Dr. Gerald K. Nider, petitioner, against F. A. Homan, Commissioner of Public Safety and Welfare and Ex Officio Mayor of the City of Fresno, and the City Commission of the City of Fresno, for a writ of prohibition restraining F. A. Homan from sitting as a member of the Commission in trying charges against petitioner. Judgment for petitioner, and defendants appeal.

Reversed, with directions.

C. M. Ozias, City Atty., of Fresno, for appellants.

Rae B. Carter, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment prohibiting F. A. Homan from sitting and acting, and the City Commission of the city of Fresno from permitting him to sit and act on the City Commission when that body sits as a trial board to try respondent on charges filed by F. A. Homan accusing respondent of acts of misfeasance and malfeasance in office, which, if proved, would cause him to be permanently removed as city physician of the city of Fresno.

Fresno is a municipal corporation organized and existing under a charter. Stats.1921, p. 1823. Its legislative body is called the City Commission of the city of Fresno. F. A. Homan is Commissioner of Public Safety and Welfare and Ex Officio Mayor of the City of Fresno. The City Commission is composed of the mayor and four other members.

Respondent's office falls within the classification in the charter of "exempted service" and does not come under civil service. Hearing and determination of complaints against, and removals of those within the exempted service come within the jurisdiction of the City Commission. § 22, art. 3, City Charter.

About August 26, 1938, Homan, in his official capacity, signed and filed with the City Commission written charges accus-

ing respondent with specific acts of misconduct and removing him from office.

About August 31, 1938, respondent filed his verified denial of the charges against him. He was notified of a time and place of hearing and that the charges against him would be heard before the entire City Commission including his accuser. Respondent then filed verified objections to Homan sitting and participating in the hearing on the ground that he, being the accuser, was disqualified from acting as one of the triers of fact at such hearing. As Homan refused to disqualify himself, and as he proposed to sit and act as a commissioner at the trial of respondent, this action was brought against Homan and the City Commission of the city of Fresno seeking a writ of prohibition restraining Homan from sitting as a member of the commission trying the charges against respondent.

In California a writ of prohibition can only issue when a court, board or tribunal proposes to act in excess of its jurisdiction. § 1102, Code Civ.Proc.

In Croly v. Board of Trustees of City of Sacramento, 119 Cal. 229, 51 P. 323, it appears that the charter of that city vested jurisdiction in its board of trustees to try charges against city officers. The board of trustees proposed to try Croly, its street superintendent, on charges filed against him by a citizen. Croly filed an action seeking a writ of prohibition restraining the board of trustees from proceeding with the hearing. The Supreme Court affirmed the judgment denying Croly the writ on the ground that the city charter gave to the board of trustees the power to sit in a quasi-judicial capacity and try charges; that those provisions gave that body jurisdiction to try those charges; that having such jurisdiction a writ of prohibition would not issue. See, also, Whitten v. California State Board, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Drummey v. State Board, Cal.Sup., 87 P. 2d 848.

We believe the Croly case decisive of the issues presented here. The charter of the city of Fresno gives the City Commission the power (jurisdiction) to try the charges against respondent. Section 9 of article 2 of the charter provides that "a majority of all members shall constitute a quorum to do business". It follows that three members of the commission can try the charges here involved. Excluding Homan, there remain four members competent to sit in the matter and proceed with the hearing. They possess the necessary jurisdiction to hold the trial.

[1-3] The presence of a fifth disqualified member of the commission sitting at the trial might be serious error but it could not deprive the commission of jurisdiction to hear the case. Mere error does not warrant the issuance of a writ of prohibition.

The judgment is reversed with directions to the trial court to enter judgment for appellants.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 11

NIDER v. HOMAN, Com'r of Public Safety, et al.

Civ. 2416.

District Court of Appeal, Fourth District, California.

March 29, 1939.

Hearing Denied by Supreme Court May 26, 1939.

1. Officers ⇐108

Local boards, not boards of state-wide authority, may act in a judicial capacity as a quasi-judicial body.

2. Judgment ⇐1
Statutes ⇐2

A "judicial act" determines what the law is and what rights of parties are with reference to transactions already had; whereas, a "legislative act" prescribes what the law shall be in future cases arising under it.

[Ed. Note.—For other definitions of "Judicial Act" and "Legislative Act," see Words & Phrases.]

3. Municipal corporations ⇐159(4)

The City Commission of the City of Fresno would act in a judicial capacity in conducting hearing on charges of misfeasance and malfeasance against city physician, in making findings on the evidence produced, and in pronouncing its judgment.

4. Officers ⇐110

Generally, a judge or officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent determination of the proceeding.

5. Municipal corporations ⇐159(2)

Commissioner by whom charges of misfeasance and malfeasance in office were filed against city physician of city of Fresno was disqualified from sitting as a member of the commission to try the charges, and from voting on physician's guilt or innocence at conclusion of trial, where majority of the commission had jurisdiction and were qualified to conduct the hearing. St.1921, p. 1823; p. 1828, § 9; p. 1832, § 22.

6. Mandamus ⇐187(10)

Portion of alternative writ of mandate which District Court of Appeal on record before it did not feel called upon to consider could be discharged.

Original proceeding in mandamus by Dr. Gerald K. Nider, petitioner, against F. A. Homan, Commissioner of Public Safety and Welfare and Ex Officio Mayor of the City of Fresno, and others, to compel reinstatement of petitioner as city physician of the City of Fresno, to compel payment of salary since removal, or in the alternative to compel the City Commission of the City of Fresno to set charges filed by the named defendant against petitioner down for hearing and trial.

Alternative writ directing reinstatement and payment of salary dismissed and discharged without prejudice; peremptory writ directing City Commission to fix date for hearing and trial of charges issued.

Rae B. Carter, of Fresno, for petitioner.

C. M. Ozias, City Atty., of Fresno, for respondents.

MARKS, Justice.

This is an original proceeding here for a writ of mandate. The alternative writ required F. A. Homan, Commissioner of Public Safety and Welfare and ex officio Mayor of the city of Fresno, to reinstate petitioner to the office of city physician of the city of Fresno, and William Glass, Commissioner of Finance of the city of Fresno, to pay his salary since his removal from office by Homan, or in the alternative, to the City Commission of the city of Fresno and its members, to set the charges filed by Homan against petitioner down for hearing and trial, or in both instances to show cause why these acts should not be done.

An appeal involving the same situation which is before us here has been this day decided. 89 P.2d 135. In that case the superior court issued a writ of prohibition preventing Homan from sitting on the City Commission during the trial of his charges against Nider. We reversed that judgment on the sole ground that a writ of prohibition could be issued only to restrain the defendants in that case from exceeding their jurisdiction; that as there were at least four members of the commission who were qualified to sit at the hearing they had jurisdiction to do so; that Homan's presence on the commission could not affect its jurisdiction to try the charges. His presence there would only constitute error.

Fresno is a municipal corporation organized and existing under a charter. Stats.1921, p. 1823. Its legislative body is the City Commission. F. A. Homan is Commissioner of Public Safety and Welfare and ex officio Mayor of the city. The City Commission is composed of the mayor and four other members.

Petitioner's office fell within the classification in the charter of the "exempted service". It does not come within the civil service. Hearing and determination of complaints against and removals from offices of those within the exempted service come within the jurisdiction of the City Commission. Section 22, Art. 3, City Charter.

About August 26, 1938, Homan signed and filed with the City Commission written charges accusing petitioner of specific acts of misconduct and removing him from office.

About August 31, 1938, petitioner filed his verified denial of the charges. As required in the charter, he was notified of the time and place of hearing. The notice also informed him that the charges against him would be heard before the entire City Commission, including Homan. Petitioner filed his verified objections to Homan sitting and participating in the hearing on the ground that he, being the accuser, was disqualified from acting as one of the triers of fact at such hearing.

The City Commission refused to proceed with the hearing without Homan's presence and this proceeding followed. The principal question argued by counsel is this: Does the fact that Homan, having filed the accusation against petitioner and having removed him from office, disqualify him from sitting on the City Commission during the trial of petitioner on that accusation and from voting on petitioner's guilt or innocence at the conclusion of that trial?

We have been cited to no case and have found none in California which precisely answers this question. There are numerous cases from other jurisdictions on that subject. They are in hopeless conflict.

A much cited case is State ex rel. Starkweather v. Common Council of Superior, 90 Wis. 612, 64 N.W. 304. In that case it was held that the common council of the village of Superior did not sit in a judicial but in an administrative capacity in trying charges aganst the mayor, which charges, if sustained, might result in his removal from office. For that reason it was held that a councilman preferring the charges against the mayor was not disqualified from sitting at the hearing and voting on the charges.

A few years after the decision of State ex rel. Starkweather v. Superior, supra, the Supreme Court of Wisconsin had before it a quite similar question and by a divided court came to the opposite conclusion. The common council of the town of Rushford had before it the revocation of a liquor license because the licensee had sold liquor to a minor. The court had before it the question of the disqualification of the chairman of the common council to participate in the trial of the charges because he had employed the minor to purchase the liquor from the licensee. The Supreme Court of Wisconsin held that the trial of the charges before the common council was a quasi-judicial proceeding and that the chairman of the common council was disqualified to participate in the hearing because " 'the rule is very plain that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint on which the order is made.' Id. [The Queen v. County Council (1892) 1 Q. B. 190], 195, 196; Leeson v. General Council, 43 Ch.Div. 379." State ex rel. Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172, 173, 37 L.R.A. 289.

In the case of State ex rel. Cook v. Houser, 122 Wis. 534, 100 N.W. 964, the Supreme Court of Wisconsin returned to the rule announced in State ex rel. Starkweather v. Superior, supra.

In State ex rel. Heimburger v. Wells, 210 Mo. 601, 109 S.W. 758, the court held that where the provisions of a city charter imposed on the mayor the duty of seeing that the laws were properly enforced, the fact that his secretary preferred charges against another city official would not disqualify the mayor from hearing those charges and from participating in the trial.

State ex rel. Murphy v. Burney, 269 Mo. 602, 191 S.W. 981, is to the effect that an officer preferring charges could sit on the trial board at the hearing of those charges. This conclusion seems to be based on the opinion of the court that in conducting the trial the board of commissioners acted in an administrative rather than in a judicial or quasi-judicial capacity.

In Hawkins v. Common Council, 192 Mich. 276, 158 N.W. 953, 957, Ann.Cas. 1917E, 700, it appears that a committee of the common council had preferred charges against a city treasurer with the view of removing him from office. The court announced, as a general rule, that the fact that the charges were prepared by this committee did not disqualify its members from sitting as members of the common council during the trial of the charges. This is followed by the statement that it is essential that those councilmen sitting at the trial "be qualified to act fairly and impartially, without prejudice, personal interest, or ill feeling towards the accused". The order of the common council removing the treasurer from his office was annulled, one of the grounds of annulment being that during the hearing three councilmen showed bias and prejudice against the accused. In weighing the effect of this case it should be observed that the total number of councilmen and the total number on the committee preferring the charges does not appear. Thus the applicability of the rule of necessity, to which we will shortly advert, cannot be determined.

In the case of Rutter v. Burke, 89 Vt. 14, 93 A. 842, it was held that a city council exercised judicial or quasi-judicial functions when hearing and passing upon

charges against a city employee; that the mayor who filed the charges and prosecuted them as required by the law of Vermont, was not disqualified from sitting as a member of the trial board because he was also the accuser and prosecutor; that his conduct in his capacity as juror and judge must have been free from bias and prejudice. The order of the council dismissing the employee was annulled.

[1] It is settled in California that local boards (not boards of statewide authority) may act in a judicial capacity as a quasi-judicial body. Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St.Rep. 17; Croly v. Board of Trustees of City of Sacramento, 119 Cal. 229, 51 P. 323; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Rigdon v. Common Council, 30 Cal.App. 107, 157 P. 513; Norman v. Cogswell, 82 Cal.App. 159, 255 P. 251; Bayside Land Co. v. Dolley, 103 Cal.App. 253, 284 P. 479. In the Croly case it was held that when a board of trustees sits at the hearing of charges against a city officer the board is acting in a quasi-judicial capacity. Garvin v. Chambers, 195 Cal. 212, 232 P. 696, is to the same effect.

[2] In Quinchard v. Board of Trustees, 113 Cal. 664, 45 P. 856, 857, it is said: "The distinction between a judicial and a legislative act was pointed out by Field, J., in the Sinking Fund Cases, 99 U.S. [727], 761 [25 L.Ed. 504], as follows: 'The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.' "

In Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780, 782, it was said: "It does not follow, however, that where the Legislature delegates such power to a local board, and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board after a notice and hearing to parties interested, that the proceeding thus authorized is not of a judicial character. Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them. In Robinson v. Board [of Sup'rs], 16 Cal. 208, the court says: 'It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially whatever may be their public character.' There are many decisions to the same effect. People v. Supervisors, 8 Cal. [58], 61; People v. Supervisors, 10 Cal. 344; El Dorado [County] v. Elstner, 18 Cal. [144], 149; Murray v. Board [of Sup'rs], 23 Cal. [492], 494; Miller v. Board [of Sup'rs], 25 Cal. [93], 97; Keys v. [Board of Sup'rs of] Marin [County], 42 Cal. [252], 254; Smith v. Strother, 68 Cal. [194], 196, 8 P. 852; Wulzen v. Board, 101 Cal. [15], 24, 35 P. 353, 40 Am.St.Rep. 17. Where in a proceeding before such a board a public notice is required to be given, and a hearing of objections or protests to the contemplated action is provided for, and the order to be made thereon is one which affects the property or rights of the citizen, the proceeding is usually held to be judicial and subject to be reviewed on certiorari."

Petitioner was removed from office upon charges filed and an order made by Homan under the charter of the city of Fresno. He filed a denial of the charges and it then became the duty of the city commissioners to set the cause for hearing, take evidence and determine the truth or falsity of the charges. If Nider be found not guilty it will be the duty of the commissioners to reinstate him in his office.

[3] Under the decisions already cited it would seem clear that the City Commission will act in a judicial capacity in conducting the hearing, in making its findings on the evidence produced and in pronouncing its judgment. See Garvin v. Chambers, supra. It follows that little weight can be given here to those cases from other jurisdictions holding that a member of the trial board who filed charges to be tried is not disqualified to sit on the board during the trial because the board acts in an administrative and not in a quasi-judicial capacity.

The Michigan and Vermont cases which uphold the right of the accuser to sit during the trial were also firm in enforcing the rule that such member of the trial board must act fairly and impartially and without any bias against the accused. These cases go no further than holding that the filing of the charges is not in itself sufficient evidence of bias or prejudice of the accuser to disqualify him from sitting on the trial board. Thus they merely announce rules of evidence prevailing in those states.

[4] The general rule adopted in a majority of jurisdictions is called the rule of necessity. It is thus stated in 39 A.L.R., page 1476: "By the great weight of authority, a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding." The numerous cases there cited fully sustain the text.

This rule of necessity has been adopted in California. Federal Construction Co. v. Curd, 179 Cal. 489, 177 P. 469, 2 A.L.R. 1202.

In a majority of the states it is held that where a board or commission exercises quasi-judicial functions in the trial of charges filed by a member against another, and where the absence of the accuser does not destroy the power of the board to try the charges, the rule of necessity does not apply and the accuser may not sit during the trial. 39 A.L.R. 1479, et seq., and cases cited.

Respondents rely upon the case of People ex rel. Burby v. Common Council, 85 Hun 601, 33 N.Y.S. 165, where it was held that the filing of an accusation by a member of the council did not disqualify him from sitting and acting on that body during the trial of the charges. The rule announced in that case no longer prevails in New York. People ex rel. Pond v. Board of Trustees of Village of Saratoga Springs, 4 App.Div. 399, 39 N.Y.S. 607; Wilcox v. Supreme Council, 210 N.Y. 370, 104 N.E. 624, 52 L.R.A.,N.S., 806; People ex rel. Hayes v. Waldo, 212 N.Y. 156, 105 N.E. 961. The present rule in New York is thus stated in the fairly recent case of Eigo v. Wheeler, 248 App.Div. 53, 289 N.Y.S. 34, 39, as follows:

" 'Where it is so provided by statute and it is necessary for a person either individually or as a member of a board to act in a judicial capacity to prevent injustice and to maintain reasonable discipline in the department of which he is a member, the action of such person should be and is upheld although it results in his being both accuser and judge or passing upon a question of fact about which he has personal knowledge.

" 'When it is not necessary so to act, the opposite rule should and does prevail.' "

The following cases also support those already cited which disqualify the accuser from sitting on the trial board under circumstances where the rule of necessity does not apply: State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317, 40 L.R.A. 317, 67 Am.St.Rep. 706; State ex rel. Miller v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470; State ex rel. La Crosse v. Averill, Tex.Civ.App., 110 S.W. 2d 1173; Stockwell v. Township Board of White Lake, 22 Mich. 341; Metsker v. Whitesell, 181 Ind. 126, 103 N.E. 1078; Craft v. Davidson, 189 Ky. 378, 224 S.W. 1082; State v. Crane, 36 N.J.L. 394.

While we know of no California case deciding the question before us, there is some dicta on it.

In Grosjean v. Board of Education, 40 Cal.App. 434, 181 P. 113, 116, the superintendent of schools of San Francisco filed charges against Grosjean which were heard by the school board of which the superintendent was ex officio a member. Concerning his disqualification to sit on the trial board the court remarked: "Such an objection might in a proper case prove effectual", but that such disqualification could not be urged in that case because the school superintendent "did not in fact sit or act as a member of the board, in the final determination thereon."

In Butler v. Scholefield, 54 Cal.App. 217, 201 P. 625, charges were filed against Butler, county engineer, seeking to have him removed from office. It was the duty of the board of supervisors, of which Scholefield was a member, to hear and pass on the charges. Butler sought a writ of prohibition to prohibit the supervisors from hearing the charges, alleging, among other things, that Scholefield, a member of the board, had procured the filing of the charges by Ford P. Gage and Maurice Leavitt. A demurrer to the petition was sustained and the writ denied. The correctness of this decision cannot be questioned. A writ of prohibition can only issue when a board is acting quasi-judicially without or in excess of its jurisdiction. Section 1102, Code Civ.Proc.; Croly v. Board of Trustees of Sacramento, supra; Whitten v. California State Board, 8 Cal. 2d 444, 65 P.2d 1296, 115 A.L.R. 1. Without Scholefield there were four members of the board of supervisors qualified and with jurisdiction to act. The disqualification of Scholefield could not affect that jurisdiction. It is obvious that any re-

marks by the court on Scholefield's disqualification were pure dicta.

The case of Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073, involved charges that one member of the respondent board which revoked Dyment's license to practice medicine was prejudiced against Dyment. It does not appear who preferred the charges. A demurrer to the petition for a writ of certiorari was properly sustained. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P. 2d 119; Drummey v. State Board, Cal. Sup., 87 P.2d 848. While in the Dyment case the court discussed the question of disqualification of a member of the board because of prejudice a determination of that question was not necessary for a decision of the case. Furthermore, it did not appear in that case as appears here that a member of the board had filed charges against Dyment.

In discussing the applicability of the rule of necessity, the Supreme Court in Federal Construction Co. v. Curd, supra, said [179 Cal. 489, 177 P. 471]: "Conceding it to be true, as a rule of ethics, that no person or body of persons should sit in judgment in cases and proceedings in which they are interested parties, and conceding, also, that it has been frequently and properly held that the attempted violation of this ethical rule by persons presiding over causes triable in the ordinary courts of justice amounts to a denial of due process of law to those who are injuriously affected by such denial, yet, to this there are certain exceptions which are said to spring from the necessity of the situation. The statement in general terms of the principle underlying these exceptions is to be found thus stated in 23 Cyc. 581: 'Where disqualification if permitted to prevail destroys the only tribunal in which relief may be sought, and thus effectively bars the doors of justice, the disqualified judge is bound to hear and decide the cause.'"

[5] The City Commission of the City of Fresno has five members. The charter provides (sec. 9, art. 2) that "A majority of all members shall constitute a quorum to do business." It is therefore apparent that there are four members of the commission (exclusive of Homan) who are qualified and who may conduct the hearing on the charges preferred against Nider. Therefore no occasion arises for invoking the rule of necessity here.

Were Homan permitted to sit on the commission during the trial he would appear in the capacities of a complaining witness who filed the charges, a juror to weigh the evidence, and a judge to pass sentence. Thus he would be more than a judge sitting on his own case. Good ethics should not permit him to occupy those positions. We have no hesitancy in holding that under the facts before us he is not qualified to do so.

[6] On the record before us we do not feel called upon to decide the question of whether, because of lapse of time, the order of Homan removing Nider from his office has become void and the latter has been restored to his official position, and whether, consequently, William Glass as commissioner of finance of the city of Fresno should draw his warrant for pay accruing since his removal. We may discharge this portion of the writ. Holtum v. Greif, 144 Cal. 521, 78 P. 11. We conclude that Nider should receive a prompt trial of the charges filed against him and that no sufficient reason has been shown why the City Commission of the City of Fresno should not forthwith set those charges for trial.

It is ordered:

(1) That the portion of the alternative writ of mandate directed to F. A. Homan requiring him to reinstate Gerald K. Nider to the position of city physician of the city of Fresno, and to William Glass to pay Nider his salary accrued since his removal from office or to show cause why either or both of said acts should not be done, is dismissed and discharged without prejudice.

(2) That a peremptory writ of mandate issue to the City Commission of the City of Fresno requiring that body to determine and fix a date for the hearing and trial of the charges filed by F. A. Homan against Gerald K. Nider as prayed for.

We concur: BARNARD, P. J.; GRIFFIN, J.

32 Cal.App.2d 26

PEOPLE v. FISK et al.

Cr. 3164.

District Court of Appeal, Second District, Division 1, California.

March 30, 1939.

1. Criminal law ⇐238

The doctrine of reasonable doubt applies to a judgment of conviction, but slight evidence is sufficient to justify an order of a magistrate holding an accused to answer to the superior court.

2. Criminal law ⇐327

An accused is not required to prove his innocence.

3. Gaming ⇐98(5)

In prosecution for keeping a room with documents for purpose of registering bets on horse races, tried to the court, where defendant testified that he was merely using a telephone at the place and, though there were many persons present, none of them appeared as witnesses, nor did trial court resort to statutory provisions with a view to effective ascertainment of the truth, conviction was required to be reversed. Pen.Code, § 337a, subd. 2; §§ 1044, 1100.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Alfred Fisk, John Keyes, Jack L. Lewis and Mike Seals were charged with keeping a room with books and papers for the purpose of recording and registering bets upon the result of horse races. From a judgment of conviction as to defendant Jack L. Lewis, he appeals.

Reversed and remanded for a new trial.

Emanuel & Klein, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DORAN, Justice.

This is an appeal from a judgment of "Guilty" and from an order denying defendant's motion for a new trial.

Briefly, the facts are as follows: Appellant, together with three codefendants, was accused in an information filed by the district attorney with keeping a room with books and papers for the purpose of recording and registering bets upon the result of horse races, in violation of section 337a of the Penal Code.

At the trial in the superior court a jury was duly waived by the four defendants, including appellant, whereupon it was stipulated that the issue should be submitted upon the transcript of the evidence adduced at the preliminary examination.

The transcript of the evidence heard by the committing magistrate reveals that only two witnesses testified at the hearing, namely, police officer Flannery and police officer Kolhoff.

Officer Flannery testified, in substance, that he found Fisk, appellant's codefendant, back of a counter at the end of a room about 30 feet long by 15 feet wide, within which room a number of people were congregated; that he saw some of the occupants in the room handing Fisk money; that he heard one of these occupants say to Fisk: "I want to bet one dollar to win on 'High Most' in the fourth race at Hollywood"; that appellant Lewis was sitting behind the counter at the other end thereof making notes on a piece of paper resembling what was introduced in evidence and marked as Exhibit "B".

Officer Kolhoff testified, in substance, that when he entered the room he saw Lewis behind the counter telephoning; that he arrested Lewis and Fisk, whereupon Lewis grabbed the money box or drawer, which contained $35.05; that he saw Lewis, who was in his shirt-sleeves, remove his coat from a coat-hanger.

Certain documents were also received in evidence at the preliminary hearing, none of which were explained or described in the record of the preliminary, or at the trial.

After the trial judge had read the transcript of the evidence given at the preliminary hearing above described, a motion to dismiss by defendants' counsel was granted as to two of appellant's codefendants who were thereupon adjudged "Not Guilty." The defendant Fisk and the appellant Lewis then testified. Defendant Fisk testified that he, Fisk, was in charge of the "place"; that appellant Lewis was not employed there and had nothing to do with the operation of the establishment; that appellant Lewis had merely stepped back of the counter at the end to use the telephone when the

officers appeared. He further testified that the money drawer was kept under the counter in front of him, and was not visible.

Appellant Lewis testified, in substance, that he was merely a visitor in the place and had stepped back of the counter to use the telephone; that he had taken his coat off and had held it across his arm because it was warm. He denied that he had seized the cash drawer, or that he had ever seen it.

At the close of the evidence the following occurred:

"The Court: Now, so far as Lewis is concerned, Mr. Emanuel, all this does is to put in sharp issue the testimony of the officers and the testimony of the defendant Lewis, supplemented by Fisk. One or the other is not telling the truth, because the officers testified that not only was Lewis standing behind the counter and made a grab for the money box, but that he took a coat from a hanger from the back room. They asked the defendant Lewis how it happened that he had a coat hanging in the back room and he stated he did not know. He took a package of tickets out of the money box. They asked him how it happened he is authorized to go to that box. He said he did not know, he said he did not work there, said he was not running a book.

"Mr. Emanuel (Counsel for Defendants): If your Honor please, I will admit that there is a conflict in the testimony, but the evidence in my opinion is very weak to arrest a man merely because he happens to be in a place and to charge him with running it and maintaining it; it seems to me you should connect the party up closer than that. If somebody were taking bets at that desk and they came in and arrested me for standing there it does not seem fair or just that they could sustain a conviction.

"The Court: Manifestly they did not do that. These defendants stated there were a great many people in there and even with two of the men they did bring in they did not pad their case any, they did not show enough evidence which could justify holding them, while probably they did have something to do with the case, but I think the evidence is insufficient.

"Mr. Emanuel: There was no evidence against these two men even to bind them over, they were arrested outside of the place. Now, as far as the defendant Lewis is concerned, the only basis is that he was using the phone and they claim his coat was behind the counter. Now, is that sufficient?

"The Court: That is not all there is, Mr. Emanuel. There is the failure to explain, had he been innocent, why his coat was hanging there, and the access to the money box. Now, if we believe those things there is much more than you say.

"Mr. Emanuel: If we take everything the prosecution says and believe it 100 per cent., all that we have is a man standing behind the counter using the telephone, and his reaching for the money box. Now, if we believe everything in its entirety it is not enough to sustain a conviction.

"The Court: What is the reaction of the parties in a place like that? They generally scramble for the door. They do not help the right defendant out by getting his money box.

"Mr. Emanuel: I do not think they let them scramble for the door, they generally have somebody at the door.

"The Court: I have read in the newspapers they climb out of windows and any way to get out.

"Mr. Emanuel: Well, I think that there has been no proof beyond reasonable doubt in this case and that the defendant is entitled to the benefit of the doubt.

"The Court: Mr. Emanuel, I have a very great respect for your judgment, but I cannot always agree with you, unfortunately for you.

"Mr. Emanuel: Certainly on this case, because I dislike to see a conviction on evidence so slight as this, it appears to me that you could sustain a conviction with almost anything, there is no connection between the defendant and this case.

"The Court: Maybe I had better read the evidence over as to these other men.

"Mr. Emanuel: I wish you would, they picked the defendants at random out there, they picked a man that was out in the street, they picked up the janitor because he had a key that fitted the front door. He explained to them that he came there in the morning and cleaned the place, and it is the same with this defendant, he happened to be using the telephone there, so he is guilty of owning the place. If he had been fortunate enough to have been reading a form sheet he would have been an ordinary bettor,

but the fact that he was using the telephone was sufficient to connect him with the place.

"The Court: It is the judgment of this court that the defendants Fisk and Lewis are and each of them is guilty of the offense charged, to wit, the crime of violation of subdivision 2, section 337a, Penal Code, a felony."

[1] As can be seen from the foregoing, the trial was rather a listless affair and although technically complete, nevertheless, from the viewpoint of one disposed to be more thorough, left much to be desired. There is a great difference between the legal requirements with regard to what evidence is necessary to justify the order of a magistrate in holding a defendant to answer to the superior court, and that which is necessary to support a judgment of "Guilty". The doctrine of reasonable doubt applies to the latter, whereas but slight evidence is sufficient to justify the former. To be accused of, and placed on trial for, a felony manifestly cannot be regarded as a trivial matter, and the perfunctory disposition of such an action can scarcely be said to be in accord with that form usually followed and recognized in connection with the administration of justice. Nor can the conviction of a felony be judicially regarded as a mere experience of no consequence in the ordinary course of events.

Section 1044 of the Penal Code provides as follows: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

In that connection section 1100 of the Penal Code provides: "When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant."

Section 1099 of the Penal Code is as follows: "When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people."

[2] Although officer Flannery testified at the preliminary examination that at the time of appellant's arrest there were "thirty or sixty" persons present in the room, none appeared as witnesses at the trial. Nor were the above mentioned provisions of the Penal Code resorted to "with a view", at least to some extent, "to the expeditious and effective ascertainment of the truth". In that regard, it should be noted that a defendant in a criminal action is not required to prove his innocence.

The evidence is not sufficient to sustain the judgment; therefore the judgment and the order denying the motion for a new trial are reversed, and the cause is remanded for a new trial.

We concur: YORK, P. J.; WHITE, J.



STORY v. CHRISTIN et al.*

Civ. 11997.

District Court of Appeal, Second District, Division 2, California.

March 28, 1939.

Hearing Granted by Supreme Court May 26, 1939.

1. Pleading ⇐428(6)

An objection to introduction of any evidence on ground of insufficiency of complaint should be determined upon same principles as general demurrer.

2. Pleading ⇐428(6)

All facts alleged in complaint are assumed as true on objection to introduction of any evidence on ground of insufficiency of complaint.

3. Pleading ⇐428(6)

On objection to introduction of any evidence on ground of insufficiency of complaint, grounds of special demurrer are deemed waived, and defensive matter pleaded in answer is not considered.

4. Fixtures ⇐4

The intention of parties is controlling in determining whether article affixed to

*For subsequent opinion see 95 P.2d 925.

land is a "fixture" and part of realty, or is personalty.

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

5. Fixtures ⇐35(2)

An amended complaint alleging that vendor and purchaser under land contract intended that nursery trees should not become permanently annexed to realty but should remain personal property of purchaser, and seeking damages for vendors' conversion of nursery trees, stated a cause of action.

6. Pleading ⇐428(6)

In action by purchaser under land contract for damages for vendors' conversion of nursery trees, admission of purchaser's attorney, that written contracts did not state whether nursery trees were personal property, did not render inapplicable the rule that allegation in complaint that parties intended trees to remain personal property would be assumed to be true for purposes of objection to introduction of any evidence on ground of insufficiency of complaint.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles W. Story against Estelle Porter Christin and Charles A. Christin, her husband, for damages for conversion of personal property. From a judgment for the defendants, the plaintiff appeals.

Reversed.

Clyde C. Shoemaker, of Los Angeles (Winthrop O. Gordon, of Los Angeles, of counsel), for appellant.

Guthrie & Darling, of Los Angeles, and Charles A. Christin, of San Francisco, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the trial court's sustaining an objection to the introduction of any evidence on the ground that the complaint as amended failed to state a cause of action in a suit to recover damages for the conversion of personal property, plaintiff appeals.

So far as material here the complaint as amended alleged:

"That during all the times herein mentioned the defendant Estelle Porter Christin was the owner of the legal title of the land hereinafter particularly described; that on or about the 17th day of February, 1922, the defendant Estelle Porter Christin, as vendor, made and entered into an agreement in writing with the plaintiff, as vendee, wherein and whereby the defendant agreed to sell and convey unto said plaintiff, and said plaintiff agreed to buy from said defendant, all that certain tract of land situated in the County of Los Angeles, State of California, and bounded and particularly described as follows, to-wit: (Description of real property.) for the purchase price of ninety-eight thousand eight hundred eighty-five dollars ($98,885.00) payable on or before five (5) years after June 1, 1922. That at the time said agreement was made said plaintiff was already in the possession of said described real property as a tenant under a lease from said defendant, and said plaintiff, from and after the date of said agreement of purchase was actually in the possession of said described real property, and thereafter set out said property to citrus trees and walnut trees, and cultivated, irrigated and farmed said premises, and grew and raised on said property, and removed therefrom, various crops, together with nursery stock consisting of small Valencia orange trees and walnut trees, and sold and removed nursery stock from said premises from time to time, all with the knowledge of said defendants.

"That thereafter, to-wit, on or about the 8th day of June, 1927, said plaintiff made and entered into another agreement in writing with said defendant Estelle Porter Christin, wherein and whereby the term of said agreement dated February 17, 1922 was extended for an additional period of three (3) years, and wherein and whereby said defendant agreed to sell and convey to said plaintiff and said plaintiff agreed to buy from said defendant all of said described parcel of land for the purchase price of one hundred thousand dollars ($100,000.00) payable on or before three (3) years after June 1, 1927, and that said agreement last mentioned was an extension of the term of said former agreement of February 17, 1922, and was made and entered into by way of substitution and took place of said former agreement of February 17, 1922. That said plaintiff had been continuously in actual possession of said described land under said former agreement of February 17, 1922, and was in

actual possession of and farming and cultivating said land, as aforesaid, at the date of said subsequent agreement, to-wit, June 8, 1927, and that on the 8th day of June, 1927, and when said subsequent agreement was made, and during all the times herein mentioned until on or about January 25, 1929 said plaintiff was occupying, cultivating and farming said described land and was growing and producing thereon, and removing therefrom and selling various crops from time to time, including nursery stock, consisting of small orange trees set closely together, and planted for the purpose of being removed and marketed, all with the knowledge and consent of said defendants.

"That thereafter on or about the 25th day of January, 1929 and at all times thereafter, the said defendants wrongfully and unlawfully prevented the plaintiff from removing from said described real property, and wrongfully and unlawfully withheld and detained from the possession of plaintiff, and said defendants wrongfully and unlawfully converted to their own use the following described property, to-wit, nursery stock and nursery trees, consisting of orange trees, planted closely together in rows on said real property, to-wit:

"(1) 9,000 Valencia orange buds, approximately one (1) year old.

"(2) 4,000 Washington navel orange buds.

"(3) 12,000 orange seedlings, budded with Valencia orange buds, still dormant.

"(4) 4,500 orange seedlings, budded with Washington navel orange buds, still dormant.

"(5) 1,500 orange seedlings, approximately one (1) year old, unbudded.

"That all of said described nursery stock and nursery trees up to said time, to-wit, January 25, 1929, were in the possession of the plaintiff, and the said plaintiff had the right of possession of said nursery stock and nursery trees, and the said nursery stock and nursery trees had been planted and grown upon said described property by the plaintiff under his occupancy of said premises by virtue of his aforesaid agreement of purchase and while in possession of said premises as vendee under said agreements. That all of said nursery stock and nursery trees were planted and grown upon said premises by the said plaintiff as a part of the operation by him of a general nursery business; that all of said nursery stock and nursery trees were planted and grown in the manner customary in the general operation of a nursery business in that they were planted closely together and in rows and in such close proximity to each other that at all times it was impossible for the said trees to remain in said position and condition more than for a short period, and thereafter develop and become a part of a producing orange orchard; that said trees were planted as herein set forth, with the intention and with the purpose, as defendants herein well knew, that after a short period of time they would be removed, marketed and sold; that many of said trees at the time of said conversion by said defendants had been contracted to be sold by the plaintiff to various third parties and had been sold by the plaintiff on future delivery to third parties; that plaintiff at the time of said conversion was endeavoring to sell the remainder of said nursery stock and nursery trees in the open market; that none of said trees as planted and standing upon the premises at the time of said conversion were ever intended to be any part of an orchard situated on said premises, and that the only purpose and intention of planting and growing said nursery trees as they were then situated was that they might be developed sufficiently to become saleable as a marketable chattel; that the said defendants and each of them, during all of said times, had full knowledge of all the facts and matters hereinbefore alleged, and the said defendants at all times understood the said purpose and had knowledge of said intention of the plaintiff, as previously set forth in this paragraph, in planting and growing said nursery stock and nursery trees, and consented to the planting, growing, removing and sale of the said nursery trees and nursery stock upon and from said property, as hereinbefore alleged, and that all of the parties hereto understood and intended that said nursery trees should not become permanently annexed to said real estate and should remain the personal property of plaintiff herein, and that the same should be removed and sold to various third parties and thereafter transplanted for the purpose of being later set out in orchards; that plaintiff is informed and believes and therefore states, that the said defendants had knowledge of and consented to the aforesaid sales and contracts of sale of the said nursery stock and nursery trees at the time of said conversion.

"That the plaintiff on or about the said 25th day of January, 1929, and thereafter notified said defendants that they were wrongfully withholding and retaining possession of all of said described nursery stock and nursery trees, and demanded that said defendants immediately deliver all of said nursery stock and nursery trees to the plaintiff, or permit the plaintiff to take and remove the same from said premises, but that said defendants, and each of them, at all times failed and refused to comply with any such demand on the part of the plaintiff, and the defendants thereafter wrongfully took possession of and appropriated all of said described nursery stock and nursery trees, and wrongfully converted the same to the defendants' own use, to the damage of the plaintiff in the sum of twenty-seven thousand dollars ($27,000.00), and that at all of said times the plaintiff was the owner and entitled to the possession of all the aforesaid nursery stock and nursery trees; that the value of said nursery stock and nursery trees at said time was said sum of twenty-seven thousand dollars ($27,000.00).

* * * * * *

"That by reason of the aforesaid wrongful acts of the defendants, the plaintiff has suffered and sustained damages in the sum of twenty-seven thousand one hundred dollars ($27,100.00), no part of which has been paid.

"Wherefore, the plaintiff prays judgment against the defendants, and each of them, for the sum of twenty-seven thousand one hundred dollars ($27,100.00), together with interest at the rate of seven (7) per cent per annum from January 25, 1929, and for costs of suit and for general relief."

This is the sole question to be determined:

Did the complaint as amended state a cause of action?

This question must be answered in the affirmative, and is governed by these pertinent principles of law:

[1-3] (1) In ruling upon an objection to the introduction of any evidence upon the ground that a complaint fails to state facts sufficient to constitute a cause of action, the same rules are applicable as in ruling upon a general demurrer, to-wit: (a) All the facts alleged in the complaint are assumed as true for the purposes of the objection, (b) grounds of special demurrer are deemed waived, and (c) defensive matter pleaded in the answer is not considered. Tucker v. Howe, 139 Cal.App. 161, 162, 33 P.2d 1055; Venturi v. Zurich General A. & L. Co., 14 Cal.App.2d 89, 90, 57 P.2d 1002.

[4] (2) The intention of the parties is controlling in determining whether an article affixed to land is a fixture and part of the realty or is personalty. Southern California Telephone Co. v. Board of Equalization, Cal.Sup., 82 P.2d 422.

[5] Applying the foregoing rules to the pleading in the instant case, it is apparent that, for the purpose of ruling upon the objection, the trial court was bound to assume that the parties intended the trees and nursery stock planted in the ground to remain personal property, since it is alleged in the pleading, among other things, as follows: "That all of the parties hereto understood and intended that said nursery trees should not become permanently annexed to said real estate and should remain the personal property of plaintiff herein".

Had plaintiff introduced substantial evidence to sustain the foregoing allegation and the other material allegations of the complaint, the trial court could properly have made findings that would have supported a judgment in favor of plaintiff as prayed.

[6] There is no merit in defendants' contention that plaintiff's attorney made an admission at the time of the trial which now precludes plaintiff from relying upon the foregoing rules of law. During the course of argument the following colloquy took place between the court and counsel for plaintiff:

"The Court: I would like to ask counsel for plaintiff one thing in connection with the statement of what he expects to prove. Is there any written agreement between the parties which you expect to introduce in evidence which gives the plaintiff the right to remove the nursery stock after a forfeiture?

"Mr. Shoemaker: No. The written contracts were the contracts referred to, the contracts of purchase and sale.

"The Court: There is nothing in those contracts which refers to the right of removal, one way or the other?

"Mr. Shoemaker: That is right, Your Honor."

The above conversation at best constituted but an admission by plaintiff's counsel that there was no mention in the written contracts of the parties as to whether or not the trees and nursery stock were to be deemed personal property. For aught that appears from the record there may have been an oral agreement between them in conformity with the allegation in plaintiff's pleading. If this were true, proper proof thereof would support a finding that the parties had agreed that the property in question should be considered as personal property.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



31 Cal.App.2d 734

TAYLOR v. BOARD OF EDUCATION OF CITY OF SAN DIEGO.

Civ. 2307.

District Court of Appeal, Fourth District, California.

March 28, 1939.

Hearing Denied by Supreme Court May 26, 1939.

1. Schools and school districts ⇐21, 150

School districts are "political subdivisions" of the state and all children resident in the state may take advantage thereof.

[Ed. Note.—For other definitions of "Political Subdivision," see Words & Phrases.]

2. Statutes ⇐149

A legislative enactment which would, if construed to be a contract, limit or extinguish the power of the government completely to control the subject matter of the enactment, will not be so construed unless the legislative intent to create a contract clearly appears, and all doubts must be resolved in favor of the continuance of the power of the government.

3. Statutes ⇐149

An agreement requiring the surrender or suspension of legislative control will not be raised by mere implication.

4. Schools and school districts ⇐133

Tenure of school teacher is statutory and not contractual. School Code, § 5.500 et seq.

5. Schools and school districts ⇐133

There is no contractual relationship between school teacher and the state of California.

6. Schools and school districts ⇐136, 141(1)

The tenure provisions of school law do not become a part of a teacher's contract of employment, but rather are restrictions upon the power of school district to dismiss a teacher after he has been employed under specified conditions for certain length of time. School Code, § 5.500 et seq.

7. Schools and school districts ⇐133

The Legislature has plenary power over teacher tenure, there being no constitutional provisions in any way limiting that power. School Code, § 5.500 et seq.

8. Schools and school districts ⇐133

A teacher's permanent tenure under School Code is not protected by federal constitution. U.S.C.A.Const. art. 1, § 10.

9. Schools and school districts ⇐133

The Legislature has reserved to itself the power at any time to make amendments to permanent tenure laws. School Code, § 5.406.

10. Schools and school districts ⇐133

The amendment of teacher's permanent tenure law by statute providing for the termination of permanent tenure of teachers reaching the age of 65 years is fair and reasonable. School Code, § 5.505 as added by St.1935, p. 1881.

11. Constitutional law ⇐102(1), 140(1) Schools and school districts ⇐133

Statute providing for termination of permanent tenure of teachers reaching age of 65 does not unconstitutionally impair obligation of contract for permanent tenure, nor deprive teacher of vested rights of permanent tenure. School Code, § 5.406 and § 5.505, as added by St.1935, p. 1881; § 5.504, as added by St.1931, p. 1395; Gen.Laws 1931, Act 5151; Const.Cal. art. 1, § 16; U.S.C.A. Const. art. 1, § 10.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceedings on the petition of D. P. Taylor for a writ of mandate against the Board of Education of the City of San Diego, to review the respondent's action in terminating the tenure status of the petitioner as a permanent certified employee of school district. From a judgment dismissing the petition, the petitioner appeals.

Affirmed.

Stearns, Luce, Forward & Swing and Albert J. Lee, all of San Diego, for appellant.

James B. Abbey, Dist. Atty., and Bertram McLees, Jr., Deputy Dist. Atty., both of San Diego, for respondent.

GRIFFIN, Justice.

Petitioner and appellant was 65 years of age prior to May 1, 1938. He was first elected to teach in the San Diego City High School August 23, 1918, without limitation as to time of service and has continuously served as a teacher of mathematics in said high school ever since his first election. At the time of his first election he held a valid certificate issued by the San Diego County Board of Education entitling him to teach in secondary schools and in 1922 his certificate never having been revoked, he was issued a life diploma.

High schools have been secondary schools of the state of California since prior to 1918, and for that period of time the San Diego City High School District has been governed by a city board of education and has had a personnel which has caused appellant to be classified as a permanent employee of the San Diego City High School District (now the San Diego Unified School District) since the tenure provisions of the school law were incorporated into section 1609 of the Political Code by amendment in 1921, St.1921, p. 1664.

The city of San Diego was a city of the second and one-half class in 1918, and a city of the second and one-fourth class in 1921 (Classification Act, Stats.1883, p. 24, as amended by Stats.1911, p. 476, and Stats.1921, p. 1654; Deering's Gen. Laws, Act 5151.)

Deductions have been made from appellant's salary as a teacher of the San Diego City High School in accordance with the Teachers' Retirement Law of 1913 (Stats. 1913, p. 1423) ever since he was first employed in that school.

Appellant was elected to serve as a half-time certified employee without tenure classification in the secondary schools of the San Diego Unified School District of San Diego County, California, for the school year of July, 1938, to June, 1939. No attempt has been made to terminate, suspend or reduce his employment for cause. His reduction to half-time service and the termination of his tenure classification has been undertaken pursuant to the provisions of section 5.505 of the School Code, as added by St.1935, p. 1881. There are no provisions of the charter of the city of San Diego providing for the age of retirement of certified employees of the San Diego Unified School District.

On filing the petition for writ of mandate, the parties stipulated that the ruling on the demurrer to be filed by respondent should be followed by a judgment granting the peremptory writ without filing an answer if the ruling was favorable to appellant, or vacating the alternative writ and dismissing the action without leave to amend the complaint if the ruling was in favor of respondent. It was further stipulated that an appeal might be immediately perfected and that the record on appeal should consist of the stipulation, the amended petition, the alternative writ, the demurrer on file, and the judgment of the court sustaining the demurrer dismissing the petition and discharging the alternative writ. In accordance with the stipulation the respondent Board of Education of the San Diego Unified School District demurred to the petition on the ground that the petition did not state facts sufficient to constitute a cause of action. The court entered judgment as follows:

"The demurrer herein having been presented to the court under a stipulation that the petition as amended contains a correct statement of facts and that the ruling of the court on said demurrer would be determinative of the issuance of the peremptory writ prayed for in said complaint, argument on said demurrer having considered the constitutionality of section 5.505 of the School Code in terminating the tenure status of permanent certified employees of school districts of the age of 65 years with particular reference to the rights of such employees under provisions of section 10, article 1, of the Constitution of the United States, U.S.C.A. and section 16 of article 1 of the Constitution of the State of California, the court having been

fully advised in the premises and having concluded that said section 5.505 of the School Code terminating the tenure status of petitioner as a permanent certified employee of the San Diego Unified School District of San Diego County, California, was constitutional;

"It is therefore ordered, adjudged and decreed that the demurrer of respondent to petitioner's amended petition be and the same is hereby sustained without leave to amend; that the petitioner take nothing by this action; that the issuance of a peremptory writ of mandate in the above proceeding be and the same is hereby denied; and that the alternative writ of mandate heretofore issued be and the same is hereby discharged."

From this judgment appellant has perfected this appeal. The question may be thus stated: Does section 5.505 of the School Code, effective September 1, 1937, terminating the permanent tenure of teachers, reaching the age of 65 years violate any of the provisions of the Constitution of the State of California or the Constitution of the United States? Section 5.505 of the School Code provides as follows: "Excepting in districts situated within, partly within, or coterminous with the boundaries of a city, or city and county, where the charter, if any, of such city, or city and county provides an age at which employees, including certificated employees of such districts, shall be retired, when a permanent employee reaches the age of sixty-five years, or if a permanent employee has reached the age of sixty-five years, the permanent classification of such employee shall cease and thereafter employment shall be from year to year at the discretion of the governing board; provided that any certificated employee who is not reemployed under the provisions of this section, and who has not completed the requirements for full retirement salary, shall be deemed to have been retired on account of physical disability within the meaning of the provisions of this code relating to retirement of certificated employees of school districts. Provided that the effective date of this section shall be September 1, 1937."

It is to be noted that the legislature (Stats. 1937, p. 153) enacted a plan or method for adopting a pension and retirement system in the school districts throughout the state (section 5.1100 of the School Code), anticipating the effective date of section 5.-505. Davis v. County of Los Angeles, Cal. Sup., 84 P.2d 1034.

It is the contention of appellant that section 5.505 above quoted impairs the obligation of his contract for permanent tenure and also deprives him of vested rights of permanent tenure, in violation of section 16, article 1, of the Constitution of the state of California, and in violation of section 10 of article 1 of the Constitution of the United States, U.S.C.A.

Appellant, in support of his contention, insists that at the time of the enactment of section 5.505 of the School Code the status of petitioner was that of an "employee" and that the terms of the employment were fixed by contract, citing Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858; Martin v. Fisher, 108 Cal.App. 34, 291 P. 276; Anderson v. Board of Education, 126 Cal.App. 514, 15 P.2d 774, 16 P.2d 272; Cullen v. Board of Education, 126 Cal.App. 510, 15 P.2d 227, 16 P.2d 272, and claims that once such relationship existed, the law then in effect would enter into the contract and form a part of it, and accordingly the extent and limitations of the obligation of the contract must depend on the law out of which it arose, citing Flagg v. Sloane, 135 Cal.App. 334, 26 P.2d 874; Robinson v. Magee, 9 Cal. 81, 70 Am.Dec. 638; Rosenberg v. Janssen, 11 Cal.App.2d 15, 52 P.2d 952, 54 P.2d 721; Los Angeles County Flood Control District v. Wright, 213 Cal. 335, 2 P.2d 168. In Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029, 1035, this language is found: "The result of these enactments was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broad sense of being annexed by operation of law to the contract and have been said to be 'in the nature of a civil service regulation.'"

Appellant relies on the case of Lotts v. Board of Park Commissioners, 13 Cal.App. 2d 625, 57 P.2d 215, 220, in support of his assertion that if appellant has by reason of the infirmities of age or otherwise become inefficient or incapable of performing his usual duties as a teacher, his removal may be accomplished pursuant to the provisions of his contract and the statutory provisions annexed thereto and forming a part thereof, but to terminate his tenure on the ground of age alone

without a hearing as to his evident fitness is to act arbitrarily and "to vitiate and destroy every semblance of protection intended to be afforded by the spirit of" the teachers' tenure laws.

Section 5.505 of the School Code, added by the Statutes of 1935, page 1881, effective September 1, 1937, was enacted after the appellant in this case had acquired permanent tenure and retirement rights by operation of law and he claims for that reason that it would in no way affect his vested right to the enjoyment of that status. Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31; Klein v. Board of Education, 1 Cal.2d 706, 37 P.2d 74. As a part of the enactment referring to the teachers' tenure laws this provision is found: "5.504. Nothing in this article shall be construed as affecting any permanent employee classified as such at the time this section takes effect nor shall any decrease in the average daily attendance of any school district operate to deprive any permanent employee of the district of his classification as such." St.1931, p. 1395.

The purpose of this section is fully discussed in Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27, and has no particular bearing upon the facts in this case.

Appellant further claims that by reducing the services of appellant to half time without his consent is equivalent to dismissal, and therefore the offer of employment for half time at half his salary does not avoid the consequence of termination of tenure, citing Crawford v. Board of Education, 20 Cal.App.2d 391, 67 P.2d 348.

Respondent, in answer to appellant's contentions, claims that the contract of employment referred to created a "three-sided relationship". A teacher does not ordinarily have a contract of employment with the state of California but with the school district where he is employed. As stated in the case of Leymel v. Johnson, supra [105 Cal.App. 694, 288 P. 862]: "The contract of employment of a teacher produces the relation of employer and employee; the first, the board of education, and the second, the teacher * * *. Of course the powers of the board are limited by statutes, but does this fact alone render this employment under the state? We think not. * * * The statutes governing the employment, duties and privileges of the teacher are rules of contract and regulation defining the duties, privileges, and obligations of the profession."

[1] The teacher has all the powers of making employment contracts with the school district that many persons in private employment have, but the state does have an interest in the teacher's contract of employment. School districts are political subdivisions of the state and all children resident in the state may take advantage thereof. Consequently, the state has surrounded the contract of employment of the school district and the teacher with many more statutory restrictions and privileges than is true of most contracts.

Section 1793 of the Political Code, as amended in 1911, St.1911, p. 941, contained these provisions:

"The holders of city, or city and county, certificates are eligible to teach in cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this code, duly ascertained and approved by the boards of education of such cities, or cities and counties. * * *

"The holders of special city, or city and county, certificates are eligible to teach the special branches mentioned in their certificates, in the grades of all the schools in the city, or city and county, in which such certificates were granted, corresponding to the grade of said special certificates, and when elected, or assigned, shall be dismissed or removed only for insubordination or other causes, * * *."

These provisions have been construed in Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. The court there held that a teacher elected by a city board of education without limitation as to time, was entitled to hold the position while competent and faithful, and could only be dismissed for violation of the rules of the board of education, or for incompetency, or for unprofessional or immoral conduct. This holding was subsequently followed in Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26, and Klein v. Board of Education, supra. This rule has been discussed and held inapplicable under the facts related in Marion v. Board of Education, 97 Cal. 606, 32 P. 643, 20 L.R.A. 197; Stockton v. Board of Education, 145 Cal. 246, 78 P. 730; Barthel v. Board of Education, 153 Cal. 376, 95 P. 892; and Bradley v. Board of Education, 1 Cal.App. 212, 81 P.

1036, in which the holder of a special city certificate was held not within the rule of the Kennedy case, thereby confining the rule to holders of general certificates only.

In Loehr v. Board of Education, 12 Cal. App. 671, 108 P. 325, 327, it is stated: "Section 1793 [Political Code] confers the right of indefinite employment * * * this right is conferred only as an incident to the holding of a city certificate as distinguished from a county, state or special certificate."

[2, 3] Thus the rule of the Kennedy case has developed two definite conditions: first, it applies only to those teachers holding general city certificates issued after an examination by a city board of examiners. Second, it applies only to those persons whose contracts of employment are without limitation as to time. In these respects appellant does not fall within this rule. Sec. 1617, Pol.Code, as amended, Stats.1913, p. 1136; sec. 1791, Pol.Code, as amended, Stats.1915, p. 817. Section 1617 was amended and incorporated into section 1609 of the Political Code but the same restriction of duration of the terms of teachers' contracts existed in 1918, when appellant was employed by respondent. See Stats.1917, p. 735-738. The pertinent parts of section 1609 of the Political Code, as amended in 1921 (Stats.1921, p. 1664), and which subsequently were incorporated into the School Code in 1929, may be thus stated. In effect these sections provide that a school district may enter into a contract of employment with a certificated teacher for a period of one school year and will be deemed to continue to enter into such contracts unless the district properly notifies the teacher of the termination of the contract prior to the end of the school year; that if the district continuously employs a teacher for a prescribed number of years and does not dismiss the teacher at the end of that time, the district loses the power to dismiss the teacher and must continue to employ him unless he is removed for cause or the number of pupils decreases to the point where the personnel must be reduced or the branch of education he is teaching is discontinued. Nowhere does the law provide that this limitation on the power of the district to dismiss the teacher shall be part of his contract. Nowhere in the law is there any provision for the contract between the teacher and the State of California guaranteeing this permanency of tenure. Under well recognized principles of law, a legislative act which would, if construed to be a contract, limit or extinguish the power of the government completely to control the subject matter of the enactment, will not be so construed unless the legislative intention to create a contract clearly appears, and all doubts must be resolved in favor of the continuance of the power of the government. An agreement requiring the surrender or suspension of legislative control will not be raised by mere implication. 12 Am.Jur. 39.

No clearer indication of the legislative intent in the enactment of these tenure provisions with respect to the relinquishment of legislative control can be found than that contained in the last paragraph of section 1609 of the Political Code and now contained in section 5.406 of the School Code. This section provides: "All employments under the provisions of this Part shall be subordinate to the right of the Legislature to amend or repeal this Part or any provision or provisions thereof at any time, and nothing herein contained shall ever be held, deemed or construed to confer upon any person employed pursuant to the provisions hereof a contract which will be impaired by the amendment or repeal of this Part or of any provision or provisions thereof."

The "Part" referred to in section 5.406 is part 3 of division 5 of the School Code, in which part are contained the provisions of the code relating to the employment, qualifications, classification and dismissal of teachers. Not only is it clear from the statutes themselves that the legislature did not intend to relinquish jurisdiction over permanent tenure of teachers, but no cases have been cited in which the permanent tenure status has been held to be contractual. On the contrary, several California cases have specifically stated that tenure is a statutory and not a contractual status. McKee v. Edgar, 137 Cal.App. 462, 30 P.2d 999.

In Fidler v. Board of Trustees, 112 Cal. App. 296, 296 P. 912, 915, it is stated: "A distinction must be kept in mind at all times in consideration of the instant case between the right to permanent tenure of the office and the right to compensation during each year. * * * It is an important distinction, for his status as a permanent teacher is conferred upon him by the statute, and is not dependent upon con-

tract; while his right to compensation is a proper subject of contract."

In this case is cited Buckbee v. Board of Education, 115 App.Div. 366, 100 N.Y.S. 943, 950, wherein the court states: "There is an obligation until the Legislature sees fit to change the law, but not a contract, for the permanent employment of teachers * * *."

[4-6] These and other expressions of California courts compel the conclusion that tenure in California, under the 1921 amendment to Political Code section 1609 and under the terms of the present School Code, is statutory and not contractual; that there is no contractual relationship between the teacher and the State of California; that the tenure provisions of the law did not become a part of the teacher's contract of employment, but rather are restrictions upon the power of the school district to dismiss a teacher after he has been employed under specified conditions for a certain length of service.

Certainly there is a contract of employment between the school district and the teacher and the terms thereof are carefully prescribed by the statutes and explained by the cases previously cited. The maximum term of employment for which the school district can contract is one year. For the first year there must be an express contract but thereafter it can be implied. The contract can specify the salary, subject to a statutory minimum, the duties to be performed, the number of hours per day which the teacher shall perform his services, the age and class of students which will be taught, and other details relating to actual employment. But nowhere is there any term of the contract relating to permanent tenure nor, significantly, is there any provision anywhere in the School Code or in any statute requiring the teacher to accept employment for an indefinite time, requiring the teacher to remain in the service of the school district, once he has obtained tenure, as long as he is physically, mentally and morally able, or giving the school district a cause of action against the teacher for breach of contract if the teacher resigns without leave of the district at the end of any school year after the teacher has acquired permanent tenure.

[7] As between the school district and the teacher, as was stated in the Buckbee case cited above, there is an "obligation" specified in the school law, but as was also stated in that case, this obligation continues only "until the Legislature sees fit to change the law". In California, as in New York, the legislature still has plenary power over teacher tenure, there being no constitutional provisions in any way limiting that power.

Questions of the validity under the Constitution of the United States of statutes altering teacher permanent tenure have been passed upon by the Supreme Court of the United States (Phelps v. Board of Education, 1937, 300 U.S. 319, 57 S.Ct. 483, 485, 81 L.Ed. 674.) By New Jersey statutes teachers' tenure not only guaranteed continuity of employment but also that a teacher's salary could not be reduced except for specified causes. An amendment permitted local boards of education to lower salaries to a specified minimum. This case was brought to attack the action of a local board in lowering the plaintiff's salary and the appeal to the United States Supreme Court was taken on the ground that plaintiff's right not to have his salary lowered was contractual. The Supreme Court upheld the decision of the state court that this right was statutory and did not amount to a legislative contract. In this decision the court pointed out: "Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year. The employe assumed no binding obligation to remain in service beyond that term. * * *"

In Dodge v. Board of Education, 1937, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57, an act of the Illinois legislature in 1917 established teacher tenure in the Chicago schools following a three-year probationary period. In 1926 an act was adopted providing for compulsory retirement of Chicago teachers at the age of 70, with certain exceptions during the time the act was being put into effect, on a retirement salary of $1,500. In 1935 an amendment reducing the retirement age to 65 years was adopted and the retirement salary reduced to $500. Several teachers affected by this amendment brought actions for restoration of their $1,500 annuities. The United States Supreme Court held that

the retirement annuity was purely statutory, created no contractual obligation, and was therefore subject to revision by the legislature.

[8] Applying these rules of the United States Supreme Court, we can reach only one conclusion and that is that appellant's tenure is not protected by the Constitution of the United States. In no California case cited by appellant has any California court found such a contract as the one before us to be considered as a contract between the state and the teacher, or found that any statutory provision incorporates the tenure laws into the teacher's contract of employment.

The recent decision on May 10, 1938, of the Supreme Court of Oregon (Campbell v. Aldrich, 159 Or. 208, 79 P.2d 257), is so factually similar to the instant case and the various cases cited by appellant and respondent have been so adequately assimilated and harmonized, that we feel disposed to willingly adopt as a part of this opinion the reasoning therein expressed and the inevitable conclusion reached. An appeal was taken in that case to the United States Supreme Court and was dismissed on October 10, 1938, in that court on motion of appellees, "for want of a substantial federal question". 59 S.Ct. 87, 83 L. Ed. ——. The Oregon statute under consideration was, in effect, much stronger than section 5.505 of the School Code of this state in that it not only terminated permanent teacher tenure, which had been previously adopted, at the age of 65 years, but made retirement thereafter compulsory. The teachers' tenure law in question was similar to the tenure law of our state. In upholding the validity of the enactment that court said, 149 Or. 208, 79 P.2d at page 259:

"Let us first determine whether the plaintiffs acquired any contractual rights, as distinguished from a mere status or privilege, by virtue of the 1913 tenure law. Ordinarily it is the function of a Legislature to make laws and not contracts. It is true, however, that legislative enactments may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state. It is also equally well established that the intention of the Legislature thus to create contractual obligations, resulting in extinguishment to a certain extent of governmental powers, must clearly and unmistakably appear. * * *

"The Legislature, in the exercise of its sovereign power, has in effect said that compulsory retirement of teachers who are 65 years of age tends to promote the general welfare of the public and is for the betterment of the public school system. Many reasonable-minded persons believe that there is danger of schools being loaded down with superannuated teachers who have lost their appeal to youth. It is, indeed, significant that the interveners, who are officials of the Affiliated Teachers' Council of Portland and who are interested in maintaining a high standard of efficiency in the schools, support the contention of the defendants that the compulsory retirement provision was enacted for the purpose of increasing the efficiency of the teacher employees. Whether such legislation is wise is not for this court to determine. It is sufficient to say that we do not consider such compulsory retirement of teachers arbitrary or unreasonable. * * It is beside the question that the plaintiffs are efficient and well qualified to teach. Laws are not enacted to fit individuals. It is the average teacher of the age of 65 years that the Legislature had in mind.

"In our opinion, the sovereign power vested in the Legislature to enact laws for the betterment of common schools is one which cannot be bartered away. The exercise of such power at one time does not mean that future Legislatures may not, in the light of experience, declare a different policy. If such is not the law, there is no hope for progress, and future legislators, in determining educational policies concerning the tenure of teachers, must follow in trodden paths."

[9-11] Since the status of teachers having permanent tenure in the public schools of the state of California is statutory and not contractual, since the legislature reserved to itself the power at any time to make amendments to the permanent tenure laws, and since the amendment of these permanent tenure laws enacted into section 5.505 of the School Code is fair and reasonable, this section does not violate any provisions of the Constitution of the State of California or of the Constitution of the United States.

Appellant's application for a peremptory writ of mandate to compel his restoration to his former status is, therefore, without legal foundation and the action of the Superior Court of the State of California

in and for the County of San Diego is sustained.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



32 Cal.App.2d 49

WILLIAMS v. McDOWELL et al.

Civ. 2246.

District Court of Appeal, Fourth District, California.

March 31, 1939.

Rehearing Denied April 27, 1939.

Hearing Denied by Supreme Court May 29, 1939.

1. Trial ⇐395(5)

The trial court is required to find only those ultimate facts which are necessary to support judgment on the essential issues presented by the pleadings.

2. Trial ⇐395(5)

The trial court's findings should state the ultimate facts pleaded and not the probative facts.

3. Automobiles ⇐310

In action for death of automobile occupant, where complaint alleged that trailer-truck was negligently parked on highway, and that overtaking motorist negligently collided with automobile approaching from opposite direction, finding that motorist, truck driver and truck owner were negligent, and that death of automobile occupant was proximate result of negligence of all three, was sufficient to sustain recovery against the three. Code Civ.Proc. § 377.

4. Appeal and error ⇐1013

In action by thirteen-year-old daughter for death of mother in automobile collision, value of support which would have been furnished by mother during year after death, until daughter's marriage was question of fact for court. Code Civ.Proc. § 377.

5. Death ⇐99(4)

$1,200 for support of thirteen-year-old daughter whose mother was killed in automobile collision, for period of year, was not under the evidence, if so valued, excessive. Code Civ.Proc. § 377.

6. Death ⇐88

An element of pecuniary loss suffered by thirteen-year-old daughter from death of mother was to be found in fact that daughter was deprived of comfort, society and protection of mother. Code Civ.Proc. § 377.

7. Death ⇐88

Pecuniary loss suffered by 13-year-old daughter on being deprived of comfort, society and protection of mother, was substantial element of damage which might continue even after daughter's marriage one year following mother's death. Code Civ. Proc. § 377.

8. Appeal and error ⇐1013

Under statute permitting allowance of such damages for death as under all circumstances might be just, much is left to sound discretion of jury or trial court in determining amount of damages, and their finding will be reversed only where amount fixed is obviously so disproportionate to injuries involved as to justify conclusion that verdict or judgment is result of passion or prejudice. Code Civ.Proc. § 377.

9. Death ⇐86(2)

The "pecuniary loss" to which recovery for death is limited may be either a loss arising from deprivation of something to which heir would have been legally entitled, such as support, or may arise from a loss of benefits which under circumstances could reasonably be expected to have accrued to heir, though obligation resting on deceased may have been moral obligation only. Code Civ.Proc. § 377.

[Ed. Note.—For other definitions of "Pecuniary Loss," see Words & Phrases.]

10. Death ⇐99(4)

$2,500 damages awarded 13-year-old daughter for death of mother was not excessive, though daughter married a year later. Code Civ.Proc. § 377.

11. Automobiles ⇐245(62)

In action for death of automobile occupant in collision with approaching automobile which swerved to avoid parked trailer-truck, whether alleged negligence of truck driver in parking truck on side of paved highway was proximate cause of accident, in view of evidence respecting position of truck on highway, and evidence that truck was not equipped with flares, was question of fact. Code Civ.Proc. § 377; St.1935, p. 194, § 590.

12. Automobiles ⇐244(36)

In action for death of automobile occupant in collision with approaching automobile which swerved to avoid parked trailer-truck, evidence sustained finding that alleged negligence of truck driver in parking truck on side of paved highway was proximate cause of collision. Code Civ.Proc. § 377.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mary E. Williams against Chester H. McDowell, M. H. Powell, and another for damages for death resulting from an automobile collision. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

George S. Hupp and D. M. Potter, both of Los Angeles, for appellants.

Claflin, Dorsey & Campbell, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action brought under section 377, Code of Civil Procedure, for damages on account of a death resulting from an automobile collision.

About 10:30 p. m. on December 19, 1936, the defendant McDowell was driving south from Bakersfield on U. S. Highway 99 in a truck and trailer owned by his employer, the defendant Powell. The trailer was loaded with chickens, piled four crates high. At a point some eighteen miles south of Bakersfield one of the wheels of the trailer came off and McDowell parked the outfit with a part of the trailer extending upon the paved portion of the highway. About forty minutes later the defendant Nier came along in a Packard car, traveling south. He did not see the parked trailer until he was close to it and then swerved to his left and ran head-on into a Ford automobile, in which a Mr. and Mrs. Hines were riding, which was traveling north on the east half of the highway. Hines and his wife both died as a result of the collision.

Mr. and Mrs. Hines had been married for only six months. Mrs. Hines had formerly been married to a man named Williams, from whom she had been divorced about ten years. The plaintiff is the daughter of Mrs. Hines by the former marriage. She was thirteen years old at the time her mother was killed and her mother was thirty-three. She brought this action against the owner and driver of the truck and trailer and the driver of the Packard car. On December 17, 1937, before the trial of the action, she was married to a man named Miller. The court found that all three defendants were guilty of negligence and that as a proximate result of the negligence of all three Mrs. Hines received the injury which caused her death. Judgment for $2,500 was entered against all three defendants and the defendants McDowell and Powell have appealed.

[1-3] It is first contended that the findings are insufficient to support the judgment against the appellants. It is argued that there is nothing in the findings which connects the manner in which the appellants' car was parked with the fact that the Nier car collided with the Hines car, and that it is not specifically found that the way in which the appellants' car was parked had anything to do with the Nier car being on the wrong side of the road. The complaint alleged that the appellants negligently drove, operated and parked their truck and trailer on the highway at a certain time and place and that at that time and place the defendant Nier negligently and carelessly drove and operated his automobile onto and against the car in which Mrs. Hines was riding, and that as a proximate result of the negligent acts and conduct of all three defendants at this time and place, Mrs. Hines received injuries which caused her death. The court is required only to find those ultimate facts which are necessary to support the judgment on the essential issues presented by the pleadings. Forman v. Hancock, 3 Cal.App.2d 291, 39 P.2d 249. The findings should state the ultimate facts pleaded and not the probative facts. McCarthy v. Brown, 113 Cal. 15, 45 P. 14. In Carlson v. Stanbitz, 7 Cal.App.2d 455, 45 P.2d 820, the Court said: "The plaintiff further contends that the trial court evaded its duty in failing to state in its findings whether the defendant was on the right side or the wrong side of the highway when the accident happened. But the plaintiff pleaded the negligence of the defendant in general terms, and there was no duty upon the trial court in any event to make a finding as to this evidentiary detail." The findings sufficiently covered the ultimate facts alleged and are sufficient to support the judgment.

[4, 5] It is next contended that the damages awarded the plaintiff are excessive and not supported by the evidence. It is argued that since the plaintiff was married about a year after her mother was killed, the duty of supporting her would thereafter fall upon her husband; that the only pecuniary loss which she could have sustained would have been support for one year; that any such support would necessarily have been very meager since Mr. Hines was employed as a "bell hop" in a Los Angeles hotel; and that his income must have been very meager as the evidence shows he was contributing $25 or $30 a month to the support of his mother.

There is no evidence as to the amount of Hines' income. Some "bell hops" earn very substantial sums. We are not advised as to whether Mrs. Hines had any income other than what she received from her husband. There is evidence that the plaintiff had lived with her mother up to the time of the accident. She was then visiting her father in Corcoran and the Hineses were on their way to take her back to Los Angeles, where she had lived with her mother. She lost the support which she would otherwise have received in the home of her mother for the period of a year and until the time of her marriage. The value of this support was a question of fact for the court and, from the evidence before us, it could not be held unreasonable or excessive if the court valued this support at $1,200.

[6-9] A further element of pecuniary loss suffered by the respondent is to be found in the fact that she was deprived of the comfort, society and protection of her mother. Under well-settled rules this element of damage in the case of a thirteen-year-old girl is a substantial one which should not be disregarded and, contrary to appellants' contentions, is one which may continue even after her marriage. Section 377 of the Code of Civil Procedure provides that in every action brought thereunder, "such damages may be given as under all the circumstances of the case, may be just". It is well settled that in the determination of the amount of damages in such cases much is left to the sound discretion of the jury or of the trial court, and that their finding in that regard will be reversed only where the amount fixed is obviously so disproportionate to the injury involved as to justify the conclusion that the verdict or judgment is the result of passion or prejudice. Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083. While recovery is limited to pecuniary loss this may be either a loss arising from the deprivation of something to which the heir would have been legally entitled, such as support, or it may arise from a loss of benefits which under the circumstances could reasonably be expected to have accrued to the heir even though the obligation resting upon the deceased to bestow such benefits may have been a moral obligation only. Sneed v. Marysville Gas, etc., Co., 149 Cal. 704, 87 P. 376. In Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 112 P. 564, 572, the court said: "And, obviously, this element of loss of society, comfort and protection of the son to be reckoned in determining the pecuniary value of the service of the deceased to his mother is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case." In Quill v. Southern Pacific Co., 140 Cal. 268, 73 P. 991, 993, it was held that it was error to instruct the jury that the consideration of pecuniary loss suffered through deprivation of the comfort and society of the deceased should be limited to the remaining period of a child's minority, the court saying, "A parent may enjoy the comfort and society of a child after its minority, and even after its marriage; and there is nothing in the law which will limit the consideration by the jury to the period of minority only." Adult or nondependent children may, in proper cases, recover damages estimated upon a pecuniary basis for loss of society, comfort and protection. Thompson v. Dentman, 131 Cal.App. 680, 21 P.2d 1009. In Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41, 45, the court said: "Again, on the trial it was shown that these parties were children of the decedent and while it was shown that decedent did not contribute to their support, there was no showing that the cordial and affectionate relationship usually existing between parent and child did not exist as to them. Loss of comfort, protection, and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages." A

child has a right to recover the value of its mother's "nurture and instruction, moral and physical, and intellectual training". Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520, 526. In Burns v. Jackson, 59 Cal.App. 662, 211 P. 821, 825, it is said: "It is, of course, true, as stated by appellant, that no 'hard and fast guide' can be applied to all cases, but that the jury is permitted to exercise an intelligent discretion in view of the peculiar facts of the case, keeping in mind the well-established principles of law as to actual compensation for the loss sustained." In Pell v. Herbert, 33 Cal.App. 730, 166 P. 386, 387, in considering a claim that a judgment for $2,000 was excessive in the light of certain evidence, the late Justice Richards said:

"In support of the appellant's contention that the verdict of the jury was excessive, he directs our attention to certain evidence tending to show that the deceased was a man of dissolute and unthrifty habits, and was not a very useful member of society or supporter of his family. These were matters properly submitted to the jury, and doubtless considered by them in arriving at the amount of their verdict. We are unable to say that a verdict in the sum of $2,000 for the death of a human being through the negligence of another under the circumstances detailed in this case was so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount."

[10] In the light of these established rules, we cannot say that this judgment is so plainly excessive as to suggest at first blush passion or prejudice on the part of the court. Although a part of the judgment is based upon the loss of the comfort, society and protection of the mother it cannot be held that that element of damage is unsubstantial in the case of a 13-year-old girl. The contrary is suggested by the very fact relied upon by the appellants as limiting their liability, the marriage of the girl a year later when she was but 14 years old. Such a marriage might not have been necessary or might not have occurred had she not been deprived of the comfort, society and protection of her mother.

[11, 12] The last point raised is that the court's finding, that the negligence of the appellants was a proximate cause of the accident, is not supported by the evidence. The appellants rely on a portion of the evidence to the effect that their truck was parked on the extreme west side of the paved highway, and argue that the defendant Nier should have been able to see their truck and trailer and that the accident occurred solely because of his negligence. However, there is evidence that although the paved portion of the highway was twenty feet wide the left rear wheel of the trailer was but seventy-five inches west of the center stripe. There is also evidence that the driver of appellants' truck violated section 590 of the California Vehicle Code, as it then read, St.1935, p. 194, which required that every truck or commercial vehicle should under such conditions be equipped with at least two flares or two red lanterns or two warning lights, and that a signal of that character should be immediately placed approximately 200 feet to the rear of the disabled vehicle. There can be no question that the appellants were guilty of negligence, and the question whether this negligence was a proximate cause of the accident was one of fact, and the evidence supports the court's finding in that regard.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 56

CARMODY v. POWELL et al.

Civ. 2247.

District Court of Appeal, Fourth District, California.

March 31, 1939.

Rehearing Denied April 27, 1939.

Hearing Denied by Supreme Court May 29, 1939.

1. Death ⇐5

Where 36-year-old husband and 33-year-old wife were killed in same automobile accident, husband presumptively outlived his wife and presumption supported court's finding that husband's mother was sole heir of husband, in absence of evidence to the contrary. Code Civ.Proc. § 1963.

2. Death ⇐55

In action for death of son, alleged error in allegation that mother was son's sole

heir, if properly raised in trial court, could have been cured by amendment to complaint.

3. Death ⇐75

In action for death of son, evidence sufficiently established that mother was heir of son.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mary Carmody against Chester H. McDowell, M. H. Powell, and others, to recover for death of son. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

George S. Hupp and Daniel M. Potter, both of Los Angeles, for appellants.

Claflin, Dorsey & Campbell, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is a companion case to Williams v. McDowell et al., Cal.App., 89 P.2d 155, this day decided. The two cases were tried together, although not consolidated, and both appeals have been presented upon the same transcript. In the instant case plaintiff is the mother of Mr. Hines, who was killed in the accident in question. From the judgment in her favor, in the sum of $1,500, the defendants McDowell and Powell have appealed.

Two points raised in the other case are raised here, namely, that the findings do not support the judgment and that the finding that the negligence of these appellants was a proximate cause of the accident is not supported by the evidence. The argument presented is the same as that made in the other case and no further consideration is necessary.

No contention is made that the amount of the judgment in this case is excessive. It is here contended, however, that the court's finding that the respondent was the sole heir of the decedent Hines is not supported by the evidence. The respondent alleged in her complaint that she was the sole heir of Hines and this was denied in the answer. It is argued that while it appears from the evidence that respondent is the mother of Hines, that he contributed to her support, and that he had no children, it also appears that Hines' wife survived him by a few minutes, making her also an heir.

[1] There is an entire absence of evidence as to what property was left by Hines. The respondent testified, by deposition, that she knew of no separate property owned by Hines at the time of his marriage. This is not surprising as she lived in Indianapolis and he lived in Los Angeles. Apparently he had an automobile, but there was neither evidence of what it was worth after the wreck nor that it was community property, although counsel asserts that this was true. Although counsel repeatedly states that Mrs. Hines outlived her husband for a few minutes we can find no evidence in the record to this effect. Counsel for the appellants and counsel for the defendant Nier stipulated to that effect, but counsel for this respondent refused to so stipulate and no evidence was produced in that regard. Hines was 36 years old, his wife 33, both were killed in the same wreck, and under section 1963 of the Code of Civil Procedure there was a presumption that Hines outlived his wife. This presumption supports the finding complained of in the absence of evidence to the contrary.

[2, 3] A further consideration is that, even assuming that the wife outlived the husband and was also an heir, her pecuniary loss could only have been nominal as, in any event, she outlived him only a few minutes. If the point had been properly raised in the trial court the matter could have been cured by an amendment to the complaint. Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077. The fact that the respondent was an heir of Hines was sufficiently established by the evidence. Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A.L.R. 509.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

32 Cal.App.2d 74

PEOPLE v. COPLEY.

Cr. 3182.

District Court of Appeal, Second District, Division 2, California.

April 4, 1939.

1. Criminal Law ⇐1144(13)

On appeal from conviction, District Court of Appeal was required to view evidence in light most favorable to the people.

2. Homicide ⇐254

Evidence sustained conviction of murder in the second degree.

3. Homicide ⇐23(1), 146

When unlawful act resulting in death is deliberately performed by assailant who knows that his conduct endangers life of another and is executed without provocation or sudden passion, malice is presumed, and killing constitutes murder in second degree if not premeditated. Pen.Code, § 189.

4. Homicide ⇐269

In homicide prosecution, whether killing was malicious was for jury. Pen.Code, § 189.

5. Criminal law ⇐829(5)

In homicide prosecution, where trial court fully covered theory of self-defense in its instructions, refusal to give an instruction proposed by accused on the law of self-defense was not error.

6. Criminal law ⇐834(2)

Trial court was not required to instruct on law of self-defense in language of accused.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Alpha Copley was convicted of murder in the second degree, and she appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction of murder in the second degree and from an order denying a motion for a new trial.

[1, 2] The first contention of the defendant is that there is insufficient evidence to sustain the verdict. It is our duty to view the evidence in the light most favorable to the People. It appears that the defendant stabbed the deceased with a long butcher knife which she had brought from her home. At the time of the stabbing he was out in the road attempting to drive away two men who had been guests of the defendant during the evening. After she stabbed him she ran for the automobile in which the guests were waiting. The deceased followed her for a distance of 75 feet or more before he fell down on the road. He was discovered dead several hours later in a pool of his own blood. In our view there is substantial evidence, considering all the facts and circumstances and certain admissions proved to have been made by the defendant, to sustain the verdict.

[3, 4] The defendant's second contention is that the crime should be reduced to voluntary manslaughter for the reason that malice is a necessary element of murder and there is no proof of malice. In People v. Semone, 140 Cal.App. 318, 323, 35 P.2d 379, 382, the court said: "When an unlawful act which results in death is deliberately performed by an assailant who knows that his conduct endangers the life of another, and it is executed without provocation or sudden passion, which would reduce the offense to manslaughter, malice is presumed. Under such circumstances the killing constitutes murder of the second degree, when it is not perpetrated by means of poison, lying in wait, torture or any other kind of willful, deliberate or premeditated killing. Section 189, Pen.Code; People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385; People v. Hubbard, 64 Cal.App. 27, 37, 220 P. 315; 13 Cal.Jur. 603, § 18." In our view of the evidence, it was for the jury to determine under all the facts and circumstances in evidence whether there was malice in the perpetration of the crime.

[5, 6] Finally, the defendant contends that the court erred in refusing to give an instruction proposed by her on the law of self-defense. The defendant does not comply with the rules of the judicial council requiring that all instructions upon the same subject-matter that were given be printed in the brief. However, it is obvious from an inspection of the record that the defendant has no basis of complaint. As a matter of fact, the trial court fully covered in its instructions the theory of self-defense, including the law proposed

by the defendant. It was not the duty of the court to give to the jury the law of self-defense in the language of the defendant.

Judgment and order denying a new trial affirmed.

We concur: WOOD, J.; McCOMB, J.



32 Cal.App.2d 84

Ex parte SHAW et al.

Cr. 3207.

District Court of Appeal, Second District, Division 1, California.

April 6, 1939.

1. Municipal corporations ⇐79

The destruction of public records by officer having custody thereof was not strictly a "municipal affair," and therefore statute prohibiting destruction of records was not superseded by provision of city charter making it a misdemeanor to obstruct any person with respect to his right of examination. Pen.Code, § 113; St.1925, p. 1068, § 118; Const. art. 11, § 6, as amended in 1914; art. 11, § 8, as amended in 1936.

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

2. Municipal corporations ⇐79

That some parts of acts charged in indictment charging violation of statute prohibiting destruction of public records by officers having custody thereof were designated by city charter as a misdemeanor only did not preclude prosecution of defendant for commission of a felony under the statute. Pen.Code, § 113; St.1925, p. 1068, § 118.

3. Municipal corporations ⇐79

Neither the judicial system nor the matter of jurisdiction over crimes may be classified as "municipal affairs," as respects whether state law has been superseded by city charter.

Proceeding in the matter of the application of Joseph E. Shaw and William Cormack for a writ of habeas corpus.

Writ denied.

Richard H. Cantillon and Roland G. Swaffield, both of Los Angeles, for petitioners.

PER CURIAM.

[1] This is a petition for writ of habeas corpus on behalf of the two applicants, who were convicted of a violation of the provisions of section 113 of the Penal Code of this state. This petition is based upon the claim that the freeholders' charter of the city of Los Angeles has superseded such section 113 of the Penal Code, in that section 118 of article 9 of said charter (Stats.1925, p. 1068) provides as follows: "Any officer or other person who shall wilfully or corruptly, by himself or in co-operation with one or more other persons, defeat, deceive or obstruct any person in respect to his or her right of examination, or corruptly or falsely mark, grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or to be examined, of being employed, appointed or promoted, shall be guilty of a misdemeanor and punishable therefor."

However, section 6, of article 11 of the Constitution, as amended November 3, 1914, provides, among other things, as follows: "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, *to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.*" (Emphasis added.)

Section 8, of article 11 of the Constitution, as amended November 3, 1936, provides, in part as follows: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder *may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations*

provided in their several charters and in respect to other matters they shall be subject to general laws." (Emphasis added.)

The contention of the petitioners herein, as stated by their counsel, is that the details of the various acts charged were solely and strictly municipal affairs of the city of Los Angeles, and that the state of California was not interested in any way therein, and also that section 118 of the freeholders' charter of said city has superseded and obviated the effect of section 113 of the Penal Code, in so far as the facts alleged in the indictment herein are concerned.

This contention is not well founded for the reason that the acts here charged for many years have been denounced by the laws of the state of California and designated as a felony, and it cannot now be said that the commission of such acts is strictly and solely a municipal affair of the city of Los Angeles.

[2] The people of the state are primarily interested in the prevention of such crimes as are here charged, and the fact that the freeholders' charter of the city of Los Angeles designates some parts of the acts charged in the indictments as a misdemeanor only, cannot save the petitioners from a prosecution for the commission of the felony charged under the state law.

The only cases which we have been able to discover covering the main point raised by the petitioners herein, to-wit: whether or not the crime charged was solely a municipal affair, are the following:

Farmer v. Behmer, 9 Cal.App. 773 at page 781, 100 P. 901, at page 904, in which it is stated: "It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for a moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute."

Robert v. Police Court, 148 Cal. 131 at page 136, 82 P. 838 at page 840, in which it is stated in a concurring opinion written by Chief Justice Beatty: "I concur in the judgment upon the ground discussed by Justice Lorigan, and upon the further and to my mind more important and more satisfactory ground that the jurisdiction of offenses defined by state law must be regulated by general state law, and that such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the legislature, but cannot be conferred by special freeholders' charter, and certainly not in a manner which will impair the operation of general laws."

[3] Neither the judicial system nor the matter of jurisdiction over crimes may be classified as "municipal affairs". 18 Cal. Jur. 788, citing in addition to the above cases, Nicholl v. Koster, 157 Cal. 416, 108 P. 302; Jackson v. Baehr, 138 Cal. 266, 71 P. 167. See, also, Griffin v. City of Los Angeles, 134 Cal.App. 763, 26 P.2d 655, and City of Los Angeles v. Gurdane, 9 Cir., 59 F.2d 161, 164.

For the foregoing reasons, the writ is denied; but, by reason of the fact that this is an ex parte proceeding, in setting forth such reasons it is not to be understood that the petitioners, or either of them, shall be thereby foreclosed from presenting the same questions referred to herein on the appeal from the judgment, or in any other proceeding.



32 Cal.App.2d 87

PEARSON v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 11071.

District Court of Appeal, First District, Division 1, California.

April 7, 1939.

Rehearing Denied May 6, 1939.

1. Divorce ⇐262

Refusal of final divorce decree to petitioner until payment of back alimony for support of wife and child as required by interlocutory decree was not abuse of discretion, where petitioner was in contempt for

failure to make payments which he could have made.

2. Divorce ⇐156

The Code section providing for entry of final decree of divorce contemplates obedience to orders contained in interlocutory decree. Civ.Code, § 132.

Application by Alfred H. Pearson, also known as Patrick Pearson, for a writ of mandate to be directed to the Superior Court of the State of California, in and for the County of Contra Costa, and the Honorable A. F. Bray, Judge of Department 2 thereof, to compel the granting to petitioner of a final decree of divorce.

Application denied.

Paul D. Morse, of Oakland, for petitioner.

Tsar N. Calfee and Norman A. Gregg, both of Richmond, for respondents.

TYLER, Presiding Justice.

An interlocutory decree of divorce was granted to the wife of petitioner on the 7th day of July, 1936. Petitioner seeks a writ of mandate to compel the entry of a final decree which has been withheld until back alimony payments for the support of his wife and their child have been paid. The first petition for a final decree was filed in November of 1938, but the judge refused to sign the same until petitioner paid to his former wife all sums due and remaining unpaid under the interlocutory judgment and decree of divorce, with an additional sum representing the amount of certain liens against property formerly belonging to petitioner and awarded to the wife in said divorce action. On the 6th day of February, 1939, petitioner again, through his counsel, presented to the judge a final decree of divorce in due form and there requested the said judge to grant and sign the same, but the application was again denied until petitioner herein paid to his former wife all sums accrued and remaining unpaid under said interlocutory judgment and decree.

It is contended that the refusal of the judge to grant and sign said final decree is arbitrary and unreasonable and an abuse of discretion by said judge, for the reason that petitioner has been unable to fully comply with said order and said interlocutory judgment and decree of divorce; that he has complied with the same to the best of his ability. Attached to the petition for a final decree is an affidavit of petitioner herein showing the amounts of money he has earned since said interlocutory decree was entered. It appears therefrom that petitioner has been spending the sum of $45 a month for the operation and upkeep of an automobile, which he claims is necessary in his occupation as a carpenter, in addition to other sums which he claims are necessary for his support. The return to the petition shows that petitioner has not complied with the orders of respondent court, in accordance with his ability so to do, for which reason the court refused to sign the decree as prayed for by him; that he would have been committed for contempt had it not been for the hardship such an order would have worked on his family.

On each of said hearings evidence was taken as to the ability of petitioner to pay, and as to his earnings, and on each of said hearings the court found and expressed its opinion that the defendant, petitioner herein, was in contempt of court, and in each case the matter was continued and petitioner admonished by the court to make payments in accordance with the orders or he would be committed for contempt. A large percentage of the payments made by the petitioner were made under compulsion of the processes of the respondent court, and the threats of respondent court and judge thereof that he would be committed until he complied with the orders of the court. Petitioner's attitude in the matter was one of passive resistance to the orders of the court and the judge thereof. The court was of the opinion that the petitioner herein was in contempt of court and for that reason the final decree was denied.

[1, 2] We are of the opinion that respondent court was justified in refusing to enter the final decree of divorce. The section of the code providing for the entry of a final decree of divorce contemplates obedience to the orders contained in the interlocutory decree. Civ.Code, § 132. One invoking the aid of a court should submit himself to all legitimate orders and processes. No party to an action can ask the aid and assistance of a court in hearing his demand while he stands in an attitude of contempt to its legal orders and processes. The trial court has found that petitioner has treated the order of the

court with contempt and that he should not be permitted to make an application for a final decree until he has purged himself from the contempt. We are cited to the case of Isakson v. Superior Court, 130 Cal.App. 180, 19 P.2d 840, in support of the petition. It there appears that the applicant was in no financial position to comply with the order and his inability to make payments was not disputed.

The application for a writ is denied.

We concur: KNIGHT, J.; WARD, J.



32 Cal.App.2d 62

SANTOS v. SANTOS.

Civ. 2269.

District Court of Appeal, Fourth District, California.

April 1, 1939.

1. Parent and child ⇐5(1)

In wife's suit against husband to establish trust in one-half interest in land and personal property paid for through joint efforts of both, husband could not claim an interest in earnings of wife's children by a former marriage.

2. Trusts ⇐89(2)

In suit to establish trust in a one-half interest in land and personal property left by plaintiff's deceased husband, where land was sold to defendant through probate proceeding, evidence justified conclusion that one-half of purchase price was contributed by plaintiff while living with defendant as husband and wife.

3. Executors and administrators ⇐365

Rule preventing an administratrix from either directly or indirectly selling estate property to herself did not bar administratrix from enforcing trust for her own benefit in a one-half interest of estate property purchased by defendant and paid for by funds accumulated through joint efforts of administratrix and defendant, where probate sale was not void and had not been attacked by parties interested in estate in a proper proceeding.

4. Marriage ⇐54

Where a man and woman have acquired property while cohabiting as husband and wife under an illegal marriage, though, strictly speaking, there can be no community property, in dividing the gains courts will apply same rule as would obtain under a valid marriage.

5. Marriage ⇐54

Where a man and woman have acquired property while cohabiting as husband and wife under an illegal marriage, it is immaterial how much money the wife has actually contributed to purchase of property involved, since, if a legal wife, her interest in community property would vest by reason of her services as a wife and without contribution of any part of actual purchase price.

6. Trusts ⇐81(2)

In suit to establish trust in a one-half interest in land and personal property and to quiet plaintiff's title thereto, where property was acquired through joint efforts of plaintiff and defendant while living together as husband and wife, plaintiff was entitled to requested relief notwithstanding that marriage apparently was not legally performed.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Suit by Mary C. Santos, whose true name is Mary C. Rose, against Joe Santos to establish a trust in a one-half interest in land and personal property and to quiet plaintiff's title thereto, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Louis J. Coelho, of Fresno, for appellant.

J. C. C. Russell and Sidney J. W. Sharp, both of Hanford, for respondent.

MARKS, Justice.

This is an action to establish a trust in a one-half interest in twenty-five acres of land and in personal property in Kings county, and to quiet plaintiff's title thereto. Besides answering the allegations of the complaint defendant filed a cross-complaint seeking to quiet his title to the real property and personal property. Judgment was entered in favor of plaintiff to the one-half interest in the property and this appeal followed.

Plaintiff is the widow of Proferio Rose, who died on September 24, 1922, leaving three minor children, the issue of that marriage. He left as the community property of himself and plaintiff the twenty-five acres of farming land involved here and some personal property of small value. The real estate was encumbered by a mortgage securing a note of $2,500 payable to M. Bell. On January 2, 1924, plaintiff was appointed administratrix of his estate. The real estate was appraised at $2,500.

On December 1, 1924, the parties to this action applied for a marriage license which was issued to them. Neither could speak English and they were not familiar with the marriage laws of California. Believing they were married they commenced living together as husband and wife. They separated about July 5, 1937. Three children were born to the couple during that time.

In 1926 Bell began to press for payment of his loan. Through probate proceedings the real estate was sold to defendant for $3,000 and $2,737.42 was paid to Bell (Manuel Bello) by defendant on about May 3, 1926, in satisfaction of the note and mortgage. The source of this money was as follows: "$737.42 from a bank account standing in the name of defendant, and $2,000 on a loan from Manuel Thomas secured by a mortgage on the real property signed by both parties to this action."

The trial court found that "defendant had in excess of $1,300.00 at the time plaintiff and defendant commenced living together as husband and wife, and that said money was commingled with money produced by the ranch, and the money earned by plaintiff and her children by her former marriage. * * *"

Plaintiff testified that she kept house for the family; that she and her children by her first marriage worked on the ranch as laborers; that they worked for others; that their wages were principally turned over to defendant and deposited in his bank account; that in 1925 defendant sold crops from the ranch for at least $1,400, which money was deposited in his bank account.

The trial court found that the $2,000 debt secured by the mortgage we have mentioned and a loan of $150 made for funds with which to improve the house on the property were paid by the joint efforts of plaintiff and defendant.

[1] From the slightly more than $1,300 separate funds that defendant had in his bank account on December 1, 1924, he paid a personal debt of about $200 in January, 1925, leaving about $1,100 in this account. There is no satisfactory evidence showing how much of this money remained in that account on May 3, 1926. To whatever remained of these funds was added the earnings of plaintiff and of her older children and at least $1,400 produced from the ranch in 1925, as well as the earnings of defendant, if any. Defendant could claim no interest in the earnings of the children as such earnings belonged to their mother, and certainly the income from the ranch in 1925 could not be claimed by defendant. He had no title to nor interest in it until May 3, 1926.

[2] Any exact accounting between the parties was impossible. They were uneducated and kept no books of account. However, the foregoing evidence justified the trial court's conclusion that at least one-half of the initial payment on the purchase price, as well as one-half of the money used to pay the notes we have mentioned, was contributed by each of the parties to this action. We are informed that the estate of Proferio Rose has not been settled. Any adjustment, if necessary, in plaintiff's accounts as administratrix, may be settled by the probate court.

[3] Defendant maintains that plaintiff cannot assert any interest in the property in question here because the law prohibits an administratrix from either directly or indirectly selling estate property to herself; that if plaintiff was in fact a purchaser at the probate sale, such sale was void.

A similar question was before the Supreme Court in Estate of Richards, 154 Cal. 478, 98 P. 528, 535, where it was urged that James Bennallack, one of the executors, was in fact a purchaser of property of the estate and that the sale was therefore void. In disposing of this question the Supreme Court said: "As to the finding that James Bennallack, one of the executors, was in fact the purchaser at the sale of May 11, 1891, it is unnecessary to determine whether the evidence sustains it or not, because, assuming it to be sustained (which is only an assumption for present purposes), still we are satisfied that the judgment based upon either or both of these findings (and there are no others which could support it) can-

not be sustained. If plaintiff was not the purchaser, he at least succeeded to whatever rights James Bennallack had by the conveyance from himself and wife to plaintiff on May 8, 1897. If Bennallack was in fact the purchaser at the sale of this property in question, the purchase by him was not void but voidable only at the instance of those interested in the estate. Boyd v. Blankman, 29 Cal. [19] 20, 87 Am.Dec. 146; O'Connor v. Flynn, 57 Cal. 293; Burris v. Kennedy, 108 Cal. [331] 341, 41 P. 458."

The rights of the representative of the estate of Proferio Rose, as such, are not here involved and need not be decided. It is sufficient for the determination of the issues before us that the probate sale is not void and that it has not been attacked in any proper action. Estate of Madsen, Cal.App., 87 P.2d 903.

[4-6] The question of the property rights of a man and woman living together as husband and wife without a legal marriage, in property acquired during the existence of that relation is not a new one in California. In Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143, 144, the court said: "Where a man and woman have acquired property while cohabiting as husband and wife under an illegal marriage, though, strictly speaking, there can be no community property, the same rule will be applied by analogy as would obtain under a valid marriage. Under such rule it is immaterial how much money the wife has actually contributed to the purchase of the property involved, because, if a legal wife, her interest in the community property would vest by reason of her services as a wife and without contribution of any part of the actual purchase price of the property. Upon this point the case is controlled by Coats v. Coats, 160 Cal. 671, 675, 118 P. 441, 36 L.R.A.(N.S.) 844, and Schneider v. Schneider [183 Cal. 335], 191 P. 533, 11 A. L.R. 1386."

The same rule was applied in Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884, where the man and woman cohabited together for ten years without the benefit of a marriage ceremony.

These cases are decisive of the questions presented on this appeal. Defendant cannot be permitted to accept the labor, earnings, society and companionship of plaintiff for more than twelve years and retain for himself all the fruits of their labors and savings.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 66

VAN NESS v. VAN NESS.

Civ. 11022.

District Court of Appeal, First District, Division 2, California.

April 3, 1939.

Hearing Denied by Supreme Court June 2, 1939.

1. Divorce ⇐150(2)

In divorce suit, court was not bound to insert finding negativing existence of defense predicated on unreasonable lapse of time before commencement of action in absence of pleading or evidence affirmatively showing such defense. Civ.Code, §§ 111, 124–126.

2. Divorce ⇐184(12)

In wife's action for divorce commenced July 23, 1936, wherein husband was granted divorce on cross-complaint alleging desertion commencing in October, 1932, and cruelty committed prior to October, 1926, failure of trial court to make finding as to whether there had been unreasonable delay before commencement of husband's action was not prejudicial error, where, under facts in record, finding, if made, would have been adverse to claims of wife. Civ.Code, §§ 111, 124–126.

3. Divorce ⇐69

Desertion is a continuing cause of action for divorce.

4. Divorce ⇐69

A husband, who, in wife's action for divorce commenced July 23, 1936, filed cross-complaint for divorce predicated on desertion, commencing in October, 1932, was not required to be denied divorce because of unreasonable lapse of time before commencement of action, where evidence warranted finding that wife's desertion was willfully commenced in October, 1932, and willfully continued down to date of filing of complaint. Civ.Code, §§ 111, 124–126.

5. Divorce ⇐133(1)

Evidence corroborating husband's testimony was sufficient to justify judgment granting husband divorce for desertion.

6. Divorce ⇐127(4)

A husband who filed cross-complaint for divorce on ground of desertion was not required to corroborate every single element of his case.

7. Divorce ⇐130

In wife's action for divorce wherein defendant filed cross-complaint for divorce, evidence corroborating defendant's testimony was sufficient to justify decree granting divorce to husband on ground of extreme cruelty.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action for divorce by Beatrice W. Van Ness against Thomas C. Van Ness, Jr., wherein the defendant filed a cross-complaint. From a judgment awarding a divorce in favor of the defendant on his cross-complaint, plaintiff appeals.

Affirmed.

Seibert L. Sefton, of San Francisco, for appellant.

C. H. Sooy, of San Francisco, and Louis Oneal, of San Jose, for respondent.

STURTEVANT, Justice.

From a judgment awarding a divorce in favor of the defendant on his cross-complaint the plaintiff has appealed. On July 23, 1936, the plaintiff commenced the action by filing a complaint. She pleaded three different counts. In the first count she pleaded cruelty prior to the year 1932. In the second count she pleaded desertion commencing in the month of October, 1932. In the third count she pleaded failure to provide during the period July, 1934, to July, 1936. The defendant appeared and filed an answer which contained denials of all of the wrongs charged against him. He also filed a cross-complaint in which he pleaded charges against the plaintiff. In the first count he charged cruelty committed prior to October, 1926. In the second count he pleaded desertion commencing with the month of October, 1932—the same month, it will be noted, that the plaintiff had charged desertion against him. The record does not disclose that the plaintiff filed an answer to the cross-complaint, nor if she did what the contents of said document were. The trial court made findings of fact in favor of the defendant on both counts pleaded in his cross-complaint.

The plaintiff and defendant intermarried in San Francisco in the year 1918. At that time and as far back as the year 1900, Mrs. Ward, her mother, owned a home and resided at San Jose. Mr. D'Ablaing, an elderly man, was a member of her household and had been since 1900, or thereabouts. Mr. Wilbur McColl until his death in May, 1935, was also a member of the household. At the time of the marriage the defendant's mother was the owner of a home and resided at 1921 Octavia street, San Francisco, and the defendant was residing with her. After the marriage the plaintiff and defendant continued to reside with his mother. Soon after the marriage the plaintiff commenced to make visits to her former home in San Jose. Those visits were frequent and some of them extended over a period of ten days, two weeks, or longer. In 1923 the plaintiff's mother died; however, the San Jose visits continued down to the year 1932. In October of that year she left San Francisco for another visit and from that time she never returned to the residence of the defendant. Many disputes arose between the plaintiff and defendant of and concerning said visits being made, if made at all why they should be longer than from morning until night, to what extent the expenses of maintaining the San Jose home should be borne by the defendant, and other kindred matters. Other facts will hereinafter be recited as it becomes necessary.

[1, 2] The plaintiff contends that the defendant should have been denied a divorce because of the unreasonable lapse of time before the commencement of the action. Civ.Code, §§ 111, 124, 125 and 126. The defendant replies that said point may not be presented for the first time on appeal. He calls attention to the fact that the plaintiff did not plead such a defense to the cross-complaint, that she did not introduce any evidence on the subject, and that the trial court was not asked to make a finding thereon. Continuing the defendant contends that conceding a decree should be denied if there is an unreasonable lapse of time before the commencement of the action, nevertheless in support of the judgment it will be presumed the trial court made an implied finding that the lapse of

time was not unreasonable. The plaintiff replies that the trial court should have made a finding whether the defense of laches was pleaded or not pleaded. Hunter v. Hunter, 132 Cal. 473, 64 P. 772. She quotes from 132 Cal. page 476, 64 P. page 773: *"If, therefore, the evidence had shown condonation,* it would have been the duty of the court, even without a pleading, to have found to that effect." (Italics ours.) She argues that therefore in the instant case a finding should have been made that there was or was not unreasonable delay. We think not. If there had been evidence showing *affirmatively* that defense, her argument would be sound. But the trial court was not bound to insert a finding negativing the existence of a defense of which there was no evidence. The defendant also answers that under the facts in the record if a finding had been made it would necessarily have been adverse to the claims of the plaintiff, and, under these circumstances, it was not prejudicial error to fail to make the finding. That statement is supported by a long list of authorities. Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737.

[3, 4] The plaintiff also contends that the record shows she did present the point in the trial court. She calls attention to certain dates appearing in the record. It is sufficient to state that the record does not support her contention. In further support of his position the defendant calls attention to the fact that desertion is a continuing cause of action. Dee v. Dee, 87 Cal.App. 17, 19, 261 P. 501. He further contends that if, for example, he proved desertion commencing on or before the 31st day of October, 1934, and that it lasted until the 31st day of October, 1935, then and in that event no question of unreasonable delay was involved. We think that contention is also sound. There is an abundance of evidence in the record that on several occasions, if not all, the plaintiff wilfully absented herself from the residence of the defendant for one, two or three weeks at a time. Those facts, taken in connection with other facts appearing in the record, fully warranted the trial court in holding as it did that the plaintiff's desertion was wilfully commenced as early as October, 1932, and was wilfully continued down to the date of the filing of plaintiff's complaint.

[5, 6] The plaintiff then contends there was no evidence to corroborate defendant's testimony upon his cause of action based on desertion. We think the point has no merit. It will be conceded at once that he did not corroborate every single element of his case. But he was not bound to do so. Percy v. Percy, 188 Cal. 765, 767, 207 P. 369. The defendant introduced the testimony of two servants that were in his house when the plaintiff left there to go to the home in San Jose. Witnesses called by the plaintiff testified to her presence in the home at San Jose on certain of said visits. Letters were introduced which also tended to prove the same facts. The action was bitterly contested on both sides. We think the rule stated in Percy v. Percy, supra, is directly applicable.

[7] The plaintiff finally contends that the evidence was insufficient to support the decree based on the ground of extreme cruelty, and that there was no evidence to corroborate that theory. From what has been said above we do not feel called upon to discuss either of those contentions in detail. It is sufficient to remark that this court is of the opinion neither contention should be sustained. As we have shown, the decree in favor of the defendant based on the ground of desertion must be affirmed. No interest of either of the parties requires that this court should make a written analysis setting forth the specific facts constituting the proof of cruelty and the specific conclusions reached thereon by this court.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

32 Cal.App.2d 90

REIDER v. AQUEDUCT CONST. CO. et al.

Civ. 11726.

District Court of Appeal, Second District, Division 1, California.

April 7, 1939.

1. Judgment ⇐326

A judicial error cannot be corrected, by an order nunc pro tunc.

2. Appeal and error ⇐333

In action for injuries against employer and employee jointly, where it was claimed that employee was acting within scope of employment and verdict was returned against employee, alleged error in directing verdict for employer could not be corrected on appeal, after death of plaintiff, by reversing judgment and ordering trial court to enter judgment nunc pro tunc in favor of plaintiff's administratrix against employer in exact amount as rendered against employee.

3. Abatement and revival ⇐58(1)

Upon death of plaintiff in an action for personal injuries, the action abates.

4. Appeal and error ⇐333

Where plaintiff in action for personal injuries died pending plaintiff's appeal, defendant's motion to dismiss appeal would be granted.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by J. J. Reider, wherein Irene E. Reider, administratrix of the estate of J. J. Reider, deceased, was substituted as plaintiff, against the Aqueduct Construction Company and another for damages for personal injuries sustained through the alleged negligent operation of an automobile by the unnamed defendant. From a judgment for the named defendant and an unsatisfactory judgment in plaintiff's favor against the unnamed defendant, plaintiff appeals.

Appeals dismissed as to both defendants.

Gaines Hon, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles (W. I. Gilbert, Jr., of Los Angeles, of counsel), for respondent Aqueduct Const. Co.

DORAN, Justice.

Plaintiff J. J. Reider appealed from a judgment in favor of defendant Aqueduct Construction Company, a corporation, entered on a directed verdict, and also from the judgment in plaintiff's favor as against defendant J. J. Ward, in an action to recover damages for personal injuries sustained through the alleged negligent operation of a motor vehicle by defendant Ward.

At the time of the accident defendant Aqueduct Construction Company (hereinafter referred to as defendant construction company) was engaged in the building of an aqueduct, which was a part of the Metropolitan Water District project, near Desert Center, California. Defendant Ward was employed by the company as a tractor operator.

The accident involved herein occurred at about 3 o'clock in the afternoon on October 20, 1936, at which time Reider was struck by an automobile driven by defendant Ward.

At the trial, upon the theory that at the time of the accident Ward was not acting within the course and scope of his employment, the court granted the motion of defendant construction company for a directed verdict. A verdict was returned in favor of plaintiff Reider and against Ward, but in favor of defendant construction company, as directed.

Originally the sole question on appeal as conceded by both appellant and respondent construction company was whether, as a matter of law, defendant Ward at the time of the accident was acting within the scope of his employment. Appellant's brief was filed on February 28, 1938. Respondent Aqueduct Construction Company's brief was filed on March 28, 1938. On March 23, 1938, appellant Reider died. Thereafter Irene E. Reider, administratrix of the estate of appellant Reider, was duly substituted as plaintiff in the superior court and as plaintiff and appellant in the District Court of Appeal.

Respondent construction company moves to dismiss the appeal on the ground that the action abated upon the death of the plaintiff. Appellant, on the other hand, submits the following in connection with a request for a nunc pro tunc order: "Where, in an action for personal injuries against an employee and an employer jointly, the uncontradicted evidence shows that the employee was acting within the course of his employment as a matter of law, and the trial court erroneously directs a verdict in favor of the employer, and the jury thereafter renders a monetary verdict

against the employee; upon appeal by plaintiff from the decision, does not the appellate court have inherent power, after death of plaintiff pending the decision on appeal, to reverse the judgment and order the trial court to enter a judgment nunc pro tunc in favor of plaintiff and against the employer in the exact amount that was rendered against the employee?"

In re Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 14, 3 A.L.R. 1396, is relied upon by appellant in support of the foregoing proposition. Briefly, the facts in the Pillsbury case are as follows: Pillsbury, during his lifetime was a physician and was sued for malpractice; he failed to put in an appearance at the time of trial and a monetary judgment was rendered against him two days before his death. Unaware of his death, the trial court entered the judgment against him two days after his death. Several months later, the trial court being advised of Pillsbury's death, and upon proper motion, entered judgment nunc pro tunc against Pillsbury as of the day of its rendition. This was done over the objection of the representative of Pillsbury's estate. The question presented on appeal was: "Did the right of the plaintiff in his damage suit to have the judgment entered after the death of the wrongdoer survive?" The trial court was sustained, in which the Supreme Court observed that: "Under the maxim, Actus curiæ neminem gravabit, courts of law and courts of equity from very early times exercised the power of entering judgments and orders nunc pro tunc in order that the rights of the litigant who was himself not at fault should not be impaired or lost", and further, that "A nunc pro tunc order should be granted or refused as justice may require in view of the circumstances of the particular case." In re Estate of Pillsbury, supra. The opinion quotes from Dawson v. Waldheim, 89 Mo.App. 245, as follows: "'We * * * uphold the action of the circuit court on the broad ground that a court may, in the exercise of its common-law power, as a general rule when the state of the record or the minutes kept by the court or clerk show that a suitor was entitled to a particular judgment but that the judgment was not entered at the term when it should or might have been entered, at a subsequent term cause the proper judgment to be entered to relate back to the term when it should have been entered, provided the delay was not occasioned by the party applying.'" In re Estate of Pillsbury, supra, 175 Cal. page 463, 166 P. page 15, 3 A.L.R. 1396. The foregoing quotations are but brief excerpts; the opinion treats of the subject extensively.

[1, 2] It should be noted that the nunc pro tunc order in the Pillsbury case corrected an error or effected a change in the record that in no sense could be characterized as the correction or alteration of a judicial act. To the contrary, however, the error, which appellant herein either directly or in effect seeks to correct or modify, is a judicial error namely the granting of the motion for an instructed verdict. Neither the Pillsbury case nor any case to which attention has been directed goes so far as to hold that such an error can be corrected, changed or modified, by an order nunc pro tunc. Appellant's contention in this connection, therefore, cannot be upheld.

[3, 4] With regard to respondent construction company's motion to dismiss the within appeal, it is well settled that upon the death of the plaintiff in an action such as the one herein relied upon, the cause of action abates. Munchiando v. Bach, 203 Cal. 457, 264 P. 762; Smith v. Bimini Income Properties, Inc., 138 Cal.App. 447, 32 P.2d 399. Hence it is evident that the defendant Aqueduct Construction Company's motion to dismiss the appeal herein should be, and the same is, granted.

In view of the foregoing it is unnecessary to determine whether defendant Ward at the time of the accident was acting within the scope of his employment, the original question raised by the appeal as hereinbefore noted.

Appellant moves to dismiss the within appeal as to the defendant Ward, which motion is granted.

For the reasons heretofore given, the appeal herein is dismissed as to both defendants.

We concur: YORK, P. J.; WHITE, J.

32 Cal.App.2d 99

BRANDT v. BRANDT.

Civ. 6051.

District Court of Appeal, Third District, California.

April 8, 1939.

1. Marriage ⇐11

Where a married person remarries without obtaining a divorce, the court as matter of public policy, at the first opportunity, will enter decree annulling the subsequent marriage.

2. Stipulations ⇐14(11)

In husband's suit for annulment of marriage and award of one-half interest in certain property, wherein wife by cross-complaint also sought annulment of marriage and prayed that the property be awarded to the wife, stipulation, that wife might proceed with her cross-complaint for an annulment without contest and "without prejudice to any of the real property rights or division thereof," did not withdraw from jurisdiction of the court the issue as to the property, and merely operated to allow the wife to proceed without contest to have the marriage annulled.

3. Deeds ⇐190

In husband's suit for annulment of marriage and for a division of certain property, wherein wife filed cross-complaint for annulment and for an award of the entire property, and rested her title on a deed executed by the husband, the husband who did not plead mistake could not rely on contention that he executed deed at time when he mistakenly believed that his marriage to the wife was valid.

4. Pleading ⇐372

The issue of mistake is not presented where not pleaded.

5. Husband and wife ⇐267(7)

Where grantee wife received deed from husband without knowledge that husband had another wife living whom husband married prior to his purported marriage to grantee, validity of the deed as to the grantee would be presumed. Civ.Code, § 172a.

6. Husband and wife ⇐267(7)

Where grantee wife received deed from husband without knowledge that husband had another wife living whom husband married prior to his purported marriage to grantee, deed was not void in its entirety and conveyance was valid as to husband's interest and could be avoided only at suit of lawful wife as to her interest.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Peter Brandt against Katherina Brandt to annul a purported marriage between the parties and to have an adjudication of title of certain real property acquired by them, wherein the defendant filed a cross-complaint. From a portion of the judgment awarding certain property to defendant, the plaintiff appeals.

Affirmed.

H. S. Shapiro, of Los Angeles, for appellant.

Joseph H. Gosling and Lynn V. Gosling, both of Los Angeles, for respondent.

HELD, Justice pro tem., delivered the opinion of the court.

This is an action to annul a purported marriage between the parties, and to have an adjudication of the title of certain real property acquired by them. The property consists of two parcels of land in Los Angeles, one an improved residence lot, the other a vacant lot. Plaintiff by his complaint sought an annulment of the marriage, and an award of an undivided one-half interest in the property to each of the parties. Defendant by cross-complaint also sought to have the marriage annulled, and prayed that the whole of the property be awarded to her.

When the case came on for trial, the parties stipulated that the defendant and cross-complainant might proceed with her cross-complaint for an annulment without contest on the part of the cross-defendant "without prejudice to any of the real property rights or division thereof". The cross-complainant thereupon introduced evidence in support of the allegations of the cross-complaint concerning the annulment, and thereafter both parties introduced evidence relative to the ownership of the property. Findings were made, and a decree entered thereon that the marriage be annulled. The improved residence lot was by the court awarded to defendant, and an undivided one-half interest in the vacant lot to each of the parties. The plaintiff appeals from that portion of the judgment awarding the improved residence lot to defendant.

The record discloses that the true name of plaintiff is Peter Clippage; that on March 14, 1908, in the state of Pennsylvania he married Mary Barany, and later deserted her. While she was still living and the marriage between her and plaintiff remained undissolved, the plaintiff having assumed the name of Peter Brandt, married defendant in the state of Illinois on October 22, 1910. A daughter was born to them. Defendant had no knowledge that plaintiff at the time of the purported marriage to her was a married man, and did not ascertain that fact until 1932. She thereupon separated from plaintiff. The record does not disclose when plaintiff instituted this action. It does appear, however, that the second amended complaint was filed on August 2, 1935.

At the time of the purported marriage between the parties hereto, the defendant possessed as her own property, the sum of $250 in cash, which immediately after the purported marriage she loaned to plaintiff, who promised to repay the same to her. Later the parties moved to Los Angeles, and purchased the property awarded by the judgment to defendant. The initial payment thereon consisted of the $250 loaned by defendant to plaintiff, and in addition thereto certain moneys which were the joint earnings of the parties. The premises were occupied by plaintiff and defendant as a home. In 1924 the plaintiff contemplated a visit to Europe, and the question of a settlement of their financial affairs arose. As an outcome of the discussion, the plaintiff on March 14, 1924, executed a deed to defendant. This deed was recorded on March 17, 1924, and granted to defendant "as her separate property" the improved residence property. The testimony of plaintiff was that this deed was made as an assurance on his part that he did not intend to remain permanently in Europe, but would return and resume marital relations with defendant. Defendant testified that the purpose of the deed was to repay her for the loan she had made to plaintiff and to compensate her for her share of their joint earnings. The plaintiff did go to Europe and remained there for a period of five months, and on his return the parties resumed their former relations. In 1932 defendant learned that plaintiff on his trip to Europe had taken another woman with him; also that he had another wife, and thereupon she left plaintiff.

[1] No complaint is made of the decree annulling the marriage, nor could there be, for as was said in Sullivan v. Sullivan, 219 Cal. 734, 28 P.2d 914, 915: "As a matter of public policy the court should, at the first opportunity, enter its decree annulling such a marriage, to the end that the public be protected so far as possible from the evils of such unlawful acts and to prevent the innocent from suffering therefrom."

[2] Appellant contends, however, that the court was in error in awarding the whole of the improved residence property to defendant, in view of the stipulation entered into at the time of the trial. We see nothing in that stipulation that operated to withdraw from the jurisdiction of the court any of the issues tendered by the pleadings. The court was called upon to adjudicate the validity of the purported marriage between the parties, and also to determine the title of certain property. The stipulation merely operated to allow defendant to proceed without contest on her cross-complaint to have the marriage annulled. The issue as to the property was still before the court. Upon that issue the parties went to trial and produced evidence and the court disposed of the issue, as was its duty.

[3] Defendant rests her title upon the deed to her executed by plaintiff on March 14, 1924. Defendant testified that he executed this deed, believing at the time that his marriage to plaintiff was valid, and that he acted under a mistake of fact. No such plea, however, was made in the pleadings, and it is well settled that unless mistake is pleaded, it may not be relied upon. As was said in Harding v. Robinson, 175 Cal. 534, at page 542, 166 P. 808, at page 811: "To the necessity of pleading a mistake it is sufficient to refer, from the multitude, to such cases as Pierson v. McCahill, 21 Cal. 123; Murray v. Dake, 46 Cal. [644] 645; Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am.St.Rep. 469; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Carr v. King, 24 Cal.App. [713] 714, 142 P. 131; 17 Cyc. 703.

[4] As was said in Quality Bldg. & Sec. Co. v. Bledsoe, 125 Cal.App. 493, 14 P.2d 128, where mistake was not pleaded: "That issue is not in the case."

[5] Appellant contends also that to uphold his deed to the defendant would re-

sult in a fraud upon his lawful wife, and argues that the property being community property may not be legally conveyed unless such wife joins as a grantor. Section 172a of the Civil Code is cited as authority. However, the defendant here admittedly received the deed without knowledge of the fact that the grantor had a wife living other than herself. As to defendant, the validity of the deed is presumed under section 172a of the Civil Code. The section also limits the time in which an action to set aside a deed by the husband alone may be brought. That time has long since elapsed.

[6] Nor is such a deed void in its entirety. The conveyance is valid as to the husband's interest, and may be avoided *at the suit of the wife* as to her interest. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Rubenstein v. Solk, 5 Cal.App.2d 426, 43 P.2d 324. The lawful wife of plaintiff is not a party here, and the plaintiff having conveyed all his interest may not be heard to question the deed.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 31

PEOPLE v. MACKEN.

Cr. 3175.

District Court of Appeal, Second District, Division 1, California.

March 31, 1939.

As Modified on Denial of Rehearing April 14, 1939.

Further Modified April 26, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Perjury ⇐12

To establish the corpus delicti of perjury, it must be proven that defendant took an oath that he would testify truly before a competent tribunal, that such oath was lawfully administered and that wilfully and contrary thereto, defendant stated as true, a material matter which he knew to be false. Pen.Code, § 118.

2. Criminal law ⇐551

The terms "positive evidence" and "direct evidence" are interchangeable and synonymous.

[Ed. Note.—For other definitions of "Direct Evidence" and "Positive Evidence," see Words & Phrases.]

3. Perjury ⇐33(8)

Positive testimony of state of facts contrary to that sworn to by accused or absolutely incompatible or physically inconsistent with her evidence may be sufficient to sustain conviction of perjury. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

4. Perjury ⇐32(8)

Upon trial for perjury, direct evidence is not limited to denial in ipsissimis verbis of testimony given by defendant, but includes any positive testimony of contrary state of facts from that sworn to by her at former trial, or which is absolutely incompatible with her evidence, or physically inconsistent with facts so testified to by her. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

5. Perjury ⇐34(5)

The statute respecting quantum of evidence necessary in perjury cases will be satisfied, if there is testimony of one witness to facts that are absolutely incompatible with innocence of accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend with reasonable degree of certitude to show that accused is guilty as charged. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

6. Perjury ⇐34(4)

In prosecution for perjury in that defendant falsely testified that $2,800 in envelope had been stolen from her on evening that her husband and his attorney broke into her home and served her with divorce papers, testimony of husband's attorney that he did not see husband take any envelope or other article, corroborated by deputy sheriff, and testimony of friend of defendant and two daughters that defendant left envelope with them, was sufficient to establish falsity of defendant's statement. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

7. Perjury ⇐9(1)

As respects jurisdiction of court over proceeding in which alleged perjury occurred, where trial court secured jurisdiction over divorce action by filing of complaint and service of complaint and summons on adverse party, court had jurisdiction to hold hearing on order to show cause filed by one

of parties in connection with pending action, regardless of failure of order to include memorandum of points and authorities, as required by statute. Code Civ.Proc. § 527.

8. Appearance ⇐24(1)

Under statute requiring order to show cause to include memorandum of points and authorities, appearance of person to whom order was directed and participation in hearing thereon was waiver of statutory requirement and gave court jurisdiction. Code Civ. Proc. § 527.

9. Perjury ⇐11(9)

Testimony which affects credibility of witness is "material" and will afford basis for perjury.

[Ed. Note.—For other definitions of "Material Evidence or Testimony," see Words & Phrases.]

10. Perjury ⇐11(9)

Where matter falsely sworn to is circumstantially material or tends to support and give credit to witness in respect to the main fact, it is perjury.

11. Perjury ⇐25(5)

It is not necessary that it appear in information for perjury to what degree the point in which the man is perjured was material to the issue, for, if it is but circumstantially material, it will be perjury.

12. Perjury ⇐11(8)

The false testimony on which a charge of perjury is based need not be directly and immediately material, but it is sufficient if it is so connected with fact directly in issue as to have a legitimate tendency to prove or disprove it.

13. Perjury ⇐11(9)

When alleged perjured testimony is used as basis for impeachment purposes, it is material.

14. Perjury ⇐9(1)

Where defendant filed affidavit to secure order to show cause against her husband in pending divorce action, in which alleged false statement was accusation that husband stole $2,800 which she had in envelope when he and his attorney broke into her home to serve divorce papers, statement, if false, was foundation of perjury charge, regardless whether court had jurisdiction to try title to money or to require husband to return money, where statement was material to give credit to defendant and impeach husband in connection with other issues raised in divorce action over which court concededly possessed jurisdiction.

15. Perjury ⇐36

The materiality of alleged perjured testimony is to be determined by trial judge presiding in criminal action, and not by judge before whom alleged perjury was committed in testifying at the perjury trial.

16. Perjury ⇐33(6)

Where defendant allegedly falsely testified at hearing on order to show cause had in connection with divorce action that $2,800 in envelope had been stolen from her on evening that attorney and her husband broke into her home and served her with divorce papers, that trial judge presiding at hearing on order testified that he did not regard alleged perjured statement as material did not prevent such testimony from being made basis of perjury prosecution.

17. Perjury ⇐36

The question of materiality of evidence, no matter when or how it may arise, is one of law for court, and not of fact for jury.

18. Criminal law ⇐887

While jury, in rendering general verdict in criminal case, necessarily has power to decide all questions arising on general issue of not guilty, it only has right to find facts and apply to them law, as given by trial court.

19. Perjury ⇐37(1)

On trial for perjury, it is duty of trial court to instruct jury as to what facts would show material testimony.

20. Perjury ⇐11(2), 36, 37(1)

The ordinary test of "materiality" of alleged perjured testimony is whether testimony could have probably influenced trial judge before whom case was being tried, upon issue involved therein, and it is exclusive right of trial judge in criminal case to determine materiality of alleged perjured testimony and to instruct jury thereon.

21. Criminal law ⇐822(1)

Instructions must be considered as an entirety.

22. Perjury ⇐37(1)

Where instructions considered as whole fully and fairly advised jury as to kind, quality, and degree of proof necessary before defendant could be convicted of perjury, nothing more was required.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Juanita Marie Macken was convicted of perjury, and she appeals from conviction and order denying her motion for new trial.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and John W. Loucks, Deputy Dist. Atty., both of Los Angeles, for the People.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, defendant was accused in six counts of the crime of perjury. Trial by jury resulted in her conviction on the first three counts. The fifth count was dismissed upon motion of the district attorney, and the jury acquitted defendant upon the fourth and sixth counts. From the order denying her motion for a new trial, appellant prosecutes this appeal.

Count I alleged the institution and existence of a divorce action between appellant and her husband in the Los Angeles county superior court; that during the pendency of such litigation and in connection therewith the court issued an order directing her to appear and show cause why she should not, during the pendency of the divorce action, among other things, be restrained from disposing of approximately $4,000 in cash allegedly then in her possession; that at the hearing had upon such order appellant appeared in court and testified that approximately $2,800 had been stolen from her on the evening of June 16, 1937, at the time her husband and his attorney had broken into her home and served her with the divorce papers and a copy of said order. The falsity of such testimony is made the gravamen of this count.

Count II alleged that on June 30, 1937, appellant prepared and filed in said divorce proceedings an affidavit setting out substantially the same facts with reference to the theft of the $2,800, together with other averments not here material; that this affidavit was filed as the basis of her application for an order to show cause directed against her husband, ordering the latter to appear in said superior court to show cause why he should not be required to pay appellant's attorney's fees, court costs, alimony pendente lite, allowance for support, and in re custody of a minor child of the parties. The falsity of that portion of the affidavit referring to the loss of the $2,800 furnishes the basis of this count.

Count III alleges the falsity of testimony given by appellant with reference to an alleged disappearance of the $2,800 upon a hearing conducted in said superior court on July 13, 1937, pursuant to the order to show cause referred to in count II.

The allegations of all counts may be epitomized in the statement that appellant was accused of falsely swearing that on the night of June 16, 1937, she had the sum of $2,800 in cash in her purse; that the last time she saw the purse it was on the divan in her residence at 5734 Harcourt street, Los Angeles; that on the night in question her husband, William Wesley Macken, and his attorney came in the back door of her residence without her permission and after an altercation they left her residence, and that after they had gone she discovered the $2,800 was gone; and that she had given no one permission to take the money.

[1, 2] The main ground of this appeal is the claim that there is a total absence of any positive testimony to prove the defendant guilty of the crimes charged for the reason that there was no proof of the corpus delicti; that it was incumbent upon the prosecution, by direct testimony, to prove the negative fact that Dr. Macken did not take the $2,800. To establish the corpus delicti in the crime of perjury, it must be proven that the defendant took an oath that he would testify, declare, depose or certify truly before a competent tribunal, officer or person; that such oath was taken in a case in which such an oath may by law be administered; and finally, that wilfully and contrary to such oath, the defendant stated as true a material matter which he knew to be false. Pen.Code, § 118. People v. Wells, 103 Cal. 631, 37 P. 529; People v. Rodley, 131 Cal. 240, 63 P. 351. The terms "direct evidence" and "positive evidence" are interchangeable and synonymous. Words & Phrases, First Series, vol. VI, page 5461.

[3] It is true that perjury must be proved by the testimony of two witnesses or one witness and corroborating circumstances. Section 1968, Code Civ.Proc.; section 1103a, Pen.Code. However, this does not mean that it is necessary to produce someone who was present at the de-

fendant's home on the evening of June 16, 1937, to supply direct evidence that Dr. Macken did not steal the money. It is, however, necessary to have positive testimony as to facts that are absolutely incompatible with the innocence of the accused. People v. Porter, 104 Cal. 415, 38 P. 88; 20 Cal.Jur. 1023. Positive testimony of a state of facts contrary to that sworn to by the accused or absolutely incompatible or physically inconsistent with her evidence, may be sufficient. People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 389; People v. Casanova, 54 Cal.App. 439, 202 P. 45; People v. Follette, 74 Cal.App. 178, 240 P. 502.

[4] It was said by the court in People v. Chadwick, supra [4 Cal.App. 63, 87 P. 387]: "'Direct evidence' is declared in section 1831 of the Code of Civil Procedure to be 'that which proves the fact in dispute directly without an inference or presumption, and which in itself, if true, conclusively establishes that fact.' Upon a trial for perjury, direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him."

[5] And in People v. Casanova, supra [54 Cal.App. 439, 202 P. 47]: "The statute respecting the quantum of evidence necessary in perjury cases will be satisfied, if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged."

[6] In People v. Wells, supra, upon which case appellant relies, the court said: "As we have already suggested, in order that the evidence may be sufficient, there must be positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial. For instance, to support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that place, or that the cow was not there * * *."

If the latter part of this language were applied to this case, it would read: "It was necessary to produce the positive testimony of one witness at least either that Dr. Macken did not steal the money or that the money was not stolen at all." When Dr. Macken was called as a witness to testify that he did not steal the money, appellant successfully interposed an objection to his testimony on the ground that being the husband of the defendant, his testimony against her was barred by the provisions of section 1881, subdivision 1, of the Code of Civil Procedure. It then became necessary for the prosecution to prove that the money was not stolen by anyone, but in fact remained in the possession of the defendant on and after the visit of her husband and the latter's attorney to her home on the evening of June 16. While there may be an absence of what the law denominates "direct evidence" as to Dr. Macken's not stealing the money, there is positive evidence that his attorney did not steal it, and there is positive evidence that it was not stolen at all, by Dr. Macken or anyone else, or at least positive evidence showing a state of facts absolutely incompatible and inconsistent with the defendant's oath-bound statement that larceny of the money occurred. There is positive evidence that at the hearing on the order to show cause appellant was sworn and testified, in substance, that she had withdrawn the sum of $3,116 from the bank and had placed $2,800 of the money in an envelope which she had hidden under one of the cushions of the davenport in the living room, and on the night of June 16 her husband and his attorney broke into the house; that she had an altercation with her husband, and after he had left she discovered that the envelope and the $2,800 were gone, and that she had given no one permission to take the same. It was proved, however, that on June 18, two days after appellant claims the money was stolen, she went to the residence of a friend and the latter's two daughters, and left with them an envelope, stating that it contained valuable papers. Later that day appellant stated to one of the daughters that the envelope contained $3,000 in cash. During the time these people had possession of the envelope left with them by appellant, the latter called on different occasions to take money from the envelope, and on these

occasions the custodians had an opportunity to observe its contents. It was further proved by direct evidence that on October 14, 1937, appellant called at the home of the women with whom she had left the money and was in a very hysterical condition, during which visit she said, "My God, what has happened, Mrs. Lydig?" to which Mrs. Lydig replied, "Calm yourself, Juanita, your money is all right. Nothing has happened to your money." In reply to which appellant said, "I don't care about the money; I can go to jail. I have perjured myself." It was further proved that upon this occasion, after appellant had quieted herself, Mrs. Lydig produced the envelope and appellant counted the contents, which consisted of $2,300, and at which time Mrs. Lydig requested the appellant to give a receipt for the money, with which request appellant complied, with the understanding that the receipt should not set forth the amount of money returned to her by Mrs. Lydig. It was proved that during the month of June, 1937, appellant was talking to a friend by the name of Mrs. Margaret Darnell, at which time appellant said that she had the money, the $3,000, and was going to accuse her husband of stealing it. Thus we see that the corpus delicti or falsity of the defendant's sworn statements was proved by the testimony of Dr. Macken's attorney, who was present at the home of the defendant on the evening of June 16, and who testified that Dr. Macken was within the presence of the witness at all times that they were in the house, and that he did not see Dr. Macken take any envelope or any article of any kind. There was corroboration of this by a deputy sheriff who was called at the home of defendant on the evening in question. And certainly the testimony of Mrs. Lydig and her daughters established facts absolutely incompatible with the innocence of appellant.

[7, 8] Appellant's contention that because the order to show cause served upon her did not include a memorandum of points and authorities, as required by section 527 of the Code of Civil Procedure, the hearing had upon such order was void because the court was without jurisdiction, cannot be sustained. It is true that no points and authorities were served, as contended by appellant, but the failure of such service did not divest the court of jurisdiction. The court acquired jurisdiction over the subject-matter of the divorce action by the filing of the complaint, and jurisdiction of the person of appellant was acquired through service of the complaint and summons upon her. From that time on the court was authorized to proceed. Appellant appeared in response to the order of the court and participated in a trial on the merits of that proceeding. Conceding that the requirement of service of points and authorities under section 527 of the Code of Civil Procedure is mandatory, nevertheless, the conduct of appellant in appearing at the hearing and participating therein was a waiver of the statutory requirement therein and gave the court jurisdiction. Anyone may waive the advantage of a law intended solely for his benefit. Civ.Code, §§ 3515, 3516. As was said in Walberg v. Underwood, 39 Cal.App. 748, 751, 752, 180 P. 55, 57, "Where the object of a notice was accomplished, it is immaterial whether there was notice or not. When both parties appear, no notice whatever is necessary to be shown."

[9] With reference to count II, appellant urges that the court was without jurisdiction to hear the matters pertinent to the alleged perjury. The record indicates that in the pending divorce action appellant sought an order to show cause against her husband requiring him to appear in court to show cause why he should not pay attorney's fees, court costs, alimony pendente lite, allowance for support of the child of the parties, and also why he should not be required to return to appellant "the sum of $2,800 taken from her purse by plaintiff or his attorney". In her affidavit made to secure the issuance of such order to show cause appellant swore to the following: "On the night of June 16, 1937, plaintiff and his attorney, Romaine Hogan, broke in house, took $2,800—it was necessary to call police officers to quiet the confusion and disturbance they caused." Appellant earnestly contends that the foregoing statement was sworn to for the single purpose of supporting the request contained in the affidavit that the court make an order requiring her husband to return the $2,800, and that the court, being without jurisdiction either to try the question of title to the $2,800 or to order the husband to return the same, it being community property—the allegedly perjured statement was immaterial as to any matter over which the court had jurisdiction. This might be true if the sworn statement in the affidavit were material only to the issue

of the requested return of the $2,800, but such is not the case. The claimed perjured statement was material to give credit to the affiant and to impeach her husband in connection with the other issues raised thereby and over which the court concededly possessed jurisdiction. In People v. Metzler, 21 Cal.App. 80, 130 P. 1192, it was held that testimony which merely affects the credibility of a witness is material, for the reason that such evidence usually tends to strengthen the case of a party to an action or to weaken the defense of his adversary.

[10-14] The purpose of the affidavit here in question was twofold. First, it served as the basis for an order directed to Dr. Macken to show cause why he should not be required to pay attorney's fees, alimony, allowance for support and custody of child, etc.; and secondly, to be used and considered as evidence, as it was, on the hearing of the order to show cause predicated thereon. The alleged perjured statement in the affidavit certainly affected the moral character of Dr. Macken upon the question of the custody of the child and his right of visitation with the child; and the sworn statement in question certainly had a tendency to affect the credibility of the doctor as a witness. In Wood v. People, 59 N.Y. 117, 123, it is said: "If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury." In Rex v. Giepe, 1 Ld. Raym. 256, we find the following: "It is not necessary that it should appear in an information for perjury to what degree the point in which the man is perjured was material to the issue, for if it is but circumstantially material, it will be perjury. * * * So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduced to the proof of the point in issue." People v. Phillips, 56 Cal.App. 291, 205 P. 40, 41, holds that: " 'The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise.' 22 Am. & Eng. Ency. of Law, 687; * * *." When the alleged perjured testimony is used as a basis for impeachment purposes it is material. People v. Barry, 63 Cal. 62, 64, 65. In People v. Albert, 91 Cal. App. 774, 776, 267 P. 587, 588, it was held that "the false testimony need not be directly material. It is sufficient if it is circumstantially material; the degree of materiality being unimportant." The aforesaid statement contained in the affidavit, if untrue, being material to the cause in connection with which it was filed, was legally and properly made the basis of a perjury charge; and the evidence, as heretofore set forth, being sufficient to establish its falsity, the finding of the jury thereon cannot here be disturbed.

[15, 16] Count III alleges that when the order to show cause referred to in count II came on for hearing, the appellant falsely swore to facts alleged in such affidavit to have occurred on the night of June 16, 1937, wherein she charged that her husband and his attorney broke into her home and took the $2,800. What we have said as to the materiality of the alleged perjured testimony in connection with count II applies with equal force to the same contention raised by appellant in her argument urging a reversal of the judgment as to count III. Appellant, however, further asserts that the judge who presided at the hearing on the order to show cause, and who was not the judge who issued the same, testified at the trial of appellant on the perjury charge that he did not consider the testimony in regard to the $2,800 as material, his testimony in that regard being substantially as follows: "I have had my memory refreshed and I recall that Romaine Hogan stated something in this manner, 'then you must be taking into consideration the $2,800 upon making this order', that was the order that I was making at that time of July 13, and I stated that I was not taking into consideration the $2,800 in making the order and that I was not going to decide which one of them had taken the $2,800, as I was not called upon to decide that question at that time, and I believe that I stated there was enough other testimony sufficient to make the order."

It is the contention of appellant that when the judge who presided at the hearing on the order to show cause testified that he did not consider the testimony in regard to the $2,800 as material, such testimony cannot be made the basis of a perjury prosecution. We are unable to sustain appellant's claim in this regard. It is well settled in our law that it is for the trial judge presiding in the criminal action to determine the materiality of the alleged perjured testimony, and it is not a question

for the determination of the judge before whom the alleged perjury was committed.

[17-19] "The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury. It usually arises in the ordinary trial of a cause where one party offers evidence and the other objects to it as material, and in that case it would be clear to every one that the question was for the court. But the question is exactly the same when, on a trial for perjury, the materiality of the alleged false testimony arises. Of course, a jury, in rendering a general verdict in a criminal case, necessarily has the *naked* power to decide all the questions arising on the general issue of not guilty; but it only has the right to find the facts, and apply to them the law, as given by the court. And on a trial for perjury, it is the duty of the court to instruct the jury as to what facts would show material testimony." People v. Lem You, 97 Cal. 224, 228, 32 P. 11, 12.

[20] The ordinary test of materiality is whether the testimony given could have probably influenced the trial judge before whom the case was being tried, upon the issue involved therein and it was the exclusive right of the trial judge in the criminal case to determine the materiality of the alleged perjured testimony and to instruct the jury thereon.

[21, 22] Finally, appellant complains of the action of the trial court in the giving of certain instructions, the gist of which criticism is based on the claim that the court neglected to advise the jury that it was necessary for the prosecution to prove its case by the direct and positive testimony of two witnesses or of one witness and corroborating circumstances; that the instructions given might well have led the jury to conclude that so long as they were convinced beyond a reasonable doubt of the guilt of the defendant they could so find, regardless of whether or not such conviction in their minds was brought about through the testimony of a single witness, or upon circumstantial evidence alone, rather than direct or positive evidence. It would unduly prolong this opinion to here set forth the instructions complained of, but we have read all of the instructions offered, given and refused, and find no prejudicial error in the giving or refusal of any instructions. It must be remembered that instructions must not be considered singly, but as an entirety, and when so viewed the instructions given in the instant case are not subject to the criticism urged by appellant. A review of all the instructions given convinces us that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before appellant could be convicted of perjury. This is all that was required. People v. Kelly, 70 Cal.App. 519, 524, 234 P. 110; People v. Alston, 139 Cal.App. 575, 576, 34 P.2d 759; People v. Bolton, 215 Cal. 12, 22, 8 P.2d 116; People v. Jordan, 24 Cal.App.2d 39, 54, 74 P.2d 519. In reading the instructions given, we are impressed not only with the fact that the trial judge painstakingly and zealously guarded the rights of appellant, but that if there was any error in connection with the instructions, it is to be found in the giving of certain instructions requested by appellant and which were much more favorable to her than she was probably entitled to under the law.

The appellant having been fairly tried, the order denying her motion for a new trial should be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.



32 Cal.App.2d 103

STROSNIDER v. POMIN et al.

Civ. 6217.

District Court of Appeal, Third District, California.

April 8, 1939.

Rehearing Denied May 8, 1939.

Hearing Denied by Supreme Court June 1, 1939.

1. Venue ⇐16½

If in one complaint there have been united allegations and prayer for relief in causes of action both transitory and local, defendants are entitled to have the cause transferred to the county of their residence.

2. Venue ⇐5(5)

The term "injury to property" in statute requiring action for damage to real property to be brought in county where property is located is not limited to mere physical

injury to real property. Code Civ.Proc. § 392(1) (a).

[Ed. Note.—For other definitions of "Injury to Property," see Words & Phrases.]

3. Venue ⇐5(5)

The fact that cause of action is for recovery of damages for fraud and deceit does not fix character of action as "transitory" if plaintiff in order to make out case must prove ownership of interest in real property and damages, if any, must necessarily be predicated upon an immediate or consequential injury to real property of plaintiff.

[Ed. Note.—For other definitions of "Transitory Action," see Words & Phrases.]

4. Venue ⇐5(5)

Cause of action for damages to real property of plaintiff which would be affected by obstruction of right of way by defendants and which resulted from dismissal of prior quiet title action through fraud of defendants was a "local action" and not a "transitory action" so that defendants were not entitled to have venue transferred to county of their residence. Code Civ.Proc. § 392(1) (a).

[Ed. Note.—For other definitions of "Local Action," see Words & Phrases.]

5. Venue ⇐8

Where fraud alone is relied on, "action" is "transitory."

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by R. H. Strosnider against Ernest Pomin, also known as Ernest H. Pomin, and others to quiet title to a right of way and easement and for damages for fraud. From an order granting a motion for change of venue, plaintiff appeals.

Reversed.

Thomas Maul, of Placerville, for appellant.

H. J. Kleefisch, of San Francisco, for respondents.

Otis D. Murdock, Jr., of Placerville, amicus curiæ.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order granting a motion for a change of venue from the county of El Dorado to the county of Placer. The motion was made by defendants and respondents on the ground that they were residents of the county of Placer. It is the contention of appellant that the trial court erred in granting the motion, for the reason that the action was local, and that the allegations of both the causes of action in the complaint brought the case within the provisions of section 392 of the Code of Civil Procedure, which provides in part as follows:

"(1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real propery, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

"(a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

The first cause of action is admittedly one to quiet title to a right of way and easement. It is alleged that plaintiff is the owner of a right of way or easement as follows:

"A right of way forty feet in width extending from the West line of the N E ¼ of the N W fractional quarter of section 17, Township 14 N. R. 17 E., M. D. B. & M. Said strip extending easterly along the North boundary of said Sec. 17 to the shores of Lake Tahoe, and along said shore to the east boundary line of said N. E. ¼ of the N. W. ¼ of said sec. 17; said strip of land and right of way to be appurtenants to the N ½ of the S W ¼, and all of the N W fractional of Sec. 17, and to be used * * * as a way for the passage of pedestrians and vehicles over the above described land to the shores of Lake Tahoe from the lands adjacent to and abutting thereon."

It is also alleged that plaintiff is the owner of an easement described as: "An easement to the 340 feet of waterfront extending along the shore of Lake Tahoe in a general southerly direction from the most easterly point on the right of way first hereinabove described, including the right of wharfage and landing thereon, and the right to the use of the wharf, already constructed, and also the right to build a boathouse on the Lake front, and use and operate the same, or to use in common the boathouse already constructed thereon." It is further alleged that defendants have constructed a barbed-wire fence, which

obstructs said right of way, and that they still maintain, and now keep such fence in a manner that it is impossible for the plaintiff to use the said right of way, and that defendants are also obstructing the said easements and rights of way by the maintenance of two dwelling houses. The final allegation is that the claims of the defendants are wholly without right or color of title.

The second cause of action incorporates, by reference, all the allegations of the first cause of action. It is alleged that plaintiff filed an action in the county of El Dorado against Edward W. Gensberg, executor of the estate of Marion E. Pomin, deceased, for the purpose of quieting title to the property described in the first cause of action, and also seeking judgment in the sum of $29,000; that Ernest Pomin, one of the defendants acting for and on behalf, and with the knowledge and consent of the other defendants, verbally and in writing recognized the rights of plaintiff in the use of said rights of way and easements, and agreed and promised that plaintiff should have the free and uninterrupted use of those rights of way and easements; that thereafter, said Ernest Pomin, acting for the other defendants, opened up the said rights of way and easements to the free and uninterrupted use of plaintiff and other lot owners, in full recognition of the rights of plaintiff and the other lot owners; that said representations, agreements and promises were made fraudulently, and in bad faith, for the sole purpose of inducing the plaintiff to dismiss said quiet title action, and at the time said representations, agreements and promises were made, neither defendant Ernest Pomin, nor any of the other defendants, intended to perform them; that said false and fraudulent representations directly caused and induced plaintiff to dismiss said quiet title action; that defendants, fraudulently and in bad faith, thereafter erected an obstruction across said easements and rights of way, to-wit, a barbed-wire fence, and still fraudulently and in bad faith maintains the said obstruction; that the lands of plaintiff are valuable for summer residences and homesites, and the said rights of way give the only access from plaintiff's lands to the shores of Lake Tahoe; and that the obstruction of said right of way by the defendants has damaged plaintiff in the sum of $6,000. The following relief is prayed for:

"1. That the rights of the plaintiff hereto to be declared in and to the rights of way and easements set forth and described in this complaint and in said Exhibits A and B.

"2. That the rights of the plaintiff in and to said rights of way and easements set forth and described in this complaint and in said exhibits A and B be quieted, and that it be adjudged and decreed that the plaintiff, his heirs, administrators, executors or assigns are the owners and entitled to the use and enjoyment of such rights of way and easements, and that the defendants be required to remove all obstructions and encroachments therein.

"3. That the plaintiff have judgment against said defendants in the sum of thirty-five thousand dollars ($35,000.00).

"4. That this court enter judgment and declare the defendants to be obligated to open and maintain said easements and rights of way.

"5. That the said defendants, their agents, servants, or employees and any and all persons claiming under them be forever restrained and debarred from interfering with the right of the plaintiff or his assigns in and to the free and uninterrupted use of said easements and rights of way, more particularly set forth and described in this complaint and in said Exhibits A and B. And that the said defendants, their agents, employees and servants be forever restrained and debarred from asserting any right, title or interest adverse to the plaintiff or his assigns in and to said easements and rights of way.

"6. That the said plaintiff have judgment for costs of this suit, and for such other and further relief as this court may deem meet and equitable."

[1] It is conceded by respondent that if it were not for the second cause of action, the place of trial would be in El Dorado county. This is due to the fact that the first cause of action is merely an action to quiet title to real property, and comes directly and unquestionably under the provisions of the code section above cited. Respondents earnestly contend, however, that the second cause of action is personal and transitory in character, and that defendants are therefore entitled to have the case transferred to the county of their residence, under the familiar rule

that "if, in one complaint, there have been united allegations and a prayer for relief in causes of action both transitory and local defendants are likewise entitled to have the cause tried to the county of their residence". Bardwell v. Turner Co., 219 Cal. 228-230, 25 P.2d 978, 979. It becomes necessary, therefore, to carefully examine the allegations of the second cause of action in order to ascertain whether or not it is local or transitory.

We believe that the case of Coley v. Hecker, 206 Cal. 22, 272 P. 1045, 1047, supports the contention of appellant, and requires a reversal of the order. In that case the question before the court is thus stated:

The first and principal point presented by appellants is that, respondent having joined a real and personal action, to wit, an action to quiet title to real property with an action to recover for a slander of title, did thereby lose his right to hold the case in the county where the real property was situate. This contention is based upon the claim that an action for the recovery of damages for slander of title sounds in personal action, and does not bring the venue within the purview of section 392, Code of Civil Procedure. Said section provides: 'Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

"'1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for the injuries to real property * * *.

"'3. For the foreclosures of all liens and mortgages on real property.'"

After holding that the action was local, and that the second cause of action came under the section of the code quoted above, the court said:

"It is appellants' contention that, by the term 'injury to property,' as used in section 392, supra, it was intended to include only physical interference with, or physical injury to, real property, such as waste, or some sort of physical trespass committed upon the lands, and that the term was not intended to be as broadly applied as its meaning would seem to imply. In addition to the construction which we feel constrained to place upon said section, and which is supported by the construction given to practically the same language by the Supreme Court of Louisiana in Labarre v. Burton-Swartz etc. Co., 126 La. 982, 53 So. 113, to the effect that slander of title is an actual intrusion upon one's property, and is in the 'nature of a trespass, a real action to protect title,' our conclusion is further fortified by eminent authority holding that a libel written or published in disparagement of title is in the nature of an action to trespass on the case. 'The term "injury to real property" is in itself a wider and less technical term than "trespass to real property." As applied to questions of venue, it has been declared to embrace every wrong which in legal contemplation is an injury to real property, not only the direct and forcible injury, but consequential injuries, and threatened injuries to land, and even a mere nonfeasance, as permissive waste.' 40 Cyc. 74; 17 R.C.L. 454.

"The trend of decisions of this court is generally in accord with the doctrine, whenever the question has come before it, that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries."

In the case before us, the cause of action is unquestionably based upon a tort—damages arising out of fraudulent representations made in respect to the dismissal of the prior quiet title action. The real question is: Damages to what? According to the allegations of the complaint, damages to the real property of plaintiff which would be affected by the obstruction of the right of way of defendants and which resulted from the dismissal of the prior action through the fraud of defendants. Thus it is clearly alleged that the fraudulent act injured the real property of plaintiff—a consequential injury which the court in the Hecker case held to be covered by the term "injury to real property".

The complaint also brings the action under that portion of section 392 of the Code of Civil Procedure which requires the action to be brought in the county where the real property is situated, where it is "for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest". It is quite clear, from a reading of the second cause of action, that plaintiff would have to prove ownership of his own real property, and of the easement in question, before he could establish any right to damages. In our opin-

ion this would call for the determination, in some form, of an estate and interest in real property.

[2, 3] The fallacy of respondents' position lies in the contention that by the term "injury to property", as used in section 392, above, it was intended to include only physical interference with, or physical injury to, real property, and that the second cause of action is based upon fraud. Hence, the section is inapplicable. This was the precise contention made in the Coley case, where it was held that such a narrow and restricted construction should not be made. See quotation above. It is true, as respondents state, that the second cause of action is for the recovery of damages based upon fraud and deceit, but those facts do not fix the character of the action as transitory, if the further fact appears, from the allegations of the complaint, that plaintiff, in order to make out a case under his pleading, must prove ownership of an interest in real property, and if the further fact appears that the damages, if any, must necessarily be predicated upon an immediate or consequential injury to the real property of plaintiff.

The admitted fact that plaintiff seeks to recover a money judgment does not necessarily stamp the action as transitory, if, according to the allegations of the complaint, such judgment is predicated upon damages to real property. Proof of fraud alone, in the dismissal of the former action to quiet title, would not result in a money judgment for plaintiff—he must go further and prove he was injured or damaged by such fraud. According to the allegations of the second cause of action, he was the owner of the easement. He alleges that, by reason of the fraudulent dismissal, "defendant Ernest Pomin, did fraudulently and in bad faith erect, or cause to be erected across said easements and rights of way—an obstruction, to-wit, a barbed-wire fence; * * * that said defendant Ernest Pomin, did fraudulently, and in bad faith maintain, and does fraudulently and in bad faith maintain the said obstruction to-wit, a barbed-wire fence". It is prayed that defendants be compelled to "open and maintain such easements and rights of way". It is obvious from the foregoing that not only will the trial court be called upon to adjudicate, "in some form", a right or interest in real property, but also the matter of injury to said property. We have carefully examined the authorities cited by respondents, but none of them are pertinent to the question here involved. In all of these cases the allegations of the complaint are the controlling factor, and a parallel situation necessarily is difficult to find.

[4, 5] Summing up the entire matter, we find that issues of title and injury to real property are so inextricably intermingled with the issue of fraud in the second cause of action, as to lead to the inevitable conclusion that the action is local in character. This conclusion is reached after considering the pleading as a whole, and with due respect to the rule that where fraud alone is relied upon, the action is transitory. Respondents' exposition of their position is scholarly and exhaustive, but we cannot adopt their somewhat narrow and restricted view of the scope of section 392 of the Code of Civil Procedure. The law requiring actions of this character to be tried in the county where the real property is situated is based upon sound principles. All the records relating to the title are immediately available at the county seat, and the expense and inconvenience of taking local officers from the place of their employment and subpoenaing them to appear in some other county, and procuring of certified copies of the records, is obviated.

We are therefore of the opinion that the proper place for the trial of this action is in El Dorado county, and that the court erred in granting the change of venue.

The order is reversed.

We concur: THOMPSON, J.; PULLEN, P. J.

32 Cal.App.2d 43

PEOPLE v. MONTGOMERY.

Cr. 1660.

District Court of Appeal, Third District, California.

March 31, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Criminal law ⇐564(1)

Testimony that defendant had lived at certain towns in Mendocino county was sufficient, for purposes of establishing venue in Mendocino county of prosecution for stealing a steer, to show crime had been committed in Mendocino county where defendant transported animal between towns in question. Pen.Code, § 484.

2. Criminal law ⇐564(2)

The state is not required to prove venue of crime beyond a reasonable doubt, but such doctrine applies only to issue of guilt.

3. Criminal law ⇐1170½(5)

In prosecution for stealing a steer, sustaining objection to defendant's question, on cross-examination of state's witness, as to whether witness had ever discussed with defendant that other steers had disappeared, was not prejudicial, where question was asked to show unpleasant relationship between defendant and witness and question did not call for an answer having such effect. Pen.Code, § 484.

4. Criminal law ⇐1170½(5)

In prosecution for stealing a steer, striking defendant's answer to a question on cross-examination as to why he did not tell the true story to a certain person was not prejudicial, where defendant was permitted to testify on redirect examination as to why he had lied to such person. Pen.Code, § 484.

5. Criminal law ⇐1169(3)

In prosecution for stealing a steer, testimony of defendant's witness concerning earmarks witness had observed on a steer on a former occasion was properly stricken as immaterial, where defendant admitted taking a steer with certain earmarks. Pen. Code, § 484.

6. Criminal law ⇐469

In prosecution for stealing a steer, overruling defendant's objection to testimony of state's witness identifying brand on steer taken by defendant, on ground witness was an expert and that evidence in question did not call for expert testimony, was proper where witness was apparently not called as an expert. Pen.Code, § 484.

7. Criminal law ⇐706

Where defendant in prosecution for stealing a steer testified on cross-examination that he had gotten several cattle off the ranch, district attorney's question asking whether they were taken legitimately was not prejudicial, where question was asked in good faith. Pen.Code, § 484.

8. Criminal law ⇐1162

That jury, in prosecution for stealing a steer, deliberated approximately 11 hours, was not sufficient to show prejudicial character of alleged errors relied upon by defendant for reversal. Pen.Code, § 484.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

C. C. Montgomery was convicted for stealing a steer, and he appeals.

Affirmed.

For prior opinion, see 88 P.2d 163.

Charles Kasch, of Ukiah, John B. Harman, of Fort Bragg, and Wayne P. Burke, of Ukiah, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

The defendant in this case was convicted of a felony, to-wit: A violation of section 484 of the Penal Code, in that, in the county of Mendocino, he feloniously stole, led and drove away a steer which was the personal property of the Caspar Lumber Company, a corporation. It was the contention of the defendant at the trial that he had permission from the company to take and sell the steer. The animal was taken from the slaughterhouse of the Caspar Lumber Company, which is about one-quarter of a mile from Caspar, and transported to Fort Bragg by appellant.

[1] The petition for rehearing was granted in the above-entitled cause in order that the court might give further consideration to the question of the proof of venue. It is earnestly contended by the attorney-general that there is sufficient direct evidence in the record, exclusive of that derived through judicial knowledge, to meet the requirements of the law in the matter of the establishment of the fact

that the crime in question was committed in Mendocino county. A reexamination of the record, in our opinion, supports this contention. The testimony of defendant relative to this matter, and upon which the attorney-general relies, is as follows:

"Q. How long have you been a resident of Mendocino County, Mr. Montgomery? A. Since I was four years old.

"Q. Where were you born? A. San Francisco.

"Q. And approximately how many years have you lived in Mendocino county? A. Well, I will be 50 years old next February.

"Q. For the last 46 years, then, you have been a resident of Mendocino county? A. Yes, sir, barring a year or so I was in Livermore.

"Q. *And during that 46 years where have you resided in Mendocino County?* A. *Fort Bragg or Caspar, or in that neighborhood.*

"Q. Either one of those places for the last 46 years? A. Practically; been away for a few months now and then, but not long.

"Q. Where have you resided for the last fifteen years? A. Caspar Woods, known as 'Camp 6'. * * *

"Q. And whose property do you reside on, or have you been residing on? A. I have resided on the Caspar property; mother lives on the Union Lumber Company's property.

"Q. What has been your occupation, Mr. Montgomery, for the last fifteen or eighteen years? A. Raising cattle and getting out split stuff for the Caspar Lumber Company. Part of the time for the Union Lumber Company, but mostly, Caspar."

[2] We are satisfied that from the foregoing the jury could reasonably infer that both Fort Bragg and Caspar were in Mendocino county. "The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. People v. McGill [10 Cal.App.2d page 155], 51 P.2d 433; Underhill on Criminal Evidence, vol. I, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking." People v. Carter, 10 Cal.App.2d 387–389, 52 P.2d 294, 295.

[3] It is next contended that the trial court erred in sustaining an objection to a question propounded by his counsel during the cross-examination of witness Biaggi, for the People. This question was in the following language: "Q. Did you ever discuss with Mr. Montgomery the fact that any other steers had disappeared or moved off the property?" The district attorney objected to the question on the ground that it was incompetent, irrelevant and immaterial, and not proper recross-examination. This objection was sustained. Arguing at the trial in support of its admissibility, counsel for appellant contended that he desired to produce evidence tending to show that the relations between appellant and Biaggi were not pleasant. Assuming that the cross-examination of the witness was unduly restricted, we do not believe that a sufficient showing has been made which would indicate that there was any serious prejudice to defendant's case arising out of the incident. Furthermore, the question would not seem to call for an answer which would have the effect of showing any unpleasant relationship between defendant and the witness. The contention is without merit.

[4] It is urged that the trial court erred in striking out the answer of appellant to a question on cross-examination. It appears to be a fact, and was admitted by defendant, that prior to the trial he had given a witness named Stickney an account of his taking the steer, which was not the truth. While being cross-examined by the district attorney, appellant was asked: "Why didn't you tell Mr. Stickney the true story?" And he answered: "I thought I could catch Harry Wakerly, and if I told Mr. Stickney the true story, he would stop me, and I first wanted to get out of the Caspar Woods." This answer was stricken out by the court. We are at a loss to see how any prejudice resulted by reason of this ruling, on account of the fact that after the incident mentioned, appellant was reexamined by his counsel regarding the incident, as follows:

"Q. Now, do you recall that you were asked on cross-examination about the conversation taking place with Mr. Lilley, between yourself and Mr. Lilley? A. Ten days ago.

"Q. Mr. Lilley said that you should not have told Mr. Stickney a lie? A. I don't know that I said that; I said, 'maybe I lied to him, maybe I didn't, maybe I had to lie to him, Jim'.

"Q. *Why did you have to lie to him?* A. Well, I thought I could gain by lying to him, if I lied to him. I don't think I admitted I lied, that I did lie to him, exactly."

In the above portions of the redirect examination, the appellant testified that he told a man named Jim Lilley, in relation to his false story to Mr. Wakerly, that "maybe I had to lie to him, Jim". Thereupon, counsel said: "Why did you have to lie to him?" Which question was in effect exactly the same question propounded to him by the district attorney, and as the appellant was permitted to answer the question when it was propounded to him by his counsel on redirect examination, there could be no prejudice to him because the answer was stricken in the first instance.

[5] It is further contended that the trial court erred in striking out the entire testimony of the witness Ernest Thompson, for the defendant. This witness testified that he was employed to search for cattle by the Caspar Lumber Company. He stated that on one occasion he ran across seven or eight steers; he noticed that one had fresh marks on its ears, but he could not identify or describe the mark; it was a red steer—a little white. The witness testified that after he saw the steer with the fresh earmark, he communicated the discovery to appellant. In view of the fact that defendant, on the witness stand, admitted that he took a steer with certain earmarks, from the property of the Caspar Lumber Company, and later sold it, we do not see how the evidence of the witness was in any respect material to the case; it was simply evidence that the witness, at some time preceding the trial, on an unmentioned date, had seen another steer roaming the woods, but he could not identify it. The trial court properly struck out this testimony and admonished the jury to disregard it.

[6] A further ground for reversal is urged, arising out of the action of the trial court in overruling an objection of appellant to the testimony of the witness Rucker. This witness was called by the prosecution, and identified the brand on the steer which was taken by the appellant. It is contended that he was called as an expert witness, and that the evidence in question was not of the character which called for expert testimony. The objection is without any merit whatever, as the witness apparently was not called as an expert and he simply described the marks which he saw on this steer.

[7] The contention is made that the district attorney was guilty of prejudicial misconduct. In cross-examining the defendant with respect to whether or not he had taken a steer from the Ballassi ranch, the appellant stated, by way of answer to a question: "I have got several cattle off that ranch." Thereupon, the district attorney asked the following question: "Yes, but I mean legitimately?" The foregoing question of the district attorney was assigned as misconduct, but no request was made that the court instruct the jury to disregard it. Throughout the entire trial the district attorney conducted the case fairly and with due regard to the rights of the defendant, and this was the only occasion where his conduct was questioned. The purport of this question was that it was desired to know whether or not the steer was taken from the Ballassi ranch with the permission of the owner. This was a legitimate inquiry, although we do not particularly approve of the language used in order to ascertain the fact. There is nothing in the record which would lead us to believe that the district attorney asked the question in bad faith or with a view to prejudice the rights of the defendant. The contention is without merit.

[8] Finally, it is contended that the length of time the jury took for its deliberations, to-wit: 9:38 a. m. to 8:53 p. m., would indicate the seriousness and prejudicial character of the alleged errors relied upon for a reversal. The question as to what factors motivate a jury in their deliberations is one of pure speculation. We are unable to adopt the view of appellant that any reasonable inference, either in favor of, or against appellant, could be drawn from the fact that the jury took a considerable length of time in which to reach a conclusion.

The defendant was given a fair trial and no prejudicial error appears in the record.

It is therefore ordered that the judgment and order be affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



32 Cal.App.2d 70

KEIM v. ROETHER et al.

Civ. 12156.

District Court of Appeal, Second District, Division 2, California.

April 3, 1939.

1. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings are conclusively presumed to be supported by the evidence.

2. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings of trial court are to receive, if possible, such construction as will uphold rather than defeat judgment, and must be liberally construed, and any ambiguity or inconsistency must be resolved in favor of sustaining the judgment.

3. Appeal and error ⇐907(3)

On appeal on judgment roll alone, every presumption and intendment is resolved in favor of regularity of proceedings in trial court, and judgment will not be reversed except for some fatal error appearing on face of the judgment roll.

4. Appeal and error ⇐907(3)

In action to compel reconveyance of property and for damages for fraud in procuring conveyance, judgment for defendants who had taken trust deed on property after conveyance, to secure loan to codefendants, was required to be affirmed on appeal on judgment roll alone, where findings established that defendants made no false representations and took no part in conspiracy to defraud grantor.

5. Appeal and error ⇐1071(1)

On appeal on judgment roll alone, inclusion of conclusions of law among findings of fact was not prejudicial where conclusions made necessarily followed from fact findings made by trial court.

6. Mortgages ⇐154(3)

Where conveyance was obtained by fraud, lender of money to grantees who took security deed on property could not be held liable to grantor in action to compel reconveyance and for damages, on ground that, at time loan was made, lender could have learned on inquiry from grantor's tenants that grantor claimed ownership of property where, at time loan was made, owner did not know of falsity of representations by which conveyance was obtained.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Edith E. Keim against William Roether and others and Harry C. Landstrom and wife, and others for judgment compelling defendants to reconvey realty and for damages for fraud. Judgment for plaintiff against defendant William Roether and others and in favor of defendants Harry C. Landstrom and wife, and from that part of the judgment in favor of defendants Harry C. Landstrom and wife and from an order, the plaintiff appeals.

Judgment affirmed and purported appeal from order dismissed.

Lucile Conrey and Thorwald Siegfried, both of Los Angeles, for appellant.

Hill, Morgan & Bledsoe and Stanley S. Burrill, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff, the owner of a lot in the city of Pasadena and certain acreage in Tulare county, charges in her complaint that the six defendants therein named "conspired and confederated together with intent to defraud the plaintiff * * * and to fraudulently obtain possession of and title to" her property. She asks for a judgment compelling defendants to reconvey the property to her free of liens and to pay a large sum as damages, both compensatory and punitive. The trial court rendered judgment in plaintiff's favor as against defendants McCabe and Roether. The judgment is in favor of defendants Landstrom, and plaintiff appeals from this part of the judgment.

The appeal is on the judgment roll alone. From the findings and the admissions contained in the pleadings it appears that plaintiff, an elderly woman, was the aunt of

Mrs. Velma Roether, one of the defendants. Defendant McCabe, who later was prosecuted and entered a plea of guilty to a criminal charge growing out of the transaction with which this litigation is concerned, interested defendants Roether in a certain fraudulent promotion referred to in the briefs as "the McCabe deal". McCabe offered the Roethers ten dollars to be returned for each one dollar paid in by them and obtained $1,800 from them. McCabe represented that he was the owner of a certain patent on a cotton gin and that the money to be raised was needed for the purpose of facilitating the activities of McCabe in disposing of the patent and to help defray McCabe's expenses on a trip to Texas, where the sale of the patent would be consummated within three weeks. Defendants McCabe and Roethers outlined "the McCabe deal" to plaintiff and held out the inducement that McCabe would purchase her property. Thereafter certain of the defendants, first the Roethers and then McCabe, went to Bakersfield and talked to defendants Landstrom concerning "the McCabe deal". They told defendants Landstrom that land owned by plaintiff would be conveyed to defendants William and Velma Roether so that the last-named defendants could borrow money thereon and invest it in the deal controlled by McCabe. They told him that McCabe was a reliable and experienced business man, that the deal was of great magnitude, that McCabe might arrange to purchase a sixteen cylinder Cadillac automobile from the Landstroms and upon consummation of the sale of the patent might purchase several other automobiles. Plaintiff conveyed her real estate to defendants William and Velma Roether, knowing that it was to be used by them as security for the purpose of borrowing money thereon and that the money to be borrowed would be delivered to McCabe. Before making the conveyance plaintiff consulted an attorney and was advised by the attorney not to proceed in the matter. Defendants Landstrom loaned several thousand dollars to defendants Roether, which in turn was turned over to McCabe. Of this sum $1,200 was represented by credit on the purchase of an automobile delivered to McCabe. Defendants William and Velma Roether delivered to plaintiff their promissory note in the sum of $14,000 secured by a second trust deed, the first trust deed being held by defendants Landstrom.

There is no finding that defendants Landstrom made any representations or statements of any kind to plaintiff. On the contrary, the court specifically found that defendants Landstrom were not parties to any conspiracy to defraud plaintiff or to obtain possession of or title to her property. The Landstroms did in fact lend the sums of money to which reference has been made. The trial court also found: "The court finds that the defendants Harry C. Landstrom and Lucile H. Landstrom in making the loans hereinbefore described were acting at all times without knowledge as to the false and fraudulent representations made to plaintiff by the defendant Frank E. McCabe and did in fact lend the various sums of money hereinabove referred to to the defendants William Roether and Velma Roether and that they lent the said funds in good faith and had no notice either actual or constructive of the fraud practiced upon plaintiff by the other named defendants and that said defendants Harry C. Landstrom and Lucile H. Landstrom are innocent holders for value of the following described notes and deeds of trust: * * *"

[1-4] Since the appeal is on the judgment roll alone the findings are conclusively presumed to be supported by the evidence; they are to receive, if possible, such a construction as will uphold rather than defeat the judgment of the court; they must be liberally construed and any ambiguity or inconsistency must be resolved in favor of sustaining the judgment. On such an appeal every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. The judgment will not be reversed except for some fatal error appearing on the face of the judgment roll. Estate of Woods, 23 Cal. App.2d 187, 72 P.2d 258; Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5. From the findings it appears that defendants Landstrom not only made no false representations to plaintiff and took no part in the conspiracy to defraud her, but that they were themselves induced to lend money by the false representations made by McCabe. We find nothing in the record to compel a judgment in favor of plaintiff as against the Landstroms.

[5] Plaintiff argues that certain conclusions of law are contained among the findings of fact and specially argues that the court's findings concerning good faith and notice should have been placed among the conclusions of law. Regardless of this contention, it has not been shown that she has

been prejudiced, since the conclusions made must necessarily follow from the findings made by the court.

[6] Plaintiff argues that defendants Landstrom had constructive notice of her rights by reason of the fact that the real estate conveyed by her to the Roethers was at all times in the possession of plaintiff's tenants. It is argued that the Landstroms could have learned upon inquiry that plaintiff still claimed ownership of the property. This contention cannot assist plaintiff's cause, since the Landstroms could not have learned any additional material fact upon making inquiries of plaintiff. It was not known by plaintiff herself that McCabe's representations were false until she later read in the newspaper of his arrest on a criminal charge. On the other hand, it was well known to both plaintiff and defendants that plaintiff's land was being conveyed to the Roethers in order that money might be borrowed to be used in "the McCabe deal".

The portion of the judgment from which appeal is taken is affirmed. The purported appeal from the order made July 28, 1936, is dismissed.

We concur: CRAIL, P. J.; McCOMB, J.



32 Cal.App.2d 93

PARNHAM v. PARNHAM.

Civ. 12102.

District Court of Appeal, Second District, Division 2, California.

April 7, 1939.

1. Pleading ⇐312

That a complaint in action on foreign judgment for alimony accruing under a judgment for divorce apparently referred to judgment of divorce as an interlocutory judgment did not render complaint defective where judgment was attached to and made part of complaint and showed upon its face that it was a final judgment of divorce.

2. Pleading ⇐312

Where foreign judgment was attached to and made a part of complaint on such judgment, judgment was controlling over allegations in complaint as to its nature and effect.

3. Pleading ⇐4

Allegations of a pleading determine its nature, regardless of name by which designated.

4. Divorce ⇐172

The interlocutory decree in a divorce action becomes final and is res judicata on all questions determined therein, including ordinarily the property rights of the parties, except final dissolution of marriage, which is generally only question held in abeyance until entry of final decree.

5. Pleading ⇐312

That complaint in action on foreign judgment for alimony referred to judgment as interlocutory did not bar plaintiff from recovering on judgment where judgment was made part of petition and appeared upon its face to be final.

6. Appeal and error ⇐931(1)

On defendant's appeal after judgment for plaintiff, District Court of Appeal would view evidence in light most favorable to plaintiff in determining whether findings were supported by evidence.

7. Divorce ⇐331

In action on a New York judgment for alimony where defendant claimed judgment was of no effect because of a previous Pennsylvania decree granting divorce to defendant, evidence sustained findings that New York court had jurisdiction to make the judgment and that Pennsylvania court did not have jurisdiction to enter decree of divorce.

8. Divorce ⇐327

Divorce decree of Pennsylvania court was not entitled to recognition in California under full faith and credit clause of Federal Constitution as a defense to action on a New York judgment for alimony rendered subsequent to Pennsylvania decree, where California trial court determined on substantial evidence that Pennsylvania court did not have jurisdiction when divorce was granted and New York court had determined Pennsylvania decree was no defense when defendant appeared before it. U.S.C.A.Const. art. 4, § 1.

9. Divorce ⇐331

In action in California on New York judgment for installments of alimony accruing under a judgment for divorce, New York judgment was entitled to recognition under full faith and credit clause in view that a New York judgment awarding alimony is final as to past-due installments. U.S.C.A.Const. art. 4, § 1.

10. Interest ⇐28

In establishing foreign judgment for alimony, the law of the state of rendition of judgment controlled rate of interest as against law of California in which judgment is sought to be enforced.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Louise Harding Parnham against John H. Parnham on a foreign judgment. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Manierre & Cuthbertson, of Los Angeles, for appellant.

Ticknor & Maxwell, of Pasadena, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff for instalments of alimony accruing under a judgment for a divorce of the Supreme Court of New York. The latter judgment is claimed by defendant to be of no force or effect because of a previous judgment made and entered by the court of common pleas of Pennsylvania granting the defendant a divorce from the plaintiff.

Under the laws of Pennsylvania service by publication may be had merely upon the return of the writ by the sheriff of his inability to serve the same, and there is no requirement that a copy be mailed to the defendant at her last known address. All that is required is that upon the return of the writ by the sheriff the sheriff shall publish notice in a newspaper of general circulation for the prescribed period of time.

The defendant obtained a divorce from the plaintiff in the state of Pennsylvania without personal service upon the plaintiff and without her appearance in the case, and he now contends that the New York judgment is invalid and not entitled to recognition in this state by reason of such decree. The defendant appeared in the New York case and urged the identical defense to plaintiff's suit for divorce which is urged in this suit. In granting the decree in the New York case to plaintiff, the New York court determined that the defense here urged by the defendant was not a good defense, and that notwithstanding the purported Pennsylvania decree, plaintiff was entitled to judgment. During the course of the New York litigation the defendant made an application for a reduction in the amount of the award of alimony made by the New York court, which application was granted. The trial court in the instant case decided that the New York court had jurisdiction to make said judgment and orders; that the Pennsylvania court did not have jurisdiction to enter a decree of divorce between the parties, and that by reason of the foregoing facts the plaintiff was entitled to recover judgment in accordance with the prayer of her complaint.

[1-3] The defendant's first contention is that the complaint does not state facts sufficient to constitute a cause of action, and in this point he contends that nowhere in the complaint does it appear that the suit is predicated upon any final judgment or order, and that it conclusively appears from the language of the complaint that the cause of action is based upon an interlocutory decree of divorce. From the allegations contained in the complaint it clearly appears that the judgment sued upon is the one dated September 29, 1922, attached to plaintiff's complaint as "Exhibit A" and made a part of it. It appears on its face that the judgment was a final judgment of divorce, and since it is included in the complaint, the judgment itself is controlling as the basis of its nature and effect. The judgment is erroneously referred to in the complaint as an interlocutory judgment. Whatever name is given it by the complaint cannot change the character of that judgment. It is not what a paper is named, but what it is that fixes its character. Hinkel v. Crowson, 83 Cal.App. 87, 256 P. 479; Allers v. Beverly Hills Laundry, 98 Cal.App. 580, 277 P. 337; 21 Cal.Jur. 58.

[4] Even though the judgment were an interlocutory decree, it might still be enforced in this state. The interlocutory decree in a divorce action becomes final and is res judicata on all questions determined therein, including ordinarily the property rights of the parties, except the final dissolution of the marriage which is general-

ly the only question held in abeyance until the entry of the final decree. Overell v. Superior Court, Cal.App., 84 P.2d 789; Borg v. Borg, 25 Cal.App.2d 25, 76 P.2d 218.

[5] The defendant's second contention is that, "Assuming, for the purpose of argument, that a cause of action may be stated upon an interlocutory decree, it appears from the evidence that all money due upon the interlocutory decree, had been paid and, hence, the plaintiff is not entitled to recover anything." This point is built upon the same contention that because the plaintiff's complaint refers to an interlocutory judgment, the plaintiff cannot recover on the final judgment. There is no merit in this contention.

[6, 7] The defendant's next contention is that the findings of fact are unsupported by the evidence. On this question it is our duty to view the evidence in the light most favorable to the plaintiff, and in our view there is substantial evidence to sustain the findings of the trial court. It is not our custom to set out the evidence in detail when such a claim is made.

The defendant's next contention is that the Pennsylvania decree is entitled to recognition in California under the full faith and credit provision of the federal Constitution. U.S.C.A.Const. art. 4, § 1. The findings of the New York court, which were a part of the evidence, included the following: "Fourth: That in the month of June, 1917, the plaintiff and defendant and their daughter moved to Stony Creek, Connecticut, and the plaintiff and defendant lived together there until February, 1918, when the defendant left the plaintiff and abandoned her without cause, and from that time on the parties have not lived and cohabited together." The parties last lived together as husband and wife in the state of Connecticut. Under the findings in the New York case it is not true that the defendant was the innocent party. The trial court in the case now under review found that the defendant did not go to Pennsylvania in good faith with the intention of making his permanent home there, and that he never became a bona fide resident of the state of Pennsylvania. The Pennsylvania decree was not binding in this state for two reasons: because the trial court determined on substantial evidence that the Pennsylvania court never acquired jurisdiction by reason of Mr. Parnham's lack of bona fide residence in the state of Pennsylvania (Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122), and because of the adjudication of the New York court adversely to the defendant when exactly the same question was there raised in a case where personal jurisdiction had been acquired and in which Mr. Parnham appeared in person and by counsel. Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321; Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann. Cas. 1.

The defendant's next contention is that the court erred in invoking the doctrine of estoppel, but in our view it was not necessary for the trial court to find that there was an estoppel and we do not discuss this question.

[8, 9] Finally, the defendant contends that, "The New York judgment is not entitled to be recognized under the full faith and credit provision of the federal Constitution for the reason that if under the laws of the state where a divorce decree is rendered, it is subject to modification retroactively, it is not entitled to full faith and credit." But defendant does not cite us to any satisfactory authority that the New York instalments of alimony already accrued may be modified retroactively. On the contrary, they hold that the right to instalments of alimony vests when the same become due, and that a New York judgment awarding alimony is final as to past due instalments. Lynde v. Lynde, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann.Cas. 1061; Keck v. Keck, 219 Cal. 316, 26 P.2d 300.

In this connection the defendant also refers us to section 1155 of the Civil Practice Act of New York, which provides in effect that the court shall have the power to annul, vary or modify any order or decree for permanent alimony at any time after final judgment. In construing this section with reference to accrued instalments of alimony which were not yet paid, the Court of Appeals of New York in Harris v. Harris, 259 N.Y. 334, 182 N.E. 7, 8, said: "These past due sums have become vested rights of property in the plaintiff which the Supreme Court has no power to take from her." Brice v. Brice, 225 App.Div. 453, 233 N.Y.S. 366; Krauss v. Krauss, 127 App.Div. 740, 111 N.Y.S. 788; Parkinson v. Parkinson, 222 App.Div. 838, 226 N.Y.S. 454.

[10] The defendant is right in his contention that the rate of interest on the

amount found due was not properly computed. The trial court in computing the amount to be recovered, figured interest at the rate of 7 per cent per annum, fixing the total amount of recovery at $26,597.93. The rate of interest on judgments under the New York law is 6 per cent. The rule is that in establishing foreign judgments the law of the state of the rendition of the judgment controls the rate of interest as against the law of the state in which the judgment is sought to be enforced. Stewart v. Spaulding, 72 Cal. 264, 13 P. 661; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 250; Note, 78 A.L.R. 1063. The judgment is modified so that it is reduced to the sum of $25,591.86.

As so modified, the judgment is affirmed. Each party to pay his or her own costs.

We concur: WOOD, J.; McCOMB, J.

13 Cal.2d 271

MacPHERSON v. MacPHERSON.

L. A. 16770.

Supreme Court of California.

April 10, 1939.

Rehearing Denied May 8, 1939.

1. Divorce ⇐305

A divorced husband's contempt of court in violating agreement with former wife and provisions of divorce decrees as to minor children's custody, willfully evading legal processes, and contumaciously defying and nullifying attempts to enforce state courts' judgments and orders, including contempt order, barred him from appealing from portion of latter order awarding wife attorneys' fees and costs.

2. Contempt ⇐80

A party to action is not entitled to court's aid while standing in attitude of contempt to state courts' legal orders and processes.

3. Divorce ⇐305

A divorced husband's contempt in refusing to yield minor children's custody to former wife pursuant to court order, deprived him of right to appeal from portion of contempt order awarding wife attorneys' fees and costs as against contention that court lacked jurisdiction to adjudge him guilty of contempt because there was no evidence that he received notice or had actual knowledge of terms of order violated, as contempt provisions of later order are not under review on such appeal.

4. Divorce ⇐312

On divorced husband's appeal from award of attorneys' fees and costs to former wife in order adjudging him guilty of contempt in disobeying court order as to custody of their minor children, it must be presumed that there was sufficient proof of all facts necessary to support contempt adjudication, where bill of exceptions does not include evidence on such issue.

5. Divorce ⇐305

An averment in divorced wife's affidavit, supporting order on which adjudication of former husband's contempt in disobeying order in interlocutory divorce decree as to their minor children's custody was based, that he had actual notice and knowledge of terms of such decree, and evidence of parties' subsequent conduct respecting children's custody, *held* to show that husband had full knowledge of custody provisions and hence was barred by his contempt from appealing from portion of contempt order awarding former wife attorneys' fees and costs.

6. Divorce ⇐305

A divorced husband's actual notice or knowledge of provisions in divorce decrees as to custody of parties' minor children is sufficient to give court jurisdiction to adjudge him guilty of contempt in violating such provisions, so as to bar his appeal from portion of contempt order awarding former wife attorneys' fees and costs.

7. Divorce ⇐305

A divorced husband, adjudged guilty of contempt in violating order as to minor children's custody, is not entitled to hearing on appeal from portion of contempt order awarding former wife attorneys' fees and costs, even if such award was void or erroneous as made after attorneys' services were rendered and expenditures made or unsupported by sufficient evidence.

8. Divorce ⇐305

A sentence of divorced husband to maximum statutory punishment for contempt in violating court order as to minor children's custody did not preclude imposition of further penalty by refusal to hear his appeal from portion of contempt order awarding former wife attorneys' fees and costs. Code Civ.Proc. § 1218.

In Bank.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Proceeding by Blossom Gray MacPherson against Cameron O'Day MacPherson for an order to show cause why defendant should not be adjudged in contempt of court for refusal to yield custody of the parties' minor children to plaintiff and compelled to do so, why an interlocutory divorce decree and property settlement agreement should not be modified to give plaintiff exclusive custody of children, and why defendant should not be compelled to pay full amount of costs and expenses. From a portion of a contempt order awarding plaintiff attorneys' fees, expenses and costs, defendant appeals. On plaintiff's motion to dismiss the appeal.

Appeal dismissed.

Bettin, Painter & Wait, D. Howard Painter, and Ray H. Kinnison, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and T. H. Joyce, all of Los Angeles (George D. Jagels and Van C. Niven, both of Los Angeles, of counsel), for respondent.

WASTE, Chief Justice.

In this proceeding, which pertains to the custody of two minor children, defendant has appealed from that portion of a judgment which orders him to pay attorneys' fees, expenses, and costs incurred in furtherance of the efforts of plaintiff, his former wife, to locate the children and have them returned to her. Plaintiff moves to dismiss the appeal.

It is urged, as ground for the motion to dismiss, that appellant is not entitled to seek the aid of an appellate tribunal because of his wilful and continuing contempt of court, in that he has contumaciously removed the children from the jurisdiction of California, in direct violation of the judgments and orders of the courts of this state, and is having them reside in the Republic of Mexico, solely for the purpose of thwarting and defeating said judgments and orders, in obdurate defiance of legal processes, and in disregard of the provisions made by law for the protection of minors, for safeguarding their welfare, and for controlling their custody. The facts establish the truth of this charge.

On October 17, 1930, plaintiff and appellant, then living separate and apart, executed a property settlement agreement which set forth a detailed plan for the custody of their two minor children, then aged seven and five and one-half years, respectively. Among other things, it was provided that custody and control of the children (subject at all times to modification by any court of competent jurisdiction upon application of either party) should remain in plaintiff, but that appellant should have the right to have them with him during a two months' summer vacation period each year, and should have the right to see them at other reasonable times. It was expressly agreed that "the said children shall, at no time, be taken outside of the borders of the United States of America, except with the mutual consent of the parties hereto, or upon application to and order of a court of competent jurisdiction", and "that either party may apply to the court by stipulation or notice, to the effect that this agreement may be embodied and become a part of a court order in any action for divorce that might hereafter be maintained by either party to this agreement".

On October 22, 1930, plaintiff sued appellant for divorce. He was duly served but did not appear in the action, and his default was regularly entered. On November 21, 1930, plaintiff was awarded an interlocutory decree of divorce, which by reference incorporated the terms of the property settlement agreement and which also expressly provided that she should have custody and control of the minors.

Until the fall of 1936, apparently no difficulty was encountered by the parties in giving effect to the custody provision. Except for a vacation spent with appellant during two months or more of each summer, the children remained with plaintiff. She remarried and established a family home in Greenwich, Conn. Appellant also remarried and continued to reside in southern California. On July 1, 1936, plaintiff brought the children from Connecticut to appellant in Santa Monica for their annual vacation visit. She returned to Connecticut in the latter part of August, having arranged with appellant to deliver the children to her in New York on September 14th. Appellant failed to conform to this plan. On September 15th, and again on September 30th, plaintiff made demands upon him for the children, which demands were unheeded. Plaintiff then employed counsel in Los Angeles and with their assistance sought and obtained an order to show cause (1) why appellant should not be adjudged in contempt of court for his refusal to yield custody of the children pursuant to the court order entered as a part of the interlocutory decree of divorce; (2) why appellant should not be compelled forthwith to deliver both children and custody thereof to plaintiff; (3) why the interlocutory decree of divorce, and property settlement agreement forming a part thereof, should not be modified to give plaintiff exclusive custody of the children during their minority, with a limited right only in appellant to visit them at their home; (4) why appellant should not be compelled to pay the full amount of costs incurred in bringing legal proceedings, and for transportation of plaintiff and the children between Connecticut and California, together with other expenses of recovering cus-

tody; and (5) why such further order as the court might deem equitable should not be made.

This order to show cause was set for hearing on October 29, 1936. Plaintiff came from Connecticut to testify, and prior to the hearing was permitted by appellant to visit the children at his residence for a period of about ten minutes. But when the matter was called in court, appellant made only an alleged special appearance, solely for the purpose of moving to quash, dismiss, or strike the order to show cause, and the petition and affidavit upon which it was based. His motion to quash was granted. Plaintiff thereupon attempted to secure service upon him of a new order to show cause, but without success. Neither private process servers nor the sheriff of Los Angeles county could locate him, and they were informed that he and the children no longer resided in Santa Monica. During succeeding weeks, plaintiff, although worried and severely ill, exhausted every means at her command to find the children. She procured an order for taking them, and appellant, into custody under sections 1497 and 1498 of the Penal Code, and employed a firm of private investigators to search for them. She obtained a warrant charging appellant with child stealing, and also conferred with the United States attorney at Los Angeles concerning the possibility of obtaining a federal warrant for his arrest. In all of these efforts she was unsuccessful. Finally she returned to her home in Connecticut. There, in December, 1936, a young friend of the children received a letter from one of them, the envelope of which bore an illegible postmark. This postmark was identified by an expert as "Mexico D. F."

With this clue to appellant's whereabouts, plaintiff resumed her endeavors to regain the children. She petitioned the District Court of Appeal for a writ of mandate to compel the Los Angeles superior court to hear the original order to show cause, with respect to which that court had previously granted appellant's motion to quash. The District Court of Appeal concluded that the order to quash was erroneous because appellant's purported special appearance had in fact constituted a general appearance. It further concluded that inasmuch as appellant had avoided the service of a second order to show cause, thereby rendering that remedy merely nominal, plaintiff was entitled to writ of mandate to compel the superior court to proceed with the hearing upon the original order. MacPherson v. Superior Court, 22 Cal.App.2d 425, 71 P.2d 91.

The writ issued on August 25, 1937, and the matter was set for hearing in December. Plaintiff again journeyed to California to appear as a witness, and after reaching this state she made one more attempt to reach appellant and negotiate with him. She asked the telephone operator to connect her with his residence in Cuernavaca, Mexico. Appellant himself answered the telephone. Although he permitted her to talk to both of the children, he refused unconditionally to return to the United States, or to discuss the matter of their custody.

The hearing was commenced on December 6th, and at its conclusion the trial court found the facts to be substantially as above set forth. It found also that appellant was a man of wealth, whereas plaintiff was without means or property with which to finance her efforts to recover the children, to compensate her attorneys, or to reimburse them for costs which they had advanced in reliance upon appellant's ability to pay. It was for the best interests and welfare of the children, so the court found, that plaintiff should pursue them and obtain custody. Pursuant to these findings, and on January 5, 1938, the court (1) ordered that appellant immediately deliver the children to plaintiff; (2) adjudged appellant guilty of contempt of court and imposed upon him the maximum penalty provided by section 1218 of the Code of Civil Procedure of five days' imprisonment and $500 fine; (3) modified the interlocutory and final decrees of divorce to provide that from date until July 1, 1940, appellant should not have the children during the summer vacation period, although he might visit them at plaintiff's residence at reasonable times, and upon reasonable notice; (4) ordered appellant to pay to plaintiff for her expenditures and obligations incurred in endeavoring to obtain possession of the children, the sum of $7,500 ($5,000 for attorneys' fees, $1,000 to cover expenditures made on behalf of plaintiff, and $1,500 for other costs and expenses incurred by plaintiff); (5) ordered appellant to pay to plaintiff on January 13, 1938, an additional $10,000 ($7,500 for attorneys' fees and $2,500 for costs), to be used by plaintiff in pursuance of

the custody proceedings, provided that appellant might be relieved of this obligation by proving to the satisfaction of the court on or prior to January 12th, that he had delivered the children to plaintiff; (6) ordered issuance of a bench warrant for appellant's apprehension, with bail thereon fixed at $5,000; and (7) ordered issuance of a commitment, committing appellant to the custody of the Los Angeles county sheriff, to be imprisoned in execution of the contempt judgment and sentence pronounced thereon.

On February 11, 1938, appellant filed a notice of appeal from that portion of the order which awarded plaintiff attorneys' fees and costs in the respective sums of $7,500 and $10,000. Plaintiff asks that the appeal be dismissed because of appellant's continuing contempt. So far as the present record shows the children are still domiciled in the Republic of Mexico. They have now attained the ages of 15 and 14 years, respectively. They have been told, so plaintiff avers, that she wished to have them arrested, and to some degree at least their affections have been alienated. Plaintiff fears, as well she may, that unless she soon regains their custody, she will never be able again to win their love and understanding.

[1,2] In secluding the children in a foreign country and alienating them, appellant violated not only his agreement with plaintiff and the provisions of the interlocutory and final decrees of divorce, but he has also wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P. 856, 14 Ann.Cas. 970; Schubert v. Superior Court, 109 Cal.App. 633, 293 P. 814; Weeks v. Superior Court, 187 Cal. 620, 203 P. 93; Funfar v. Superior Court, 107 Cal. App. 488, 290 P. 626; Soderberg v. Soderberg, 63 Cal.App. 492, 219 P. 82.

In Weeks v. Superior Court, supra, the petitioner, having removed a minor, and while contumaciously keeping the child outside of the state in order to prevent the husband from gaining possession and custody in accordance with the terms of an interlocutory decree of divorce, applied to this court for writ of mandate to compel the superior court to enter a final decree. This court, citing the above rule, held that petitioner should not be allowed to make application for a final decree of divorce until she had submitted to the lawful order of the superior court in relation to the custody of the child, or otherwise purged herself of the contempt.

Again, in Knoob v. Knoob, 192 Cal. 95, 218 P. 568, while counsel for appellant were prosecuting her appeal from a modified decree of custody, appellant removed both herself and the minor to the Republic of Guatemala in violation of the terms of the decree appealed from. The respondent thereupon moved to dismiss the appeal upon the ground that "the appellant was a fugitive from justice and in contempt of court, and for that reason not entitled to invoke the aid of the court". Granting the motion to dismiss, this court said: "But one conclusion can be reached from the foregoing facts. It is very clear that the appellant has determined to set at naught the due process and orders of the courts of California, and does not intend to obey their mandate respecting the custody of the minor child. Under such circumstances she is not entitled to press her appeal in this court. By her appeal she is seeking the court's aid, and it is manifestly just and proper that in invoking that aid she should submit herself to all legitimate orders and processes. * * * Her past actions indicate that not only is she determined to set at naught the authority of the trial court, but that her attitude will be the same toward any judgment or order made by this court in disposing of her appeal. The appeal is dismissed."

[3-6] Appellant here contends that the court lacked jurisdiction to adjudge him guilty of contempt because there is no evidence that he received notice or had actual knowledge of the terms of any order or judgment which he is charged with violating, or of the granting of the interlocutory decree of divorce (entered upon his default), or of the terms of the final decree. For this reason, appellant asserts, the alleged contempt cannot serve as a basis for depriving him of his right of appeal. There are several answers to this conten-

tion. The one most obvious is that the portions of the order adjudging appellant guilty of contempt are not here under review. The present appeal is only from those provisions of the order which relate to allowance of attorneys' fees and costs, and the bill of exceptions is limited to evidence bearing on that subject. As certified, the bill only purports to correctly set forth "all of the proceedings had during the trial of said cause and all of the evidence offered therein in so far as the same applies to attorneys' fees and costs of expenses. * * *" It does not purport to include the evidence relating to the issue of contempt. On this appeal, therefore, it must be presumed that there was sufficient proof of all facts necessary to support the contempt adjudication. But we may also observe that the evidence which is contained in the present record clearly indicates that appellant had full knowledge of the custody provisions of the divorce decrees. That he had "actual notice and knowledge" of the terms and conditions of the interlocutory decree of divorce, including the custody provision thereof, is averred by plaintiff in her affidavit filed in support of the order to show cause upon which the contempt adjudication was based. The affidavit is a part of the present bill of exceptions. Moreover, in view of the conduct of the parties with respect to custody of the minors over the period from 1930 to 1936, it would test credulity to believe that appellant was without actual knowledge of the terms of the custody provision. Actual notice or knowledge is all that is required. 4 Cal.Jur.Supp., p. 12, sec. 21, cases cited.

[7] Appellant complains that the court had no jurisdiction to make an allowance of attorneys' fees after the services had been rendered, or an allowance of costs after the expenditures had been made. Therefore, he argues, a portion at least of the order appealed from is void, and an appeal will lie even though he may be in contempt of court. This argument overlooks the fact that even though a portion of the order appealed from may be void, or erroneous, or unsupported by sufficient evidence, nevertheless the adjudication of contempt is presumably valid, and until that contempt is purged appellant is not entitled to a hearing before an appellate tribunal. The merits of the claims urged by him in support of his appeal will not be determined, nor will the appeal be heard while he persists in his contumacious attitude.

[8] Lastly, appellant asserts that inasmuch as he has already been sentenced to the maximum punishment for contempt prescribed by section 1218 of the Code of Civil Procedure ($500 fine and 5 days' imprisonment), no further penalty by way of refusing to hear his appeal can be imposed upon him. The contention is without merit. There is no language in section 1218 which in any way places a limitation upon the power of the courts to refuse a hearing to contumacious litigants. The section merely states that where a person is adjudged guilty of contempt "a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both". This statute will not be construed to infringe upon the courts' inherent power to ignore the demands of litigants who persist in defying the legal orders and processes of this state.

No other questions merit discussion. The appeal is dismissed.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.; LANGDON, J.



13 Cal.2d 158

LONG BEACH DRUG CO. v. UNITED DRUG CO.

L. A. 16748.

Supreme Court of California.

April 19, 1939.

1. Injunction ⇐118(5)

A complaint, in suit to enjoin wholesale drug company from breaching agency agreement by selling products to dealers other than plaintiff, which asked, in connection with prayer for injunctive relief, for an accounting and damages covering a specified period because of defendant's breach of negative covenant not to sell to other dealers, did not assert plaintiff's full legal right to damages for breach of negative covenant and damages for breach of an affirmative covenant by revoking plaintiff's exclusive agency.

2. Pleading ⇐248(16)

Where complaint in suit to enjoin wholesale drug company from breaching agency agreement by selling products to dealers other than plaintiff failed to adequately assert

plaintiff's right to damages, and plaintiff was not entitled to equitable relief, plaintiff could apply for permission to amend pleadings to authorize recovery of damages.

3. Principal and agent ⇐41

Whether an agreement whereby a retail drug store was appointed special selling agent for wholesale drug company was a contract of agency or a contract of sale and purchase was immaterial so far as retail company's right to damages for breach, if any, of such agreement was concerned.

4. Principal and agent ⇐33

An agency not coupled with an interest is revocable.

5. Principal and agent ⇐41

The power to revoke an agency does not necessarily confer the right to revoke; and, in event of wrongful exercise of power, principal must answer in damages.

6. Sales ⇐405

Breach of a contract of sale and purchase gives rise to an action for damages.

7. Damages ⇐6, 24

That the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment does not bar recovery of damages.

CURTIS, HOUSER, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 88 P.2d 698.

Joseph Scott, and J. Howard Ziemann, both of Los Angeles, for appellant.

Earl E. Moss, of Los Angeles, and James E. Pawson, of Long Beach, for respondent.

PER CURIAM.

On petition for rehearing it is urged that this court should permit relief by way of accounting to determine the damages, if any, which the plaintiff claims to have suffered by the alleged breach of the contract. The plaintiff has apparently misconceived the effect of the decision. It holds that equitable relief is not appropriate, as entailing well nigh impossible supervision of performance of the contract by the court. "For this reason," it is said, "if no other, the court would be constrained to deny equitable relief and to leave the parties to assert their legal rights under the contract."

[1] Although the equitable remedy is not available to plaintiff, nevertheless the contract sued upon is valid and sufficiently certain to warrant the trial court in entertaining a plea for the recovery of damages (see cases cited in opinion). The complaint, while praying for "all just and proper relief", was not framed in the alternative to seek the legal remedy for breach of the contract as a whole. It does ask, in connection with the prayer for injunctive relief, that an accounting be had and that an award be made to cover damages suffered over a specified period by plaintiff because of defendant's breach of the negative covenant of the contract. This, however, is not an assertion of plaintiff's full legal right, i. e., the right to seek damages not only for breach of the negative covenant (the covenant not to sell to other stores in Long Beach), but also for breach of the affirmative covenant (revocation of the exclusive agency and refusal to sell to plaintiff).

[2] Under present code procedure, which permits a party to litigate his right to legal and equitable relief in the same action, and by amendment to ask a change of remedy, there appears to be no reason why plaintiff, if so advised, should not apply for permission to amend its pleading. Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840; Peters v. Binnard, 219 Cal. 141, 25 P.2d 834; Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9; Ahlers v. Smiley, 163 Cal. 200, 124 P. 827; 10 Cal.Jur. p. 10, sec. 7; Note 22 C.L.R. p. 208. Whether the plaintiff is entitled to damages, or to what extent, is not here intimated. That is a matter to be proved upon trial of the issue. If such trial be permitted, under amended pleadings, evidence may be adduced as to the extent of plaintiff's alleged damage, if any, by reason of defendant's refusal to sell to it, and also by reason of defendant's sales to other stores; likewise as to defendant's damage, if any, by reason of plaintiff's alleged failure to support its products.

[3-7] It would seem that so far as the right to seek this additional relief is concerned, it is immaterial whether in the final analysis the contract be construed as a contract of agency, or as a contract of

sale and purchase. Kelly-Springfield Tire Co. v. Bobo, 9 Cir., 4 F.2d 71; Reiter v. Anderson, 87 Cal.App. 642, 262 P. 415. Construed as a contract of agency, even though it is patently not an agency coupled with an interest and is therefore revocable, nevertheless the *power* to revoke does not necessarily confer the *right* to revoke, and in the event of a wrongful exercise of the power, the principal must answer in damages. Boehm v. Spreckels, 183 Cal. 239, 248, 191 P. 5; Roth v. Moeller, 185 Cal. 415, 197 P. 62; Capital Nat. Bank v. Stoll, 220 Cal. 260, 30 P.2d 411; Stoll v. Stoll, 5 Cal.2d 687, 56 P.2d 226; Kelly-Springfield Tire Co. v. Bobo, supra. Construed as a contract of sale and purchase, a breach thereof gives rise to an action for damages (Hacker, etc., Co. v. Chapman Mfg. Co., 17 Cal.App.2d 265, 61 P.2d 944; Pease v. Lindsey, 129 Cal.App. 408, 18 P.2d 717). The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment does not bar the recovery. Hacker v. Chapman etc. Co., supra; Caspary v. Moore, 21 Cal.App.2d 694, 70 P.2d 224.

The petition for a rehearing is denied.

CURTIS, HOUSER, and EDMONDS, JJ., voted for a rehearing.



13 Cal.2d 280

PEOPLE v. LEWIS.

Cr. 4167.

Supreme Court of California.

April 10, 1939.

1. Statutes ⇐64(6)

The portion of statute limiting punishment for a misdemeanor to one year was not affected by invalidity of another portion of the statute providing different punishment in counties having penal farms, the two portions of the statute being severable. Pen. Code, § 19a; Const. art. 1, § 11; art. 4, § 25.

2. Criminal law ⇐1208(3)

The purpose of the statute limiting punishment for a misdemeanor to one year was to increase maximum term for misdemeanor. Pen.Code, § 19a.

3. Criminal law ⇐1206(1)

The statute limiting punishment for a misdemeanor to one year constituted valid amendment of prior statute limiting such punishment to six months. Pen.Code, § 19a.

4. Statutes ⇐64(1)

Where certain portions of statute are unconstitutional, the constitutional portions may stand alone and remain in force if they can be separated from the unconstitutional portions.

5. Statutes ⇐64(1)

Unconstitutional provisions of a statute will not vitiate the entire statute unless such provisions enter so entirely into scope and design of the law that it would be impossible to maintain the statute without the unconstitutional provisions.

6. Constitutional law ⇐42

The court will not consider asserted unconstitutionality of portions of a statute which do not affect the rights of party raising the question, where such portions if unconstitutional would fall without affecting the validity of the remainder of the statute.

7. Statutes ⇐64(6)

A sentence of imprisonment for two years for offense of contributing to delinquency of a minor was unauthorized in view of statute limiting punishment for misdemeanors to one year, notwithstanding unconstitutionality of another portion of the statute limiting punishment for misdemeanors, which provided different punishment in counties having penal farms, since the portion of the statute limiting punishment to one year was valid. Gen.Laws 1931, Act 3966, § 21; Pen. Code, § 19a; Const. art. 1, § 11; art. 4, § 25.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Hoyt Lewis was charged with contributing to the delinquency of a minor and entered a plea of guilty, and he appeals from the court's judgment and sentence.

Judgment reversed with directions and attempted appeal from sentence dismissed.

Prior opinion, 77 P.2d 249.

Gladys Towles Root and Morris Lavine, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin and James S. Howie, Deputies Atty. Gen., for respondent.

SEAWELL, Justice.

This appeal came to us on petition for hearing after decision by the District Court of Appeal, Second District, Division 1. We adopt as a part of the opinion of this court the following portion of the opinion of the District Court of Appeal with respect to the questions that are involved on the appeal. It follows under quotation marks, 77 P.2d 249:

"Defendant was charged, in an amended information, with contributing to the delinquency of a minor, a misdemeanor. Said defendant entered a plea of guilty to the charge, and, his application for probation being denied, was sentenced to imprisonment in the county jail for a period of two years. This appeal is from the judgment and the sentence.

"Appellant contends that the 'sentence imposed was in excess of the time as prescribed by law, and was therefore contrary to the law'.

"The offense of contributing to the delinquency of a minor, which is, by section 21 of the Juvenile Court Act (Act 3966, Deering's Gen. Laws) declared to be a misdemeanor, provides as a maximum punishment 'a fine not exceeding one thousand dollars, or by imprisonment in the county jail for not more than two years, or by both such fine and imprisonment'. Appellant, however, relies upon section 19a of the Penal Code, enacted subsequently to the Juvenile Court Act, which provides that, 'In *no case* shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for *any reason,* be committed for a period in excess of one year. If, however, any county, or group of counties together, should establish a penal farm, or if there be established a State institution for long-term misdemeanants, then commitment to such penal farms or such State institution shall be for such period as the court may order within the limits prescribed by statute for the offense.' (Italics supplied.)

"Respondent asserts, in substance, that said section 19a is unconstitutional and void for the reason that the maximum period of confinement prescribed therein is not fixed and definite under all circumstances; that it does not fix the same maximum punishment for the same offense throughout the state; that the state Constitution provides that 'all laws of a general nature shall have a uniform operation' (sec. 11, art. 1); and that said Constitution further (article 4, § 25) provides that 'the legislature shall not pass local or special laws * * * for the punishment of crimes and misdemeanors', and shall not pass local or special laws 'in all other cases where a general law can be made applicable.'"

[1] Conceding that the portion of said section 19a providing for a different punishment in counties where a penal farm is established is repugnant to the Constitution, on the ground that it is neither general in nature nor uniform in operation, and in addition is conditional and indefinite, and creates a different punishment for the same offense, it is apparent that the first sentence of said section 19a is severable from the second portion, and that the second portion is not involved so far as county jail imprisonment is concerned, for the reason that the appellant was not committed under the invalid portion of said act. The plain unambiguous language and meaning of the first sentence is not affected by the invalidity which inheres in the second portion.

The first portion of section 19a, which provides that "in no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, *or for any reason,* be committed for a period in excess of one year", forms a complete and perfect statute limiting the period of imprisonment on conviction of misdemeanor crimes. Then follows a scheme or plan as to commitments to penal farms for long-term misdemeanants in such counties as have established said farms. The attorney-general admits that there is no such institution in any county of the state of which he has official knowledge. We have no judicial knowledge, or any knowledge, of the establishment of any such institution by the state or any county of the state.

There is no force in the contention that the legislature would not have given its sanction to that part of section 19a which definitely fixes the maximum prison term in all misdemeanor cases but for the adop-

tion of the portion of the statute which establishes the penal farm plan. People v. Phair, 137 Cal.App. 612, 31 P.2d 421; In re Phair, 2 Cal.App.2d 669, 38 P.2d 826. This is made certain by the language of the section. The statute is general in scope. Prior to the amendment the maximum term of imprisonment was but six months. This statute is superseded by the comprehensive and explicit language of the amending law.

[2,3] It will be noted that both the title and the body of the amended act make it clear beyond question that the concededly invalid portion of said section 19a is denominated an "added new section" and is separable matter. The purpose of the amendment was to increase the maximum term, but in *no case* was the imprisonment in the county jail to exceed the period of one year. Said section is a valid amendment of the section as it formerly stood as to the maximum term of imprisonment which may be imposed for the commission of a common misdemeanor. It agrees with the maximum period prescribed for imprisonment in a county jail for an attempt to commit rape (sec. 264, Pen.Code), assault with a deadly weapon (sec. 245, Pen.Code), and numerous other offenses which are punishable by imprisonment in a county jail.

It will be noted that penal farms, if and when established, form no part of a county jail. The subjects dealt with in the single statute are clearly distinct and separable. Neither forms a necessary part of the other. The first portion of the statute deals with the maximum term of imprisonment in the county jail on conviction of misdemeanors. The latter portion of said statute attempts to authorize the confinement of persons convicted of misdemeanors, in the discretion of the court, to a penal farm (possibly by reason of the overcrowded condition of county jails or for disciplinarian or reformatory reasons), which term may exceed the term prescribed for imprisonment in a county jail for a like misdemeanor. So much of the statute as prescribes the confinement in or on a penal farm is attacked as being unconstitutional, and, on the theory that if one section of a penal act is unconstitutional, the entire statute must be treated as invalid and noneffective.

The rule of construction as to statutes invalid in part is thus stated in 5 California Jurisprudence, pages 643 and 644, supported by a long list of authorities:

[4-6] "It is the general rule supported by an unbroken line of decisions that a provision in or a part of an act may be unconstitutional and beyond the power of the legislature to enact, and still the whole act may not be void. The accepted doctrine in such case is that the constitutional portions of the statute may stand alone and remain in force if they can be separated from the portions which are void. The unconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions. * * * As has been pointed out in a previous section of this article, the court will not consider the asserted unconstitutionality of portions of an act which do not affect the rights of the party raising the question, in case such portions, if unconstitutional, would fall without affecting the validity of the remainder of the statute. * * *

"Where only part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole statute; but where a statute is valid in one part, and invalid in another, the former part, if not dependent in any measure upon the latter, and can, without the latter, accomplish one or all the material purposes of the act, will be sustained, and that which is void will be eliminated and disregarded."

We can perceive of no reason why the portion of the act which is unquestionably workable and complete in itself should be rendered invalid by the tacking on of the penal farm provisions, which are as far aside from the limitation placed on county jail imprisonment as if the two subjects were treated in entirely different acts or statutes.

[7] The judgment is reversed, with directions to the court from which the appeal originated to enter a judgment against the appellant not in excess of the term of imprisonment prescribed by section 19a, Penal Code, as of the day on which said judgment was pronounced, giving due credit for such time as appellant may have

served, if any, under the judgment from which this appeal is taken. The attempted appeal from the "sentence" is dismissed.

The cause is remanded to the court in which it originated for such further proceedings as are consistent with the directions herein set forth.

It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; EDMONDS, J.

I dissent: HOUSER, J.



13 Cal.2d 765

PEOPLE v. YALO.

Cr. 4166.

Supreme Court of California.

April 10, 1939.

Infants ⇐20

A sentence of imprisonment for 18 months for contributing to delinquency of a minor was unauthorized in view of statute limiting punishment for misdemeanor to one year. Pen.Code, § 19a.

HOUSER and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Lucelo Yalo pleaded guilty to the charge of contributing to the delinquency of a minor, and he appeals from the court's judgment and sentence.

Reversed and remanded for further proceedings with directions and attempted appeal from sentence dismissed.

Prior opinion, 77 P.2d 251.

Gladys Towles Root and Morris Lavine, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for respondent.

PER CURIAM.

The defendant herein pleaded guilty to the charge of contributing to the delinquency of a minor. Application for probation was denied and he was sentenced to serve a term of eighteen months in the county jail as a punishment for said offense. His appeal is from the judgment and sentence, appellant contending that the provisions of section 19a of the Penal Code limits the period of imprisonment to one year in the county jail.

Upon stipulation of the parties the District Court of Appeal, Second District, Division 1, court of original appellate jurisdiction, ordered that the instant case be considered and determined on the same brief which was filed in People v. Lewis, Cal. Sup., 89 P.2d 388.

The same question was raised and disposed of in the opinion this day filed in People v. Lewis, Cal.Sup., 89 P.2d 388, and for the reasons set forth in said opinion, and on the grounds therein stated, it is ordered that the judgment entered herein be reversed with directions to the court in which the appeal originated to enter a judgment against the appellant not in excess of the term of imprisonment prescribed by section 19a, Penal Code, as of the day on which said judgment was pronounced, giving due credits for such time as appellant may have served, if any, under the judgment from which this appeal is taken. The attempted appeal from the "sentence" is dismissed.

The cause is remanded to the court in which it originated for such further proceedings as are consistent with the directions herein set forth.

It is so ordered.

I dissent: HOUSER, J.

As this case has become moot, the appeal should be dismissed. EDMONDS, J.

13 Cal.2d 290

ENTREMONT et al. v. WHITSELL et al.

S. F. 15772.

Supreme Court of California.

April 17, 1939.

Rehearing Denied May 15, 1939.

1. Automobiles ⇐59
Highways ⇐113(1)

A contract between truck owner and Department of Public Works, whereby owner was to furnish, at an hourly rate, trucks, drivers, operating supplies, and necessary repairs, and was to carry compensation insurance and assume liability for damage, was for "transportation of property by motor vehicles" within meaning of Highway Carriers Act, especially in view of practical construction to that effect by owner, and hence was subject to rate regulation by Railroad Commission, rather than "renting of motor vehicles" within Streets and Highways Code calling for competitive bidding. St.1935, p. 262, §§ 136, 136.5; p. 878.

2. Bailment ⇐1

The chief characteristic of a "renting" or "leasing" is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ.Code, §§ 1925, 1955.

3. Automobiles ⇐59

In determining whether owner of trucks or Department of Public Works, to which trucks were "rented," controlled truck operators, as affecting right of Railroad Commission to regulate rates, owner's power to discharge and select drivers is an important factor. St.1935, p. 262, §§ 136, 136.5; p. 878.

4. Master and servant ⇐1

An employer's servant does not become the servant of another, for whom work is performed, merely because the other points out work to servant, gives signals calling the servant into activity, or gives him directions concerning details of work and manner of working.

5. Automobiles ⇐59

In determining whether contract between owner of trucks and Department of Public Works called for rental of equipment or for performance of services, as affecting right of Railroad Commission to regulate rates, decisions under doctrine of respondeat superior, rather than those dealing with workmen's compensation cases, state the proper rule. St.1935, p. 262, §§ 136, 136.5; p. 878.

6. Contracts ⇐153

Where two interpretations of contract are possible, the interpretation rendering it valid should be preferred over the interpretation rendering it illegal.

7. Automobiles ⇐59

Though building of highway or bridge by governmental agency is not a "commercial purpose," that doctrine is inapplicable to activities of trucker employed to transport materials over the highway to be so used, as respects Railroad Commission's right to regulate rates. St.1935, p. 262, §§ 136, 136.5; p. 878.

[Ed. Note.—For other definitions of "Commercial Purpose," see Words & Phrases.]

8. Automobiles ⇐59

The Highway Carriers' Act was applicable to truck owner engaged in transporting materials for Department of Public Works, so as to permit Railroad Commission to regulate rates, notwithstanding that trucker was engaged in transportation for the state. St.1935, p. 262, §§ 136, 136.5; p. 878.

9. Automobiles ⇐121

The Public Utilities Act, authorizing carriers to give rate preferences to the United States and to the state, does not validate every contract for a reduced rate, is not an absolute guaranty of preferences, and does not determine questions of procedure. Civ.Code, § 2171; Public Utilities Act Gen. Laws Supp. 1935, Act 6386, §§ 17(a) (4), 17.5.

10. Automobiles ⇐121

The statute recognizing possibility of valid preferential rates by highway carriers, on application to Railroad Commission, is applicable to transactions with governmental agencies. Gen.Laws Supp.1935, Act 5129a; Act 6386, §§ 17(a) (7), 17.5.

11. Automobiles ⇐60

The Highway Carriers' Act, authorizing Railroad Commission to regulate rates of private highway carriers, is constitutional, as against contention that such regulation is not cognate or germane to regulation of common carriers. St.1935, p. 262, §§ 136, 136.5; p. 878.

EDMONDS and HOUSER, JJ., dissenting.

In Bank.

Original proceeding in certiorari by Paul Entremont and the People of the State of

California, on relation of the Department of Public Works, against Leon O. Whitsell and others, as members of and constituting the Railroad Commission of the State of California, to annul an order of the Railroad Commission.

Order affirmed.

For prior opinion, see 80 P.2d 987.

Albert E. Sheets, of Sacramento, for petitioner Paul Entremont.

C. C. Carleton, C. R. Montgomery, Robert E. Reed, and Frank B. Durkee, all of Sacramento (P. N. McCloskey, of Los Angeles, of Counsel), for petitioner Department of Public Works of State of California.

P. N. McCloskey, Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiae.

Carl R. Schulz, of San Francisco, amicus curiæ for California Hay, Grain and Feed Dealers' Ass'n.

Ira H. Rowell, Frank B. Austin, Scott Elder, and Mary J. Moran, all of San Francisco, for respondents.

Edward M. Berol, of San Francisco, Wallace K. Downey and H. J. Bischoff, both of Los Angeles, and Sanborn, Roehl & MacLeod, Douglas Brookman, Hugh Gordon, Reginald L. Vaughan, and Varnum Paul, all of San Francisco, Robert Brennan, of Los Angeles, Gerald E. Duffy, of San Francisco, Frank Karr and E. E. Bennett, both of Los Angeles, C. W. Dooling, L. N. Bradshaw, McCutchen, Olney Mannon & Greene, Guy V. Shoup, and C. O. Amonette, all of San Francisco, and R. E. Wedekind, of Los Angeles, amici curiæ.

PER CURIAM.

This is an original proceeding in certiorari instituted by petitioners Entremont and the State Department of Public Works against the Railroad Commission to secure an annulment of an order of the respondent commission. In the order sought to be annulled it was found that Entremont, as a private carrier, and subject to regulation by the commission, had charged the Department of Public Works less than the minimum rates fixed for such service by the commission, and Entremont was ordered to collect from the department the amount of such undercharge and to abstain from charging less than the rate fixed for such service by the commission.

There is practically no dispute as to the facts. So far as pertinent here they are as follows:

In 1935 the legislature passed the Highway Carriers' Act, Stats.1935, chap. 223, p. 878; Deering's 1935 Supp., Act 5129a, p. 1358, conferring upon the commission, with certain exceptions, the power to fix the rates to be charged by highway carriers, as distinguished from common carriers. Acting pursuant to the power thus conferred, the commission fixed the minimum rate for the transportation of sand, rock, gravel, excavated material, and road building material in automobile dump trucks of three and one-half cubic yards capacity, at $2.59 per hour. After this order was made, Entremont, who then held a permit as a radial highway common carrier, on February 11, 1936, as the lowest responsible bidder, entered into a contract with the Department of Public Works, Division of Highways, whereby he agreed to "rent" three dump trucks of the above-described capacity with drivers, to the department, the trucks to be used as needed for the transportation of road building or excavated material in the repair of highways. This contract fixed a "rental" price of $2.50 per hour for the use of such trucks and drivers. After entering into this contract the three trucks were used by the department pursuant to the agreement for 251 hours. According to the rate fixed by the contract, less a discount of ½ per cent for cash, the return to Entremont was $25.72 less than he would have received had he charged the minimum rate of $2.59 per hour fixed by the commission for such service.

Upon its own motion, the commission instituted an investigation into the charges Entremont was making for the use of his dump trucks under the contract. In this proceeding the department intervened on behalf of Entremont. Several truck associations likewise intervened. As a result of this investigation, and after a full hearing, the commission determined that the contract between Entremont and the Department of Public Works called for the transportation of materials on the highway within the meaning of the order of the commission fixing the minimum rates for such service. It thereupon made and entered its order here sought to be annulled.

The petitioners make two main contentions:

First, assuming the constitutionality of the Highway Carriers' Act, supra, it is contended that the transactions here involved were not within the purview of that act; and second, that if the transactions were within the act, the statute is unconstitutional.

In connection with the first contention, the main arguments of petitioners are that the transaction is controlled not by the Highway Carriers' Act, but by sections 136 and 136.5 of the Streets and Highways Code, Stats. 1935, chap. 29, pp. 248, 262; that the trucks were contributing to the maintenance of the highways, and, therefore, were not being operated over the public highways within the meaning of the Highway Carriers' Act; and that the act, in any event, does not apply to hauling performed by the state. In our opinion, none of these arguments is sound.

[1] The first argument is predicated upon the premise that the contract between Entremont and the department did not constitute the transportation of property for compensation over the public highways, but was in fact the leasing or renting of trucks within the meaning of sections 136 and 136.5 of the Streets and Highways Code. These sections require competitive bidding for the "leasing or renting of tools or equipment for state highway purposes" by the department. It must be conceded that if Entremont had rented or leased his trucks to the department, and, if then the department had operated these trucks, clearly the transaction would not be subject to the rate regulations of the commission. In that event the transaction would be governed by the sections of the Streets and Highways Code. On the other hand, if Entremont, under the contract, operated the trucks, and transported the property of the state over the public highways for compensation or hire as a business, then the Highway Carriers' Act is applicable and the Streets and Highways Code provisions have no application.

It is our opinion that the contract, denominated by the parties as a "Service Agreement", was for the transportation of property by motor vehicle, and was not for the renting or leasing of tools or equipment. The contract provides that Entremont, "hereinafter called the vendor, hereby agrees to furnish the services or rental * * * to the Department of Public Works * * * and agrees to receive and accept as full compensation therefor the prices named in the following memorandum:

"For the rental of three only three and one-half yard dump trucks for 500 hours each at $2.50 each per hour, including operation.

"The trucks are to be used principally under power shovels for hauling gravel, slide material, etc., and for other miscellaneous hauling jobs as required anywhere in District 1."

After designating the specifications of the trucks, the agreement contains certain "special provisions." It is therein provided, among other things, that "the equipment is to be operated by the vendor, and the vendor is to furnish competent operators, all operating supplies such as gasoline, oils, etc., and all repairs necessary to keep the equipment in efficient running order"; that "the equipment will only be used as required * * *"; that the trucks must be kept within District 1 ready for immediate call; that "the operators furnished under this Service Agreement are to perform their duties to the satisfaction of the Department of Public Works, and the vendor is to replace them at any time that they do not prove satisfactory, at his own expense." The agreement required Entremont to carry compensation insurance and to assume all liability for damage to other property or injury to persons caused by the operation of the equipment. It also was provided that "all persons engaged on this work are employees of the vendor and none are employees of the Department of Public Works."

[2, 3] Although the solution of the problem is not entirely free from doubt, it is our opinion that this contract did not constitute the renting or leasing of equipment to the department but was a contract calling for the transportation of property by motor vehicle by Entremont. This conclusion follows from the fact that under the contract the possession and control of the trucks and the operators thereof did not pass to the department—the operators did not become the employees of the department—but such possession and control remained in Entremont. The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ. Code, §§ 1925, 1955. The record is clear that the only supervision exercised by the depart-

ment over the operators of the trucks was to direct them where to load and unload the material hauled, when to go on or leave the job, and to inform the operators whether the load should be dumped or spread. The department had no power to discharge the drivers—that power, and the power of selection, rested in Entremont. That is a factor of some importance in ascertaining whether Entremont or the department controlled the operators. Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551. Moreover, the provisions of the contract indicate that it was not the intention of the parties that the department should exercise exclusive control over the operators. The contract required Entremont to keep the trucks in repair; to pay all expenses incidental thereto; to supply all oil, gas and other materials necessary for their operation; to carry compensation insurance on the drivers, and expressly provided the operators were the employees of Entremont. Further, under the contract, Entremont assumed all responsibility for damage or injury to other persons or property by reason of the operation of the trucks. This provision strongly implies that exclusive control was not conferred on the department.

[4] The general rules applicable to this situation have been correctly stated in many cases. The applicable rule is stated in 39 Corpus Juris, section 1462, page 1274, as follows: "A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it." This rule has been adopted by many cases in this state. Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241; Stewart v. California Imp. Co., 131 Cal. 125, 63 P. 177, 724, 52 L.R.A. 205; Lowell v. Harris, supra; see, also, Wagner v. Larsen, 174 Wis. 26, 182 N.W. 336; Shepard v. Jacobs, 204 Mass. 110, 90 N.E. 392, 26 L.R.A.,N.S., 442, 134 Am.St.Rep. 648; Morris v. Trudo, 83 Vt. 44, 74 A. 387, 25 L.R.A.,N.S., 33; Cook v. Wright, 177 Miss. 644, 171 So. 686.

[5] We think the rule of these cases rather than the doctrine stated in Dept. of Water & Power v. Industrial Acc. Comm., 220 Cal. 638, 32 P.2d 354, and Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757, cases relied upon by petitioners, is applicable here. These last two cases recognized that where the special employer exercises some measure of control comparable to the control here involved, an injured employee under the Workmen's Compensation Act can secure an award against both his special and general employer. We think that in ascertaining whether the contract called for a rental of equipment or for services to be performed by Entremont, the cases above cited dealing with the doctrine of respondeat superior rather than the cases dealing with compensation under the Workmen's Compensation Act state the proper rule. This is so because the problem is who operated the trucks, and who was responsible for their operation, and not as to the liability to special employees under the Workmen's Compensation Act.

The case of People v. Tedesco, 18 Cal. App.2d 667, 64 P.2d 966, cited by petitioners, is not helpful on this issue. That decision was on demurrer, and the actual facts of the operation do not appear.

[6] There are two other factors which are of some importance, although neither is conclusive, on this phase of the problem. If it should be held that under the contract the equipment, with operators, was rented to the department, and that the department was, therefore, in exclusive control of the operators, then the operators would be employees of the state, and, it would probably follow, that the contract would be illegal and void under the provisions of article 24 of the state Constitution, and of the Civil Service Act, Deering's Gen.Laws, 1937, Act 1401, p. 740, as these provisions have been interpreted in State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, and Stockburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741. Where two interpretations are possible, one rendering the contract valid and the other rendering it illegal, the former, under elementary principles, is to be preferred.

Secondly, it should be mentioned that petitioner Entremont apparently conceived the transaction to be one whereby he was engaged in the transportation of property by motor vehicles upon the highways, instead of a renting contract, because in his return filed with the state board of equalization pursuant to the Motor Vehicle License Tax Act, Stats.1933, chap. 339, p. 928, he included the income paid to him by the department as part of his gross receipts. That act, so far as pertinent here, would

not be applicable if the transaction involved a rental.

From all these circumstances it must be held that the transaction lacks that element of a transfer of use and possession of property to the hirer which is essential to the existence of a leasing, Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486; Reavley v. State, 124 Tex.Cr.R. 528, 63 S.W.2d 709; that the provisions of the Streets and Highways Code have no application; and that the operation called for by the contract was the transportation of property for compensation over the public highway as a business within the meaning of the Highway Carriers' Act.

[7] Petitioners' next contention is that the transportation involved herein was for the purpose of maintaining a public highway, and did not constitute transportation upon a public highway within the meaning of the act. The contract itself described the operation as "hauling gravel, slide material, etc., and for other miscellaneous hauling jobs as required anywhere in District 1". The evidence shows that the department needed these trucks, in addition to trucks owned and operated by it, as emergency equipment to assist it in keeping the public highways in District 1 in proper repair. Although District 1 includes Del Norte, Humboldt, Mendocino and Lake counties, and part of Trinity and Siskiyou counties, the evidence shows that the actual operations of Entremont under the contract were limited to an eleven-mile strip of the state highway between the Sonoma-Mendocino county line and the town of Hopland. The trucks were used either to transport gravel from the gravel pits to the point where the gravel was used for the purpose of filling washed out portions of the road, or to transport excavated material from where excavated to the point of disposal. A major portion of each movement of the trucks was the transportation of these materials over the public highway, which highway was then open to public travel. The hauls varied in length from eleven miles to a few hundred feet. As far as Entremont is concerned, he being the person, as already held, who was performing the operation, clearly the above-described activities constitute the transportation of property for commercial purposes for a compensation over the public highways within the meaning of the Highway Carriers' Act. So far as Entremont is concerned, he was transporting the material to be used in repair of a highway over the highway. He was engaged in a commercial enterprise. He was employed to transport road building or waste material from one point on the highway to another. So far as he was concerned, that was a carriage of property for a commercial purpose. If the trucks had, in fact, been operated by the department, then petitioners' contentions would be sound. Clearly, the building of a highway or bridge by a governmental agency is not a "commercial" purpose (New York ex rel. Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306), but that doctrine has no application to the activities of a trucker who is employed to transport some of the materials to be so used over the highways.

There is nothing in Oswald v. Johnson, 210 Cal. 321, 291 P. 579, heavily relied upon by petitioners, contrary to these views. That case involved the question as to whether certain contractors were liable for the gasoline tax imposed on fuel used in vehicles operated on the public highways. It was held that gasoline used in rollers and tractors used in the construction of a highway then not open to the public was not taxable. The court stated, 210 Cal. page 322, 291 P. page 579:

"The Gasoline Tax Act was intended to provide for a license tax on motor vehicle fuel used on public highways of the state available for public travel and in aid of the construction, maintenance, and repair of public highways. Obviously, it was not intended to require a license tax on motor fuel used exclusively on the right of way under construction.

"When, as here, the rollers and tractors are being used in such construction, the public highway is not being 'operated upon' in the sense intended by the statute. Practically this same question was presented to the Supreme Court of South Dakota in Allen v. Jones, 47 S.D. 603, 201 N.W. 353, where it was held that a traction engine while in use in the construction of a highway is not 'operated upon a highway' as contemplated by a Gasoline License Tax Act of that state, similar in effect to our own statute with regard to exemptions. *It is pertinently observed in that case, however, that motor fuel used in propelling tractors or trucks in the transportation of road building material or motor fuel to or from the site of construction is used in 'operation upon' the highways* and is not purchased subject to the refund."

The problem involved in the instant case is very similar to the situation discussed in the italicized portion of the above quotation. The next contention of petitioners is that, assuming the contract called for the transportation of property for a commercial purpose by Entremont over the public highways, and therefore was superficially within the terms of the Highway Carriers' Act, the statute should be so construed as to render the transaction here involved as not within the statute. The reasons advanced are, first, that the state is not bound by its statutes unless expressly mentioned; and second, that the Public Utilities Act, Deering's Gen.Laws Act 6386, and the Civil Code indicate a legislative policy or intent to exempt transportation for the state from regulation, and to favor preferential charges to the state.

On this phase of the litigation we are satisfied with that portion of the first opinion prepared herein by Justice Langdon dealing with these two issues. Cal.Sup., 68 P.2d 964, 966. We therefore adopt as our conclusions thereon the following portions of that opinion:

[8] "The first reason is obviously based upon an unsound assumption. The Department of Public Works was in this case only a shipper, with materials to be moved. Entremont was the carrier. The statute does not cover shippers, but carriers, and the commission's regulation was directed toward the carrier, and not toward the state. Accordingly, the mere fact that Entremont was engaged in transportation for the state does not mean that the commission was regulating a state agency.

[9] "The second reason requires fuller consideration. Section 17(a) (4) of the Public Utilities Act (Deering's Gen.Laws, Supp.1935, Act 6386) provides that common carriers may transport persons or property 'free or at reduced rates' for the United States, state, county or municipal governments, where such free or reduced rate transportation is provided for in the contract. Section 17.5 of the act (Supp.1935) makes the same provision where transportation is for contractors carrying out contracts with the United States, state or other governmental agency in this state. Section 2171 of the Civil Code provides: 'A common carrier must always give a preference in time, and may give a preference in price, to the United States and to this state.' These provisions permit preferential rates to governmental agencies such as the Department of Public Works, and there is nothing in the Highway Carriers' Act which attempts to prohibit such preferences. This has been recognized by the commission in a number of instances in which reduced rates to the state or subdivisions have been approved.

[10] "But though it is conceded that preferences to governmental agencies are authorized by the Public Utilities Act and not prohibited by the Highway Carriers' Act, it does not follow that any and every contract for a reduced rate is thereby rendered valid. The declaration of policy is not an absolute guarantee of preferences, and it does not determine questions of procedure. In this connection, an important section of the Highway Carriers' Act must be read. Section 11 of said act (Gen. Laws Supp. 1935, Act 5129a) provides: 'If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of section 10 hereof.' This section recognizes the possibility of valid preferential rates, and thereby supports and does not conflict with the declared policy in the above-quoted provisions of the Public Utilities Act. But it adds a requirement for highway carriers which is not made in the case of common carriers, namely, a prior application to the commission for authority to establish the rate; and it gives the commission power to reject the proposed preference, if it appears to create an unjust or unreasonable discrimination against the public interest.

"In our opinion this section is clearly applicable to transactions with governmental agencies, and there is no reason for construing it otherwise. If it were not applied, preferences to such agencies would be entirely uncontrolled, with the consequent evils of unwarranted discrimination and price cutting by irresponsible carriers. The commission was given authority to approve reasonable preferences, and its authority must be upheld. Competitive bidding is not prevented; it is still possible to the fullest extent, subject to the commission's approval of the final bid, before the rate goes into effect. An instructive discussion of a similar authority of the Interstate Commerce

Commission will be found in United States v. Tennessee, 262 U.S. 318, 43 S.Ct. 583, 67 L.Ed. 999. See, also, City of Hillsboro v. Public Service Commission, 97 Or. 320, 187 P. 617, 192 P. 390, where the court held that service to municipalities was within the regulatory powers of the commission.

"It is to be noted, also, that the requirement of prior application to the commission follows logically from the nature of the regulatory provisions of the Highway Carriers' Act. Under the Public Utilities Act, carriers subject thereto establish their own rates by filing tariffs with the commission, subject to the power of the commission to change them for good cause. Doubtless such carriers, under the provisions of the act dealing with preferences, may themselves contract for preferential rates to governmental agencies, and the rates thus made will apply, subject to any later action by the commission. Under the Highway Carriers' Act, perhaps because of the prior experience with large numbers of truckers who engaged in bitter competition at ruinously low rates, a system was established whereby the commission itself fixes the original rates and approves all changes, before they go into effect. There is no logical reason why this prior approval should not be secured before any preferential rate is given. It is to be assumed that the commission will act in accordance with the statutory declaration of policy in favor of preferences to the state, and, under section 11 of the Highway Carriers' Act, will approve any requested preference unless the evidence shows that the particular preferential rate will constitute an unjust or unreasonable discrimination, and that the public interest will suffer thereby. The present proceeding, of course, does not involve any issue of abuse of discretion in the disapproval of a preferential rate."

[11] Both petitioners, and numerous amici curiae, have filed exhaustive briefs on the question of the constitutionality of the Highway Carriers' Act. It is urged that the regulation of the rates of private carriers is not cognate and germane to the regulation of common carriers, and that therefore the legislature was powerless to confer such power on the Railroad Commission. Substantially, the same arguments were advanced in challenging the constitutionality of the City Carriers' Act, Stats.1935, Chap. 312, p. 1057, as amended in 1937, Stats.1937, Chap. 286, p. 629. In Morel v. Railroad Commission, 11 Cal. 2d 488, 81 P.2d 144, all of these arguments were held to be unsound. No good reason exists for repeating the conclusions therein reached. Upon the authority of the Morel case it is concluded that the statute is constitutional.

For the reasons stated, we are of the opinion that the order of the respondent Railroad Commission, should be, and it is hereby affirmed.

EDMONDS, Justice (dissenting).

As I read the contract which is the basis of the controversy between the parties in this case, it provides for the rental of equipment and not for the transportation of property. If this is the correct construction of the instrument, then the petitioner is not subject to the commission's rate fixing power, for the relationship created by this contract is primarily determinative of the question for decision.

The contract did not, as the commission found, call for the use of Entremont's trucks for 500 hours each. The Department of Public Works was not bound to use his trucks for any length of time, for it expressly reserved the right to terminate the agreement *"at any time* * * * when the equipment is no longer needed" or "when state owned equipment is available". The contract, therefore, was not one for a specific transportation service, but was merely to make extra equipment available for emergency service or whenever state-owned trucks were not available.

Several other factors strongly indicate that this contract was a rental agreement. The rate of compensation was measured solely by the period of time during which the trucks were used and did not depend upon the use to which the trucks were put during that period. Although Entremont undoubtedly had the right to employ truck drivers of his own choosing, he was bound to replace any one who was unsatisfactory to the department. However, with respect to the direction of trucking operations during the performance of the work under the agreement, the evidence unequivocally shows that Entremont neither possessed nor attempted to exercise any right of control; the operators took orders solely from the foreman in charge of the highway maintenance crew.

Use and control of the hired property is the chief characteristic of a rental agree-

ment. Civ.Code, secs. 1925, 1955. To say, as the commission found, that the trucks were subject to Entremont's control throughout the performance of the hauling and that the directions given to the operators by the foreman "were only such as a carrier would normally have received from one for whom he is transporting property" is in plain contradiction with the facts established at the hearing. The evidence introduced before the commission shows that the trucks were used in conjunction with those of the Department of Public Works for the purpose of clearing slides and filling washouts on the state highways during the winter season. In doing this work material was carried for distances varying from a few hundred feet to as much as eleven miles, depending upon the necessities of the occasion, and the operators of Entremont's trucks took orders solely from the foreman in charge of the highway maintenance crew, who gave them instructions where to load and unload. In short, during the time the Department of Public Works used the petitioner's equipment, they were a part of the fleet of trucks engaged in the repair work then being done, and no distinction was made between a privately owned unit and one belonging to the state.

It is true that the contract required Entremont to keep the trucks in repair and to pay for all supplies necessary for their operation and that it characterizes the operators as the employees of Entremont. However, it is common business practice to lease construction machinery "including operation", and such facts are in no way inconsistent with the theory of lease. In Stewart v. California Improvement Co., 131 Cal. 125, 63 P. 177, 179, 724, 52 L.R.A. 205, the city of Oakland "hired the use of the street roller outfit from the defendant company—to wit, the roller engine, and the engineer to manage the same—for so much a day" and the court held that the "relation of master and servant existed between said defendant company and the defendant Conger, and not between the city of Oakland and defendant Conger". See, also, Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241; Lowell v. Harris, 24 Cal. App.2d 70, 74 P.2d 551. Nor is the fact that under the contract Entremont assumed liability for damage or injury to other property or persons inconsistent with a lease. It was competent for the parties to agree inter se upon the incidence of delictual responsibility and no doubt such a contract would be binding as between themselves.

Cases such as Department of Water and Power v. Industrial Accident Commission, 220 Cal. 638, 32 P.2d 354, and Independence Indemnity Co. v. Industrial Accident Commission, 203 Cal. 51, 262 P. 757, indicating that the department would be a "special employee" under the terms of the Workmen's Compensation Act, are not in point. The term "special employee" is a statutory relationship created by that act and is sui generis.

The case of People v. Tedesco, 18 Cal. App.2d 667, 64 P.2d 966, lends full support to the conclusion that Entremont was not engaged in the transportation of property upon the highways within the meaning of the Highway Carriers' Act. That case arose upon the sustaining of a demurrer to complaints brought by the state to recover penalties under the Highway Carriers' Act. The complaints alleged that the defendants had engaged in the transportation of property by motor vehicles for compensation in violation of the lawfully established rates for such service. By other allegations of the complaint it appeared that the defendants had hired out trucks of a specified capacity "with operators" to the United States government. The court held that the complaints failed to show that the defendants were "highway carriers".

Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486, 487, is not contrary to a conclusion that the Entremont contract is a rental agreement. In that case the facts show "leases" between the parties which were a mere subterfuge, because it was apparent on the face of the contracts that the rate payable to the truck owners was based upon the weight of the goods carried and not upon the period of time during which the truck was used. While the "rental" of each truck purported to be $19.50 per day, the court pointed out that "It is apparent from the other provisions of these 'leases,' and from the manner in which they were performed by the parties, that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of 32½ cents per 100 pounds, subject to a minimum charge of 65 cents per shipment." On the other hand, the rate of compensation payable to Entremont under his contract with the department was based solely upon the ele-

ment of time of use and was in no way dependent upon the weight of the materials carried. The contract did not define either the time involved for performance or the route or termini the trucks were to follow. In my judgment, a consideration of all of these elements, together with the fact that the direction and control of the operators during performance was vested in the department, compels the conclusion that the contract was a lease.

I am, therefore, of the opinion that the order of the Railroad Commission should be annulled.

I concur in the conclusion: HOUSER, J.



13 Cal.2d 285

AGUDO v. MONTEREY COUNTY.

S. F. 16134.

Supreme Court of California.

April 10, 1939.

1. Assignments ⇐26

The statutory cause of action against county for value of property destroyed by a mob is not assignable, if the recovery allowed is a penalty. Pol.Cole, § 4452.

2. Penalties ⇐1

A "statutory penalty" is one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong without reference to actual danger sustained.

[Ed. Note.—For other definitions of "Statutory Penalty," see Words & Phrases.]

3. Assignments ⇐26

Statute authorizing recovery from county for value of property destroyed by a mob provides a "compensatory remedy" rather than a "statutory penalty," and is hence assignable. Pol.Code, § 4452.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Louis Agudo against the County of Monterey of the State of California to recover as assignee the value of property alleged to have been destroyed by actions of a mob. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

For prior opinion, see 81 P.2d 978.

Alfred J. Hennessy, of San Francisco, for appellant.

Long & Levit, of San Francisco, amici curiæ representing Board of Fire Underwriters of the Pacific.

Anthony Brazil, Dist. Atty., of Salinas, for respondent.

EDMONDS, Justice.

The appeal in this case presents for review a judgment in favor of the defendant county after its demurrer to the plaintiff's complaint was sustained without leave to amend. The only point in controversy is whether a cause of action based upon section 4452 of the Political Code, which provides that "Every county and municipal corporation is responsible for injury to real or personal property situate within its corporate limits, done or caused by mobs or riots," is assignable.

The plaintiff alleges in his complaint that in 1934 one Canete was a labor contractor hiring men to work in the fields, and that he boarded and maintained them in certain bunkhouses on his ranch in Monterey county; that on September 21, 1934, a mob of seventy-five persons armed with loaded guns and rifles applied gasoline to the buildings in which fifty-three of these laborers were living and destroyed personal property of a stated value belonging to each of them, without any negligence on their part and against their consent. He also alleges that within one year thereafter, each of the persons whose property was destroyed filed with the board of supervisors of the county a verified claim for its value and, after it was rejected, assigned his claim to the plaintiff.

[1] The county successfully contended in the superior court and asserts upon this appeal that a cause of action for the value of property destroyed by a mob is not assignable. The plaintiff concedes that if the statute allows the recovery of a statutory penalty, the county's position is correct, but he claims that as the statute authorizes a property owner to recover only actual damages it confers a compensatory or remedial right which is assignable. See Peter-

son v. Ball, 211 Cal. 461, 296 P. 291, 74 A.L.R. 187; Western Mortgage & Guaranty Co. v. Gray, 215 Cal. 191, 8 P.2d 1016, 80 A.L.R. 866. The nature of the statute is, therefore, determinative of the question for decision.

The statute upon which the plaintiff bases his cause of action was enacted in 1872 and is substantially the same as the enactments of other states which have provided a remedy for persons whose property has been destroyed by rioters. All of this legislation stems back to a series of English statutes of very ancient origin. The genesis of the principle involved has been traced to the Statute of Winchester enacted in 1285 (1 Stat. 13 Edw. I, p. 2, ch. 3), which provided that a person robbed might sue the inhabitants of the hundred or county in which the robbery had taken place. In ancient England, the individual inhabitants of each community were in theory responsible for the preservation of peace and order therein; hence it was considered just to impose civil liability upon them for damage to property resulting from criminal disorders which should not have been permitted. See 25 Halsbury's Laws of England, [2d. ed.] 359. The American statutes rest largely upon the same fundamental principle. Local subdivisions of government which have been invested with police power to maintain law and order are subjected to a correlative liability for injuries to property occasioned by rioters. See Louisiana ex rel. Folsom v. Mayor, etc., New Orleans, 109 U.S. 285, 287, 3 S. Ct. 211, 27 L.Ed. 936.

The prototype of the present American statutes is found in a section of the statute 1 Geo. I, St. 2, Ch. 5, commonly known as the "Riot Act". In the main the act was penal, making it a felony to engage in riots or public tumults, but one clause (section 6) created civil liability against the inhabitants of the hundred in which a riot had resulted in injury to private property. Liability was measured by the loss sustained, and consequently actions brought under this section of the act were held to be primarily remedial in spite of the fact that it was embodied in a statute which otherwise was entirely penal. For example, in the case of Hyde v. Cogan, 2 Doug. 699, 99 Eng.Rep. 445, the plaintiff brought an action against the inhabitants of the hundred of Ossulton to recover damages for his dwelling house and furnishings which had been demolished in a riot. Section 6 of the Riot Act provided express indemnity for injury to dwelling houses but made no mention of furniture or chattels. It was held that the section, being remedial, should be liberally construed; hence plaintiff was entitled to damages for the loss of his personal property as well as his house.

In various American jurisdictions statutes based upon section 6 of the English Riot Act usually have provided for compensatory damages to the person whose property was injured or destroyed, and in construing them the courts have generally followed the English view that the sufferer's right to damages is remedial. County of Allegheny v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Febock v. Jefferson County, 219 Wis. 154, 262 N.W. 588; Yalenezian v. Boston, 238 Mass. 538, 131 N.E. 220; Barnes v. Chicago, 225 Ill.App. 31; Marshall v. City of Buffalo, 50 App.Div. 149, 64 N.Y.S. 411. Respondent cites Underhill v. Manchester, 45 N.H. 214, and Champaign County Com'rs v. Church, 62 Ohio St. 318, 57 N.E. 50, 52, 48 L.R.A. 738, 78 Am.St.Rep. 718, as holding that the right created by such statutes is essentially penal rather than remedial. The New Hampshire decision concerned the right to recover damages for a saloon illegally conducted by the plaintiff and which was destroyed by a mob. The court states that the statute of that state was "first and chiefly, punitive", its purpose being "to prevent and suppress riots" and reasoned that "Riots being the mischief to be remedied, the statute is to be construed, if possible, so as to suppress the mischief. The business in which the plaintiff was engaged is a fruitful source of riots * * * and, to relieve persons so employed from risks incident to their calling would tend to foster riots rather than to prevent them." Thus it appears that the decision is in reality bottomed upon the doctrine of assumption of risk; one who incites a riot cannot claim the benefit of the statute. The Ohio case was decided under a statute which differs from the usual one in providing for damages in a sum certain regardless of the extent of the plaintiff's loss. In view of this fact the court's conclusion that the statute was "essentially penal and corrective" appears to be sound. The statement in the opinion to the effect that this would be so even though the particular statute provided for compensatory damages was unnecessary to the decision and upon principle does not seem correct.

[2, 3] In this state a statutory penalty has been frequently defined as "one which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained". Los Angeles County v. Ballerino, 99 Cal. 593, 32 P. 581, 582, 34 P. 329. Clearly, the damages provided for in section 4452 of the California Political Code are measured by the property loss which the injured party suffered. Moreover, this section and the companion provisions following it (sections 4453 to 4457, inclusive) are a reenactment of a statute originally adopted in 1868 entitled "An Act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots." Stats.1867–68, p. 418, ch. 344. It seems plain from the standpoint of both legislative intention and historical interpretation that the purpose of section 4452 was to provide a compensatory remedy to persons whose property has been injured or destroyed by mob violence. The rights created in the plaintiff's assignors by this section were, therefore, assignable.

Cases such as Moss v. Smith, 171 Cal. 777, 155 P. 90; Peterson v. Ball, 211 Cal. 461, 296 P. 291, 74 A.L.R. 187, and Western Mortgage & Guaranty Co. v. Gray, 215 Cal. 191, 8 P.2d 1016, 80 A.L.R. 866, which construe former section 309 of the Civil Code as penal rather than remedial, are not at variance with this conclusion. The determination in these cases, that the liability imposed upon participating directors of a corporation for debts created in excess of its subscribed capital stock was a statutory penalty necessarily followed a construction of the statute "making the directors liable for the full amount of the excess debts which they may have authorized, regardless of loss or damage which may have been occasioned by their acts". Moss v. Smith, supra, 171 Cal. page 784, 155 P. page 93. In each of these cases it is clear that the court regarded the action as essentially punitive, because the damages were not based on actual loss, and they do not support defendant's contention that although the statute gives the property owner a remedial right, if it is punitive as far as the defendant county is concerned, the action is not assignable. The general distinction which this court made between a statutory penalty and a remedial right in the case of County of Los Angeles v. Ballerino, supra, is based upon sound legal principles. "Where the damages are given wholly to the party injured as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial." 1 Am.Jur. 89.

The judgment is reversed and the trial court is directed to overrule the demurrer to the plaintiff's complaint.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.



32 Cal.App.2d 195

STEWART v. REUTLER et al.

Civ. 12070.

District Court of Appeal, Second District, Division 2, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Master and servant ⇐332(5)

In guest's action against owners of roadhouse for alleged assault, finding that codefendant was employed by owners as a bouncer was equivalent to finding codefendant was employed to use force upon guests whenever necessary to keep peace and preserve order.

2. Master and servant ⇐329

Complaint in assault and battery action, alleging defendants were owners of a roadhouse, that they employed codefendant as floor manager at such place, and that codefendant attacked plaintiff at defendants' direction and as their agent, contained sufficient allegations that codefendant was acting within scope of authority at time of alleged assault and battery.

3. Master and servant ⇐302(1)

If a servant was directly engaged in duties which he was employed to perform when he committed the act which caused damage, the servant was, at such time, "in course of his employment."

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

4. Appeal and error ⇐996

Failure to allege or find that assault claimed to have been committed by a bounc-

er employed by owners of a roadhouse was committed upon owners' premises did not warrant reversing judgment for plaintiff, since it was fair inference that bouncer's duties included not only a duty to preserve order upon floor of roadhouse but also at approaches thereto.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Charles L. Stewart against Dorothy Reutler and others for an alleged assault and battery committed by an unnamed defendant. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Davis & Thorne and Donald E. Ruppe, by Lester C. Thorne, all of Los Angeles, for appellants.

John A. Holland and Josiah Coombs, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by defendants Reutler from a judgment rendered against them as the employers of codefendant Smith.

Defendants Reutler owned and managed the roadhouse known as The Gable, and employed the defendant Smith as the bouncer therein. On the evening of July 4th the plaintiff was a guest at The Gable, and while he was leaving the place and was between the entrance and the curb in front he got out a bunch of fire crackers and lit them. They made considerable noise. He got out an additional bunch of fire crackers when defendant Smith came up to him and told him, "You can't shoot them things out here." The plaintiff persisted. He put his foot up on a lamp post in order to strike a match when defendant Smith hit him in the face and knocked him out.

[1] The first contention of the appellants is that the findings of fact and conclusions of law are insufficient to support the judgment against them, and in this connection they say, "It will be noted that there is no finding that said Smith, as a part of his employment, was authorized or required to act for and on behalf of appellants in any other manner than to keep order and assist appellants within the confines of appellants' premises." There is a finding that defendant Smith was employed at the time by the defendants Reutler as a bouncer. In our view this is a finding that the defendant Smith was employed to use force upon the guests whenever he thought it was necessary to keep the peace and preserve order.

[2] The next contention of the appellants is that there is no allegation or proof that defendant Smith was acting within the scope of his employment at the time of the commission of the assault and battery. The complaint alleges that the Reutlers were the owners and managers of The Gable and that they employed said Smith as floor manager at the time set forth; that he was working at the direction of and at the instance of the defendants Reutler; and that he attacked the plaintiff at their direction and acting as their agent. In our view these are sufficient allegations that the defendant Smith was acting within the scope of his authority, and there is substantial evidence that he was employed as the bouncer.

[3] It is often difficult to determine whether the rule of respondeat superior has application to a certain given set of facts, that is to say, whether the evidence shows that the servant when he committed the thing which caused the damage was acting in the course of his employment. If the servant was directly engaged in the duties which he was employed to perform, it is obvious that the servant was at that time in the course of his employment. 16 Cal. Jur. 1104.

[4] Finally, the appellants contend that it is not alleged nor is there a finding that the act of violence was committed upon respondent upon the premises of appellants. This is true, but it is a fair inference to sustain the judgment that defendant Smith's duties included not only his duty to preserve order upon the floor of the Gable, but also at the approaches thereto.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

32 Cal.App.2d 148

STEWART v. STEWART.

Civ. 11029.

District Court of Appeal, First District, Division 2, California.

April 13, 1939.

1. Judgment ⇐489

Any judicial record may be impeached on ground of want of jurisdiction or fraud in party offering it. Code Civ.Proc. § 1916.

2. Divorce ⇐327

A foreign decree of divorce may be attacked collaterally upon showing that the court granting it had no jurisdiction because of want of domicile by plaintiff.

3. Divorce ⇐327

A foreign divorce obtained through assumed residence is open to attack in state of true matrimonial domicile, and parties sought to be bound by such divorce may impeach its validity and escape its effect by showing that courts which rendered it had no jurisdiction over parties or subject matter of action, and its jurisdiction may be controverted by extraneous evidence.

4. Divorce ⇐329

In divorce suit, plaintiff could attack foreign proceedings for divorce instituted by defendant as fraudulent and not in good faith, especially where defendant's answer admitted want of domicile and consequent fraud upon foreign court. Code Civ.Proc. § 1916.

5. Divorce ⇐329

Pendency of divorce proceedings instituted by husband in Mexico did not oust California court of jurisdiction, in subsequent suit for divorce by wife, to award alimony pendente lite and counsel fees, where husband's answer in California case admitted want of domicile and consequent fraud upon court in Mexico. Code Civ.Proc. § 1916.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit for divorce by Bertha H. Stewart against Ralph A. Stewart. From an order commanding defendant to make payments for alimony pendente lite, counsel fees, and costs, defendant appeals.

Order affirmed.

John F. Davis, of South San Francisco, for appellant.

Raymond Salisbury, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for divorce in the superior court in Alameda county. The defendant demurred and answered, setting up the special defense that he had previously instituted proceedings for divorce in the civil court of Juarez, Chihuahua, Mexico, and that such proceedings were then pending. The plaintiff procured an order to show cause why defendant should not be required to pay alimony pendente lite, counsel fees, and costs. The defendant replied by affidavit, and a hearing was had. The notice of motion initiating the proceedings to show cause is not in the record, but the order making the award indicated that the hearing was had upon all the papers on file. From this order commanding the defendant to make payments for these purposes, he prosecutes this appeal. The single question presented is whether the pendency of the proceedings in Mexico ousts the California court of jurisdiction to make this order.

The answer admits this allegation of the complaint: "That said defendant was not at any time and is not now a resident of said Juarez, Mexico, and said action was filed by said defendant against plaintiff solely for the purpose of harassing * * * plaintiff."

[1, 2] The record discloses the purpose of plaintiff to attack the foreign proceedings as fraudulent and not taken in good faith. Any judicial record may be impeached on the ground of want of jurisdiction or fraud in the party offering it. Sec. 1916, Code Civ.Proc. A foreign decree of divorce may be attacked collaterally upon showing that the court granting it had no jurisdiction because of want of domicile by the plaintiff. Kegley v. Kegley, 16 Cal.App.2d 216, 220, 60 P.2d 482. Here the want of domicile and the consequent fraud upon the court and upon the plaintiff herein is admitted in the answer.

[3] The rule, supported by numerous authorities there cited, is well stated in Kegley v. Kegley, supra, where 16 Cal. App.2d on page 221, 60 P.2d on page 484, the court says: "A foreign divorce obtained through assumed residence is not in good faith, and is open to attack in the state of the true matrimonial domicile, and the parties sought to be bound by it may

always impeach its validity and escape its effect by showing that the courts which rendered it had no jurisdiction over the parties or the subject matter of the action, and its jurisdiction may be controverted by extraneous evidence."

[4, 5] Since the plaintiff herein has the right to attack the proceedings pending in Mexico, it follows of course that the trial court had discretion to award her counsel fees for that purpose as well as alimony pending the final determination of the controversy.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



ROTEA v. IZUEL.*

Civ. 11440.

District Court of Appeal, Second District. Division 1, California.

April 11, 1939.

Rehearing Denied May 3, 1939.

Hearing Granted June 8, 1939.

1. Frauds, statute of ⇐23(4)

Where defendant's decedent contracted with plaintiff that plaintiff would be paid out of proceeds of decedent's estate for care furnished to decedent's invalid sister, agreement constituted an original contract binding on decedent's estate supported by sufficient consideration, rather than promise to answer for obligation of another.

2. Contracts ⇐50

It is not necessary to constitute "good consideration" for a contract that the benefit should be conferred upon promisor, a prejudice suffered or to be suffered by promisee being sufficient. Civ.Code § 1605.

[Ed. Note.—For other definitions of "Good Consideration," see Words & Phrases.]

3. Wills ⇐59

Services rendered by plaintiff in care of invalid sister of defendant's decedent at request of decedent amounted to a detriment or prejudice within contemplation of law, so as to serve as consideration for promise of decedent that plaintiff would be paid out of proceeds of decedent's estate. Civ.Code § 1605.

4. Frauds, statute of ⇐50(2), 54½, 138(4)

An alleged oral contract entered into between plaintiff and decedent to compensate plaintiff for care furnished by plaintiff to invalid sister of decedent out of proceeds of decedent's estate was unenforceable, and recovery, if any, must be based on theory of quantum meruit. Code Civ.Proc. § 1973, subd. 6.

5. Contracts ⇐15

A contract requires that there should be a reciprocal assent to a definite proposition.

6. Limitation of actions ⇐49(2)

An action for reasonable value of services for care of invalid sister of decedent furnished by plaintiff pursuant to oral agreement that plaintiff would be paid out of proceeds of decedent's estate brought within two years after death of decedent was not barred by limitations, notwithstanding that services rendered to sister terminated more than two years prior to death of decedent, since statute did not commence to run until death of decedent. Code Civ.Proc. §§ 339, subd. 1, 1973, subd. 6.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Ireneo Rotea against Pablo Izuel, as executor of the last will and testament of Antonio Izuel, deceased, for the reasonable value of services rendered to Eugenio Izuel, the invalid sister of deceased, at the request of deceased, wherein defendant filed a cross-complaint. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Fall & Fall and W. B. Bobbitt, all of Los Angeles, for appellant.

Kirtland I. Perky, James E. Fenton, and Frank G. Howe, all of Los Angeles, for respondent.

WHITE, Justice.

This appeal is from a judgment in favor of plaintiff on a claim against the estate of Antonio Izuel, rejected by his executor, for the reasonable value of personal services rendered to Eugenio Izuel, the invalid sister of decedent, from June 12, 1916, up to the time of the latter's death on

*For subsequent opinion see 95 P.2d 927.

October 16, 1932. Trial resulted in a judgment for plaintiff upon his first cause of action in the sum of $9,000, from which judgment defendant executor prosecutes this appeal.

The complaint alleged that the services in question were performed at the special instance and request of decedent, and consisted of maintaining a home for decedent's invalid sister, nursing her and administering to her comfort; that all of said services were rendered by plaintiff "with the expectation on the part of said plaintiff, that he would be paid and that he would receive, and with the expectation and intention on the part of said Antonio Izuel, that the said plaintiff should be paid and that he should receive, reasonable compensation therefor out of the estate of said Antonio Izuel, after his death. * * * That all of said services were rendered by said plaintiff to said Antonio Izuel, continuously during all of said time, pursuant to the instance and request of said Antonio Izuel, as aforesaid, and pursuant to the mutual expectations of the said plaintiff and said Antonio Izuel and with the knowledge and approval of the said Antonia Izuel, and he accepted said services, and the benefits derived therefrom."

Upon evidence, the sufficiency of which is admitted, the trial court found that the foregoing allegations were true, and it is now conceded that the judgment must be upheld unless as a matter of law it can be said that the admittedly proven facts do not entitle plaintiff to recover.

[1-3] The position of appellant is, first, that an action in assumpsit cannot be maintained upon the theory of an implied contract for services rendered, not to the party to be charged but to a third person—in this instance the sister of the party to be charged. This raises the question as to whether under the evidence the transaction between plaintiff and the decedent created an original or primary obligation on the part of the latter. Under the facts of the instant case, we are impressed with the fact that the services in question were rendered by plaintiff upon the reliance that decedent would pay for them out of the proceeds of his estate, and further, that the latter unequivocally and directly promised to make such payment. It was held in Klamath Lbr. Co. v. Co-operative Land & Trust Co., 25 Cal.App. 678, 145 P. 159, that this constitutes an original contract with a sufficient consideration to support it. Also, in the case before us, the evidence conclusively shows that at the time plaintiff commenced to render services for the invalid sister of decedent no debt had then accrued, and Antonio Izuel promised to pay out of his estate after his death for said services to be rendered. His promise, therefore, was to pay his own obligation based upon an agreement made in advance of the accrual of that obligation. That it is not necessary in order to constitute a good consideration that a benefit should be conferred upon the promisor, but that a prejudice suffered or to be suffered by the promisee affords sufficient consideration, is firmly established in our law. Civ.Code, sec. 1605. The services rendered by plaintiff in caring for the invalid sister of the promisor certainly amounted to a detriment or prejudice within contemplation of the law.

[4] Appellant finally contends that the alleged oral contract to compensate the respondent upon the death of the decedent promisor out of the proceeds of the latter's estate, was unenforceable by reason of the provisions of subdivision 6, section 1973, of the Code of Civil Procedure. That this is the law is well settled. Long v. Rumsey, Cal.Sup., 84 P.2d 146. A recovery, if any, therefore, must be based upon the theory of quantum meruit. It is earnestly urged by appellant that the action here in question based upon quantum meruit is barred by the statute of limitations, subdivision 1 of section 339 of the Code of Civil Procedure, it being conceded that the last services under the alleged contract were performed more than two years before the death of Antonio Izuel. Respondent's position is that the services were rendered under an agreement that compensation for the same was to be made out of the estate of Antonio Izuel; that when the latter failed to make provision for payment out of his estate the contract was breached, and that upon such breach the law implied a promise to pay the reasonable value of the services rendered pursuant to the agreement; and that the cause of action then arose and the statute of limitations then began to run. In Long v. Rumsey, supra, it is stated that notwithstanding the unenforceability of a contract of this nature, nevertheless in California recovery has been permitted from the estate in an action upon quantum meruit for services rendered to a decedent. See, also, cases cited at page 149 of this decision.

[5, 6] While it is true that in the cases cited by the Supreme Court in Long v. Rumsey, supra, the services terminated contemporaneously with the death of the employer, we are of the opinion that even though the services terminated prior to the death of the employer, recovery may be had where, as in the case before us, the evidence was sufficient to clearly and definitely prove an express contract to pay for certain services at a future time. The evidence in the case at bar satisfies the test announced in Spinney v. Downing, 108 Cal. 666, 41 P. 797, 798, as follows: "It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition." There is ample evidence in the record here to support the conclusion that it was the understanding of both parties to the contract that the compensation to be paid respondent, as we have already indicated, would only become due and payable upon the death of Antonio Izuel. In fact, appellant makes no argument to the contrary. The court having found upon clear, convincing and substantial evidence that the promise in question was to pay a debt at the death of the promisor, and such an agreement being a valid and legally binding obligation, it follows that the statute of limitations did not commence to run until the death of the promisor, and the action having been filed within two years thereafter, it was not barred by the statute.

For the foregoing reasons, that portion of the judgment from which this appeal was taken is affirmed.

We concur: YORK, P. J.; DORAN, J.



32 Cal.App.2d 187

HAMMOND v. McDONALD et ux.

Civ. 11752.

District Court of Appeal, Second District, Division 1, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Statutes ⇐158

The repeal of statutes by implication is not favored, especially where prior statute has been judicially construed and is generally understood and acted upon.

2. Statutes ⇐158

In absence of express terms, presumption is that Legislature did not intend by later statute to repeal former statute, if effect can be given to both by fair and reasonable construction.

3. Statutes ⇐159

The presumption that later statute was not intended to repeal former statute is overcome if statutes are "irreconcilable," or clearly repugnant, as to vital matters to which they relate and so inconsistent that they cannot have concurrent operation, or if later statute is a revision of entire subject-matter and designed as a substitute for former statute, or if intention to repeal is expressed in unmistakable language.

4. Statutes ⇐159

If reasonably possible, two statutes on same subject will be so construed as to maintain integrity of both, and former statute will be upheld if the two can well subsist together.

5. Intoxicating liquors ⇐110

The purpose of constitutional amendment relating to liquor control and the Alcoholic Beverage Control Act was to prevent return of public saloon or barroom to social life of California after repeal of the Eighteenth Amendment. St.1937, p. 2126; Const.Cal. art. 20, § 22, as amended in 1934. U.S.C.A. Const. Amend. 18, repealed by Amend. 21.

6. Intoxicating liquors ⇐259

The Unlawful Liquor Sales Abatement Act of 1915 was not expressly or impliedly repealed by 1934 constitutional amendment relating to liquor control and Alcoholic Beverage Control Act of 1935, but was continued in effect to give an additional remedy by which unlawful sale of intoxicating liquor could be restrained through civil suit in equity. St.1915, p. 236; St.1937, p. 2126; Const. art. 20, § 22, as amended in 1934.

7. Intoxicating liquors ⇐259

A provision in the Alcoholic Beverage Control Act of 1935 providing that complaints could be addressed to board of equalization for purpose of revoking or suspending liquor licenses was not an exclusive remedy and did not impliedly repeal Unlawful Liquor Sales Abatement Act of 1915 providing that unlawful sale of intoxicating liquor could be restrained through civil suit in equity. St.1915, p. 236; St.1937, p. 2161, § 40.

8. Intoxicating liquors ⇐274

Where complaint in action to abate a nuisance resulting from alleged illegal sales of alcoholic beverages was sufficient as against general demurrer but might be subject to special demurrer on ground of uncertainty, plaintiff would be given permission to file amended complaint. St.1915, p. 236.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by George Y. Hammond against Vernon McDonald and wife to abate a nuisance resulting from the alleged illegal sale of alcoholic beverages. From a judgment of dismissal, the plaintiff appeals.

Reversed and trial court directed to permit filing of amended complaint.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Newby & Newby, of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, for respondents.

YORK, Presiding Justice.

On August 25, 1937, appellant commenced the instant action to abate a nuisance resulting from the alleged illegal sale of alcoholic beverages at 2700 East Compton avenue, in the city of Compton, California, pursuant to the provisions of the Unlawful Liquor Sales Abatement Act (Act 3778, Gen.Laws, Stats. 1915, p. 236). The complaint alleged that defendants, in violation of section 22, article 20 of the Constitution (as amended Nov. 6, 1934); and in violation of subdivision (m) of section 2, and of section 53 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, as amended by Stats. 1937, pp. 1934, 2126), "are maintaining and conducting upon the premises herein described a public saloon, public bar and public barroom, in which intoxicating liquors (other than beers) are being unlawfully sold and served to the general public."

A general and special demurrer to the complaint was sustained without leave to amend, and thereafter the court having denied appellant's motion for permission to file an amended complaint, a judgment dismissing the action was entered.

This appeal from such judgment presents for determination the following questions: "Did the complaint state a cause of action for the abatement of a nuisance? And did the court err in refusing to grant plaintiff's petition for leave to amend his complaint?"

Respondents urge that the Unlawful Liquor Sales Abatement Act (referred to herein as Act 3778 and the 1915 law), has been repealed and therefore appellant has no right of action based upon it. In support of this theory, it is maintained that the 1915 law is repugnant to and inconsistent with section 22, article 20 of the Constitution and the Alcoholic Beverage Control Act, which, taken together, set up a complete and comprehensive system regulating and controlling liquor traffic in this state.

Act 3778 (Stats. 1915, p. 236) declares that "Every building or place used for the purpose of unlawfully selling, serving or giving away any spirituous, vinous, malt or other alcoholic liquor, and every building or place wherein or upon which such liquors are unlawfully sold, served or given away, is a nuisance which shall be enjoined, abated and prevented as hereinafter provided, whether the same be a public or a private nuisance. * * * Whenever there is reason to believe that such nuisance is kept, maintained or exists * * * the district attorney * * * in the name of the people * * * must, or any citizen of the state resident within said county * * * in his own name may, maintain an action in equity to abate and prevent such nuisance and to perpetually enjoin the person or persons conducting or maintaining the same. [Sections 1, 2]. * * *"

Section 22, article 20 of the Constitution provides that: "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, * * * all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria * * * or other public eating place."

Subdivision (m) of section 2 of the Alcoholic Beverage Control Act expressly prohibits a public bar, public saloon, or public barroom and defines the same as "any room to which the public has access in which there is any bar, counter or other structure over which beverages of an alcoholic content in excess of four per cent

by weight are sold or served by the drink to the public for consumption on the premises; provided, however, that counters or other structures used for the sale, service and consumption of meals, and not as a subterfuge for a public bar, shall not be deemed to be a public bar within the meaning of this act".

Section 53 of said act provides that: "Every person who sells, serves or otherwise disposes of any alcoholic beverage, except beer * * * over or at any public bar or in any public barroom, for consumption on the premises, shall be guilty of a misdemeanor."

Appellant contends that the 1915 statute provides an additional statutory remedy by a suit in equity to abate a nuisance resulting from the unlawful sale of intoxicating liquors, and that there could be no possible conflict between said statute and the regulatory and license system for lawful liquor traffic, as provided by the Constitution and the Alcoholic Beverage Control Act, supra.

The purpose of the 1915 statute, as expressed in its title, is as follows: "An act declaring all buildings and places nuisances, wherein or upon which any spirituous, vinous, malt or other alcoholic liquor is unlawfully sold, served or given away, or which are used for the purpose of unlawfully selling, serving or giving away such liquors; and providing for the abatement of such nuisances."

The purpose of the Alcoholic Beverage Control Act as set forth in its title is as follows: "An act to license, regulate and control the manufacture, transportation, sale, purchase, possession and diposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to promote temperance in the use of alcoholic beverages; to adopt and enforce unfair trade practice regulations and price posting provisions regulating the sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately."

Section 1 of said Alcoholic Beverage Control Act, as amended in 1937 (Stats. 1937, p. 2126) declares: "This act shall be deemed an exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people of the State; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages; and it is hereby declared that the subject matter of this act involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people; and all provisions of this act shall be liberally construed for the accomplishments of these purposes. This act is known and may be cited as the 'Alcoholic Beverage Control Act'."

Section 69 thereof presents a schedule of repeals, enumerating and expressly declaring repealed various code sections and statutes dating from the year 1855 to and including the year 1933, but no mention is made of the 1915 statute which is here under consideration.

By section 22, article 20, of the Constitution, as amended November 6, 1934, "All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed."

A brief history or survey of legislation affecting the regulation of liquor traffic is given in volume 7 of California Jurisprudence Supplement at page 202: "Prior to the enactment of the Eighteenth Amendment to the United States Constitution, the right of regulation of traffic in alcoholic liquors was exercised by the state or under the authority of the state by local legislative bodies and by local option. (Sandelin v. Collins, 1 Cal.2d 147, [33 P.2d 1009, 93 A.L.R. 956]). These rights of regulation were superseded by the federal law and the enactment of the State Prohibition Enforcement Act, commonly known as the Wright Act. Stats. 1921, p. 79. The Wright Act was repealed by an initiative measure approved at the general election held November 8, 1932. At the same election, section 22, providing for liquor regulation was added to article 20 of the state Constitution. [See St. 1933, p. lxxxviii]. In 1933, the legislature enacted the state Liquor Control Act, to become effective upon the repeal of the Eighteenth Amendment (Stats. 1933, p. 1697), and enacted other statutes relating to the regulation and taxation of intoxicating liquors. The Eighteenth Amendment to the United States Constitution was repealed by the Twenty-first Amendment, effective December 5, 1933 [U.S.C.A.] (Sandelin v. Collins, 1 Cal.2d 147, [33 P.2d 1009, 93 A.L.R

956]). Amendments have been made both to article 20, section 22, of the Constitution (November 6, 1934), and to the Liquor Control Act. (Stats. 1935, chap. 320.) In 1935 the legislature passed the Alcoholic Beverage Control Act, which is designed to supersede prior statutes relating to the regulation and control of liquor. (Stats. 1935, chap. 330.)"

In 1915, when the Liquor Abatement Act, which we are here considering, was enacted, California was dealing with the liquor problem under a license system with a state-wide local option law also in effect. After the repeal of the Prohibition Act by the adoption of section 22 of article 20 and the enactment of the State Liquor Control Act, this state thereby partially restored its former regulatory and license system and vested control in a state board rather than in local political units, but there has never been any express repeal of the 1915 statute which gives to a private citizen the right to abate as a nuisance premises wherein intoxicating liquor is unlawfully sold, served or given away.

Respondents urge that because the 1915 law is repugnant to and inconsistent with subsequent legislation that this constitutes an implied repeal thereof.

[1-4] It is an elementary rule of law that the repeal of statutes by implication is not favored. Boyd v. Huntington, 215 Cal. 473, 11 P.2d 383; Washington Lumber & Millwork Co. v. McGuire, 213 Cal. 13, 1 P.2d 437; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and cases therein cited. This is especially true where the prior enactment has been judicially construed and is generally understood and acted upon. Likewise, in the absence of express terms it will be presumed that the legislature did not intend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. To overcome this presumption, the two acts must be irreconcilable—i. e., clearly repugnant—as to the vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation, or it must be apparent that the later statute is a revision of the entire subject-matter and designed as a substitute for the earlier act, or the intent to effect a repeal must be otherwise expressed in unmistakable language. Lillywhite v. Superior Court, 80 Cal.App. 533, 251 P. 945. Accordingly, where there are two laws upon the same subject, they will, if reasonably possible, be so construed as to maintain the integrity of both, the courts being bound to uphold the prior act if the two may well subsist together. People v. Leong Fook, 206 Cal. 64, at page 70, 273 P. 779; People v. Carter, 131 Cal.App. 177, 21 P.2d 129; 23 Cal.Jur. 696.

In the case of Boyd v. Huntington, 215 Cal. 473, at page 482, 11 P.2d 383, at page 386, it is stated: "Every statute must be construed in connection with the whole system of which it forms a part and in the light of previous statutes upon the subject. Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject in the absence of words to that effect unless there is an irreconcilable repugnancy between them or unless the new law is evidently intended to supersede all prior acts relating to the legislation and to comprise in itself the sole and complete system of legislation upon the subject. So every new statute should be construed in connection with those already existing in relation to the same subject-matter, and all should be made to harmonize and stand together if that can be done by any fair and reasonable interpretation."

It is stated in Washington Lumber, etc., Co. v. McGuire, 213 Cal. 13, at page 17, 1 P.2d 437, at page 438: "Defendant's contention is, in effect, that the provisions of section 3440, in so far as they apply to motor vehicles, were repealed by implication upon the enactment of section 45 [34] of the California Vehicle Act. (Deering's Gen.Laws Supp.1929, Act 5128). Section 3440 in terms covers 'every transfer of personal property' with certain enumerated exceptions. It is a commonplace observation that repeals by implication are not favored, and that there must be an irreconcilable conflict between two statutes before the later will be deemed to have repealed the earlier. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; * * *. The two statutes which we are examining are not irreconcilable. Section 45 of the Vehicle Act after stating the manner in which the certificate of ownership shall be indorsed and sent to the division of motor vehicles for registration, goes on to provide: * * * The meaning of this language is quite plain: The formalities specified in the act cannot be disregarded, and no other formalities will operate to pass the title to a motor vehicle. But it does not follow that the formalities

required by the act were intended to do away with all statutory requirements on sales of personal property generally. In other words, because these formalities are *essential* to the transfer of title is no ground for concluding that they are *exclusive* of all restrictive provisions." (Italics added.)

Again, in the case of Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252, in which it was contended that the usury law of 1918 (St.1919, p. lxxxiii) was repealed by the adoption in November, 1934, of section 22 of article 20 of the Constitution (which had reference to the subject of usury and is designated proposition No. 2 to differentiate it from the section here under consideration with reference to liquor control). In discussing this point, it was there said, 10 Cal.2d at page 176, 74 P.2d at page 260: "The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed. Santa Cruz Rock Pavement Co. v. Lyons, 133 Cal. 114, 65 P. 329; Smith v. Mathews, 155 Cal. 752, 758, 103 P. 199; In re Johnson, 167 Cal. 142, 138 P. 740; Crooks v. People's Finance Co., 111 Cal.App. (Supp.) 769, 292 P. 1065; Beneficial Loan Soc. v. Haight, 215 Cal. 506, 11 P.2d 857."

[5, 6] A reading of the constitutional amendment and the Alcoholic Beverage Control Act, especially sections 1 and 53 thereof, indicates that it was the intention of the people, as well as of the legislature, to prevent the return of the public saloon or barroom to the social life of California after the repeal of the Eighteenth Amendment to the federal Constitution. It was apparently with that idea in mind that the amendment was adopted and the statute enacted prohibiting the disposal of intoxicating liquors, other than beer, for consumption by the general public upon the premises, except when served with meals. The 1915 statute is entirely consistent with such viewpoint, and was obviously continued in effect in order to give a supplemental or additional remedy by which the sale of intoxicating liquor to the general public in a public saloon or barroom could be restrained through a civil suit in equity.

There is every reason to believe that had the legislature so intended, it would have included the 1915 statute in its lengthy schedule of specific repeals, as set out in section 69 of the Alcoholic Beverage Control Act.

For the foregoing reasons, it necessarily appears that the statute of 1915 is still in full force and effect and has never been repealed or superseded.

[7] While it is true, as contended by respondents, that under the provisions of section 40 of the Alcoholic Beverage Control Act, complaints may be addressed to the board of equalization for the purpose of revoking or suspending licenses, they fail to point out any provision which makes that an exclusive remedy. As hereinbefore stated, it is the opinion of this court that the 1915 statute provides an additional remedy whereby a private individual may without undue delay abate as a nuisance that which might be termed a flagrant disregard of the avowed intention of the people in general to prevent the illegal sale of intoxicating liquor.

[8] The complaint herein is sufficient as against a general demurrer, although it may be subject to a special demurrer on the ground of uncertainty; therefore, the motion of appellant for permission to file his amended complaint should have been granted.

The judgment of dismissal is reversed, and the trial court is directed to permit the filing of said amended complaint.

We concur: DORAN, J.; WHITE, J.

32 Cal.App.2d 734

HAMMOND v. OMAR'S DOME et al.

Civ. 11753.

District Court of Appeal, Second District, Division 1, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Intoxicating liquors ⇐274

A complaint alleging that defendants were maintaining a public saloon, bar, and barroom in which intoxicating liquors other than beers were unlawfully sold and served to general public, and seeking to abate resulting nuisance as provided in Unlawful Liquor Sales Abatement Act, was sufficient as against general demurrer. St.1915, p. 236; St.1937, pp. 2127, 2169, §§ 2(m), 53; Const. art. 20, § 22, as amended in 1934.

2. Intoxicating liquors ⇐274

Where complaint in action to abate a nuisance resulting from alleged illegal sales of alcoholic beverages was sufficient as against general demurrer but might be subject to special demurrer on ground of uncertainty, plaintiff would be given permission to file amended complaint. St.1915, p. 236.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by George Y. Hammond against Omar's Dome and others to abate a nuisance resulting from the alleged illegal sale of alcoholic beverages. From a judgment of dismissal, the plaintiff appeals.

Reversed and trial court directed to permit filing of amended complaint.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Newby & Newby, of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, for respondents.

YORK, Presiding Justice.

On August 25, 1937, appellant, commenced the instant action to abate a nuisance resulting from the alleged illegal sale of alcoholic beverages at 436–438–440 South Hill street, in the city of Los Angeles, pursuant to the provisions of the Unlawful Liquor Sales Abatement Act (Act 3778, Gen.Laws, Stats. 1915, p. 236). The complaint alleged that defendants, in violation of section 22, article 20 of the Constitution (as amended Nov. 6, 1934); and in violation of subdivision (m) of section 2, and of section 53 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, as amended by Stats. 1937, pp. 1934, 2126), "are maintaining and conducting upon the premises herein described a public saloon, public bar and public barroom, in which intoxicating liquors (other than beers) are being unlawfully sold and served to the general public".

A general and special demurrer to the complaint was sustained without leave to amend, and thereafter, the court having denied appellant's motion for permission to file an amended complaint, a judgment of dismissal was entered. This appeal is taken from such judgment.

The facts in the instant case are the same in legal effect as the facts alleged in the complaint in the case of George Y. Hammond v. Vernon McDonald et ux., Cal.App., 89 P.2d 407, this day decided. The principles of law involved herein are identical with those involved in the case to which reference has just been made. For the reasons stated in the opinion in that case, the judgment of dismissal herein is reversed, and the trial court is directed to permit the filing of appellant's amended complaint.

We concur: DORAN, J.; WHITE, J.



32 Cal.App.2d 114

COOPER v. McDONALD et al.

Civ. 2263.

District Court of Appeal, Fourth District, California.

April 10, 1939.

1. Trusts ⇐86

The general rule that, when the consideration is paid by one and title is taken in another, a resulting trust arises, does not exist in the case of a parent and child, since the presumption of an advancement arises and rebuts the presumption of a resulting trust.

2. Trusts ⇐89(5)

Evidence must be clear and convincing to establish a resulting trust, especially after the lapse of many years.

3. Trusts ⇐89(1)

In action to quiet title, wherein a defendant, who was the mother of one of plaintiff's predecessors in title, contended that her son had received title to property in trust for her deceased husband, trial court's finding that property was not received in trust was sufficiently supported by evidence.

4. Trusts ⇐89(1)

In action to quiet title, trial court's finding that one of plaintiff's predecessors in title became owner of property by conveyance from his brother and did not take title in trust for his father, as contended by a defendant who was the widow of the father, was sustained by evidence that, on his father's suggestion, such predecessor assumed obligations of his brother in return for a conveyance of the property, without any knowledge of alleged fact that his brother was merely holding title in trust for his father.

5. Trusts ⇐89(1)

In action to quiet title, trial court's finding that plaintiff's predecessor in title did not take the title in trust for the grantor's father, as contended by a defendant who was the widow of the grantor's father, was sustained by evidence that grantor made an absolute conveyance to plaintiff's predecessor in title under agreement whereby she relieved him of an obligation on a guaranty.

6. Appeal and error ⇐1047(3)

In action to quiet title, wherein one of defendants contended that property had been held in trust for her deceased husband by plaintiff's predecessors in title, error, if any, in striking of evidence which may have had a bearing on showing deceased husband's activity in connection with property, was not reversible, where it did not appear that the evidence, if permitted to remain in record, would have changed result.

Appeal from Superior Court, Kern County; K. Van Zante, Judge.

Action to quiet title by Bessie E. Cooper against Callie I. McDonald and others. From an adverse judgment, the named defendant appeals.

Judgment affirmed.

Siemon & Claflin, Alfred Siemon, T. R. Claflin, and Bennett Siemon, all of Bakersfield, for appellant.

Edward West, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to a parcel of real property in Bakersfield, involving transactions between members of a family and close relatives.

One S. C. Marshall conveyed the property to Ronald McDonald, Jr., by deed executed in 1912 and recorded in 1917, which deed recites a consideration of $10. Ronald McDonald, Jr., conveyed the property to his brother, Kenneth McDonald, by a deed executed and acknowledged in 1915 and recorded in 1925. This deed recites that it is given in consideration of love and affection and "also for the better maintenance, support, protection and livelihood" of the second party. Kenneth McDonald conveyed the property to his aunt, Elizabeth Harris, by a deed executed in February, 1930, and recorded in April, 1930, which recites that it is given in consideration of love and affection, "other valuable considerations", and for the better maintenance and support of the second party. Elizabeth Harris conveyed the property to her daughter, Bessie E. Cooper, the plaintiff herein, by a deed executed in October, 1935, and recorded in November, 1935, the consideration named being love and affection and the better maintenance and support of the second party.

Ronald McDonald, Jr., and Kenneth McDonald are the sons of the defendant Callie I. McDonald and her husband Ronald McDonald, Sr. Bessie E. Cooper, the plaintiff, is a daughter of Elizabeth Harris who was a sister of Ronald McDonald, Sr. Ronald McDonald, Sr., died in 1935, and after his death Ronald McDonald, Jr., executed another deed purporting to convey the property to his mother Callie I. McDonald. This action followed the recordation of that deed.

The complaint was in the ordinary form of a suit to quiet title. The defendant Ronald McDonald, Jr., disclaimed all interest and the defendant Callie I. McDonald answered denying ownership in the plaintiff, admitting that she claimed title, and setting up a separate defense. She alleged that she is the surviving wife of Ronald McDonald, Sr.; that she was married to him for more than forty years prior to his death; that the property in question was acquired many years ago by Ronald McDonald, Sr., as their community proper-

ty; that title thereto was taken in the name of one Charles Marshall; that her husband caused Marshall to convey the legal title to Ronald McDonald, Jr.; that thereafter her husband caused the legal title to be conveyed to Kenneth McDonald to be held by him as a matter of convenience for the use and benefit of herself and Ronald McDonald, Sr.; that later her husband caused Kenneth McDonald to convey the property to Elizabeth Harris, who paid no consideration but took the property for the use and benefit of Ronald McDonald, Sr., and for the purpose of using said property, together with other property owned by her, as security for a loan made to Ronald McDonald, Sr.; that a portion of this loan had been paid out of funds belonging to Ronald McDonald, Sr.; and that approximately $2,000 of said loan remains unpaid. It is then alleged that the conveyance of the property from Elizabeth Harris to the plaintiff was made subject to said encumbrance, and that all of the above matters were within the knowledge of the plaintiff at the time she received the conveyance of the property. She prayed that her title be quieted, subject to a lien for the repayment of any remaining balance of this loan.

The court, after finding that the plaintiff is and the defendants are not the owner or owners of this property and that the defendants have no right, title or interest therein, found that Ronald McDonald, Jr., acquired title to this property in 1912 by conveyance from one Charles Marshall and by reason of said conveyance became and was the owner in fee of said lands and retained the ownership thereof until April 12, 1915; that on that day he granted and conveyed the lands to Kenneth McDonald who by reason of said grant became the owner thereof in fee; that Ronald McDonald, Jr., paid nothing as consideration for the grant from Charles Marshall; that on February 18, 1930, Kenneth McDonald granted and conveyed the premises to Elizabeth Harris and that by reason of said grant she became and was the owner of said lands in fee; that on October 28, 1935, Elizabeth Harris granted and conveyed the lands to the plaintiff by reason of which she became and still is the owner in fee of said lands; that it is not true that the conveyance from Ronald McDonald, Jr., to Kenneth McDonald was a pretended or false conveyance; that it is not true that at the time of the execution and delivery of this conveyance the description of the property here in question had not been filled in but was subsequently inserted in said conveyance; that Callie I. McDonald is the surviving wife of Ronald McDonald, Sr., and that they were husband and wife for more than forty years prior to his death; that the lands in question were never acquired by Ronald McDonald, Sr., as the community property of himself and wife; that said lands were never the property of Ronald McDonald, Sr., as community property or otherwise; that it is not true that Ronald McDonald, Sr., caused the said Charles Marshall to convey the legal title to Ronald McDonald, Jr., in trust for Ronald McDonald, Sr.; that it is not true that Ronald McDonald, Jr., then, thereafter or ever held the said lands in trust for Ronald McDonald, Sr.; that it is not true that Kenneth McDonald, Elizabeth Harris, Bessie E. Cooper or any of them ever held said lands in trust for Ronald McDonald, Sr., or for any other person; that Kenneth McDonald conveyed the property to Elizabeth Harris in fee simple upon the condition that she use said lands, together with other lands belonging to her, as security for a loan of money for the benefit of Kenneth McDonald and others; and that the said conveyance was an outright deed of grant, intended as a bonus and not as a mortgage, and conveyed the title to said lands in fee simple to Elizabeth Harris. Judgment was entered quieting title in the plaintiff and the defendant Callie I. McDonald has appealed.

Appellant's first contention is that Ronald McDonald, Sr., was the owner of this property, that he carried the legal title thereto in Marshall, that he caused Marshall to convey the title to Ronald McDonald, Jr., to be held in trust for Ronald McDonald, Sr., and that the court's findings to the contrary are without support in the evidence. It is argued that the evidence shows that this conveyance was made at the direction of Ronald McDonald, Sr.; that Ronald McDonald, Jr., never paid anything for the property or claimed any beneficial interest in it; that Ronald McDonald, Sr., had the use of the property by permitting another son, Lester, to occupy it, rent free, for fifteen years; that Ronald McDonald, Sr., in 1924, demanded that Ronald Jr. convey the land to Kenneth and upon this demand being refused effected a conveyance thereof by inserting the description of this land into another and previously executed deed; that Ronald McDonald, Sr., retained the possession of the

deeds; that Ronald McDonald, Jr., never exercised any acts of ownership over the property during the time the same stood of record in his name; and that Ronald McDonald, Sr., managed the property and held the title papers, tax statements, receipts and the like.

There is a conflict in the evidence with respect to some of the matters thus relied upon. While Ronald, Jr., testified that he paid nothing for the conveyance and that he might have received the deed from his father, who acted as a notary in the acknowledgment of the deed, and that he might have recorded it, he also testified that he carried this property in his name for a number of years before he discovered that the property was not his. While it appears that another son, Lester McDonald, lived upon the property from 1920 to 1935, it was stipulated that he did so by the consent of Ronald McDonald, Sr., and of Kenneth McDonald. While the appellant has contended throughout that this property was conveyed from Ronald, Jr., to Kenneth by inserting a description thereof in another and prior conveyance executed in 1915, there is a conflict in the evidence on that point. The original deed was before the trial court and the court's finding was contrary to the appellant's contention in this regard.

While certain deeds and title papers were found in a desk belonging to Ronald McDonald, Sr., after his death, none of these showed title in him or disclosed that he had any interest in the property. While he seems to have had something to do with the transaction by which title passed from Marshall to Ronald, Jr., there is nothing to affirmatively show that he had any interest in the property standing in Marshall's name or, if so, what that interest was. While it appears that Ronald, Jr., paid nothing for the property there is nothing to show that any consideration was paid by Ronald, Sr. It is suggested that Ronald McDonald, Sr., owned the property and carried it in the name of Marshall and the succeeding grantees in order to protect himself from his creditors. While a number of things in the record raise a suspicion that such may have been the case, there is no proof of such a fact.

[1-3] The appellant argues that when the consideration is paid by one party and the title taken in another a resulting trust arises, and that the facts above referred to lead irresistibly to the conclusion that Ronald McDonald, Sr., was the owner of this property during the time the title stood in the name of Ronald, Jr., and that the latter held the property in trust for him. It does not clearly appear that the consideration for this property was paid by Ronald McDonald, Sr., although it probably was. An exception to the rule relied upon by appellant exists in the case of a parent and child where the presumption of an advancement arises and rebuts the presumption of a resulting trust. Quinn v. Reilly, 198 Cal. 465, 245 P. 1091. Evidence must be clear and convincing in order to establish a resulting trust, especially after the lapse of many years. G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 48 P.2d 669. Although the matter is not controlling here we think the court's finding, that the conveyance of this property from Marshall to Ronald McDonald, Jr., was not one made in trust for Ronald McDonald, Sr., is sufficiently supported by the evidence.

The next point requiring consideration is that the conveyance from Ronald, Jr., to Kenneth was merely a change in the trustee, that Kenneth paid no consideration, that he took with knowledge, that he held the title in trust for his father, and that the court's finding that he became the owner by means of such conveyance is contrary to all of the evidence except Kenneth's verbal statement that he became the owner. The argument here made goes to the weight of the evidence, the appellant saying "The testimony of Kenneth is so transparently fictitious that no court is warranted in believing it". Kenneth testified that at the time he conveyed the property to Elizabeth Harris he owned the property, and that the transaction by which he acquired it took place before the deed to him was recorded. When asked what he had paid for the property when he acquired it he stated that "the understanding was that I was to assume my brother's personal obligations and his business obligations". He testified that he did this; that he had paid those obligations; that he had conversed with his father and brother about the transaction prior to the execution of the deed to him; that neither his father nor brother ever asked him for a reconveyance of the property; that neither of them had ever told him that they expected him to hold the property in trust for either of them; that he had never received any intimation from either of them or from anyone else that he was supposed to hold this property in trust until after his father's death, when

it was suggested to him by a third party; and that he had not held the property in trust for anyone. He further testified that he first saw the deed to him prior to 1920, although he could not be positive of the date; that he thought he had first seen it at his father's store; that his brother Ronald was sick and very nearly died in 1918; that after he first saw the deed it was put in his father's safe with some other papers belonging to the witness; that the deed remained there until he recorded it; that there was more than one piece of property involved in the transaction at the time it took place; that his father then told him that "Here was a piece of property of my brother's—that I was to take and assist my brother financially and to clean up some of his obligations, and when the obligations had been cleaned up I could record the document"; and that the transaction was carried on with his father.

[4] Assuming that his father then had an interest in the property and in spite of certain conflicts which appear in the evidence, this is sufficient to support the court's finding that Kenneth became the owner of the property and that he did not take title in trust for his father. There is no evidence that he had any knowledge that his brother was merely holding title for his father, if such was the case, and there is ample evidence of a consideration paid by him. Some contention is made that the court erred in failing to find upon the question as to whether Ronald McDonald, Sr., caused Ronald, Jr., to convey the property to Kenneth and upon the further question of whether Kenneth ever had any interest in the property, and that the court entirely failed to find on the main defense alleged in the answer to the effect that the property was deeded to Kenneth to be held in trust for his father. It was found, in a separate finding, that Kenneth had never held the land in question in trust for his father or for any other person.

It is next contended that the conveyance from Kenneth to Elizabeth Harris was made at the direction of Ronald McDonald, Sr., for his benefit, and without any intention of passing the equitable title, that the finding to the effect that Elizabeth Harris became the owner of the property was insufficient and unsupported by the evidence, and that the court erred in not finding that she took only the bare legal title for the benefit of Ronald McDonald, Sr. Kenneth McDonald testified that sometime before this transaction he had guaranteed a debt owed by Jennie McDonald, another sister of his father; that he received two pieces of property in return for making that guarantee; that the obligation he had guaranteed was finally reduced to $6,000; that his father came to him and told him that the bank had called for the balance of the amount owed by Jennie McDonald and guaranteed by the witness; that he attempted to sell the property here in question but was unable to do so; that he told his father that he would deed the property to Elizabeth Harris if she would relieve him (the witness) of that obligation to the bank; that his father said he would take it up with Mrs. Harris; that his father did so and shortly after that the transaction was completed; that he had made no agreement of any kind that the property was to be deeded back to him; that he had no agreement with anybody to the effect that his deed should constitute a mortgage; and that he did not expect the property ever to come back to him. It appears that Elizabeth Harris borrowed $6,000 on the property here in question, together with other property owned by her, which amount was used to pay the debt which Kenneth had guaranteed. Apparently $4,000 of this amount was later paid off.

It also appears that an action was brought in Kern county by Elizabeth Harris to quiet her title to this property, in which Lester McDonald and Ronald McDonald, Sr., were named as defendants. Ronald McDonald, Sr., filed in that action a disclaimer under date of November 20, 1934, in which he disclaimed any right, title or interest "of whatsoever kind and character" in or to the land in question. A part of his testimony in that case was read in evidence in this case, including the following:

"Q. Now this property was originally your property, was it not? A. No, it was not my property——.

"Q. Isn't it a fact that you gave this house to Lester McDonald? A. I had no authority to give it to him, it never belonged to me."

The respondent Bessie E. Cooper, testified that after the conclusion of the other case which has been referred to, Ronald McDonald, Sr., came to Elizabeth Harris' house and said to Elizabeth Harris: "Lizzie, the house is yours and no one can touch it."

[5] Disregarding any conflicts in the evidence it appears that Elizabeth Harris gave a good consideration for the deed to her, there is no evidence that she had knowledge of any facts which would adversely affect her title, she brought an action to quiet title against Ronald McDonald, Sr., upon whose interest the rights of the appellant must depend, and he not only filed a disclaimer in that action but at the conclusion thereof assured Mrs. Harris that the place was hers and no one could touch it. The evidence supports the findings and the court did not err in failing to find that Mrs. Harris took only the legal title for the benefit of Ronald McDonald, Sr.

The next contention is that the respondent was not a bona fide purchaser for value. This she concedes and there is no question that her title depends upon the title acquired by her mother, Elizabeth Harris, which was one in fee simple.

[6] The last point raised is that the court erred in several instances in ruling on the admission of evidence. It is claimed that the court erred in sustaining objections to three particular questions. In each instance a practically identical question was answered by the witness about the same time. It is then urged that the court erred in striking out certain testimony given by Lester McDonald relative to his arrangement with his father in connection with the payment of taxes while he occupied the property. Lester was asked if he had paid the taxes on this property and he replied he had paid "some taxes". He explained that at some time, which he did not fix, his father asked him if he had a soldier's exemption and he replied that he had, that he attempted to fix his affidavit on this property but the assessor objected, that he went back and "told my father and he had me put it on another piece of property, which I did every year from that period until 1928". This was struck out because it referred to property not involved in this action. Assuming that this evidence might have had a bearing in showing the father's activity in connection with this property, there was no jury, the court had a mass of other evidence showing the father's activity over a number of years and it cannot be assumed that this evidence, if allowed to remain in the record, would have changed the result. Any error was not sufficiently prejudicial to justify a reversal.

While a portion of the evidence raises a suspicion that this father owned this property, at least during a part of the time in which the title stood in the name of others, the most that can be said is that there is a conflict in the evidence. A further consideration is that he filed a disclaimer in the quiet title action brought by Elizabeth Harris and testified in that action that he owned no interest in this property. Assuming that this was not binding upon the appellant in the event the property was community property, the appellant did not sustain the burden resting upon her to prove that such was the case. It appears in the evidence that Ronald McDonald, Sr., owned certain real property at the time of his marriage to the appellant, and we can find no evidence in the record to show the source of the property here in question or to show that it did not come from the separate property of Mr. McDonald.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 198

BARRIOS v. IWAKI et al.

Civ. 12136.

District Court of Appeal, Second District, Division 2, California.

April 17, 1939.

1. Appeal and error ⇐931(1)

All reasonable inferences are to be indulged to support findings of trial court, and such findings, favored by all presumptions, will be liberally construed by appellate court in support of the judgment thereon.

2. Sales ⇐437(1)

Warranties not pleaded cannot be relied upon either in support of an action or as a defense.

3. Sales ⇐434

Where complaint alleged express warranties but did not allege implied warranty of merchantable quality in sale of hair dye, portion of answer phrased "nor did he warrant the same to the plaintiff" merely restated general denial to allegations of ex-

press warranties and would not be construed to supply a cause of action on implied warranty. Civ.Code, § 1735.

4. Appeal and error ⇐1071(6)

In action for damages upon express warranties, where implied warranty of merchantable quality was not pleaded and it was not shown that an issue on that warranty was brought up in trial court, trial court's judgment would not be reversed for failure to make finding on that issue.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Bertha Barrios against Roy Tokuzo Iwaki and others for damages resulting from the use of certain hair dyeing medicine sold to plaintiff by defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Howard Levine and Samuel A. Rosenthal, both of Los Angeles (Sampson M. Cronenberg, of Los Angeles, of counsel), for appellant.

George L. Greer, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The plaintiff on appeal contends that the trial court erred in failing to make a finding with regard to "an implied warranty of merchantability", and the sole question necessary for this court to determine is, was it necessary for the trial court to make such a finding?

Plaintiff's cause of action is based on two counts. In the first count the plaintiff alleges that in the sale of a certain medicine for hair dyeing purposes called "Two-Faces", the defendant warranted "that each and all of the ingredients in said preparation were absolutely safe and harmless; that said preparation could be used by any person in her own home for the purpose of dyeing hair without discomfort and without fear of causing injury to the hair, scalp or any other portion of the body to which it might be applied, and that the said preparation could be used as often as liked with perfect safety"; that relying upon said warranties the plaintiff purchased a bottle of said "Two-Faces"; that the plaintiff used said medicine and received certain injuries proximately resulting therefrom.

The second count alleged that the defendants manufactured said medicine and that they were negligent in so doing.

The court made a finding that the defendant had not made any of the warranties above set out and "that the said brand of hair dye was a commodity that had been regularly stocked by the defendants in said drug store for a considerable period of time previous to plaintiff's said purchase; that it was always packaged, was sold under a trade name, and was always regularly purchased by defendants through the customary wholesale trade; that neither of the defendants designed the formula for said preparation or had anything to do with the making up of said formula; that previously to learning of plaintiff's unfortunate experience with said preparation, neither defendant had received any complaint about said dye, nor learned of any other case in which it had caused injury".

The plaintiff relies upon parts of section 1735 of the Civil Code, which reads as follows: "Implied warranties of quality. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality. * * *"

[1] All reasonable inferences are to be indulged to support the findings, and since all presumptions are in favor of the findings of the trial court, an appellate court in reviewing the findings will give them a liberal construction in support of the judgment. Cal.Jur., Ten-Year Supp., vol. 1, p. 525.

[2] The complaint does not at all or in any manner allege that there was an implied warranty of merchantable quality;

neither does it allege any lack of merchantable quality in the medicine sold. "It is the rule that warranties not pleaded cannot be relied upon either in support of an action or as a defense." Alvernaz v. H. P. Garin Co., 127 Cal.App. 681, 688, 16 P.2d 683, 685; Kullman, Salz & Co. v. Sugar, etc., Mfg. Co., 153 Cal. 725, 96 P. 369; American Steel Pipe, etc., Co. v. Hubbard, 42 Cal.App. 520, 183 P. 830.

[3] The plaintiff, however, contends that a portion of the answer contained the phrase "nor did he warrant the same to the plaintiff", and that this is sufficient to make out a cause of action of whatever nature upon warranty, including that of merchantable quality. In our view this allegation merely restates the general denial of the complaint's allegations of several express warranties. It could not be held on appeal as a substitute for a valid cause of action for damages for breach of an implied warranty not alleged in the complaint.

[4] The plaintiff fails to point out to us where the alleged issue of an implied warranty of merchantable quality was called to the attention of the trial court or even mentioned during the trial, and it would not be fair on appeal to reverse the trial court's judgment for failure to make a finding on such an issue.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



32 Cal.App.2d 184

WITTMAN v. WITTMAN.

Civ. 11027.

District Court of Appeal, First District, Division 2, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Appeal and error ⇐533(1), 713(1)

Under statute specifying contents of judgment roll, trial judge's memorandum of decision is not one of the documents specified, and fact that such document was, notwithstanding, inserted in purported judgment roll and certified as being a part thereof, did not give document any additional standing. Code Civ.Proc. § 670, subd. 2.

2. Appeal and error ⇐717

Reviewing court will not examine trial court's memorandum of decision for purpose of defeating the judgment of the trial court.

3. Appeal and error ⇐934(2)

Where trial court's memorandum of decision was included in purported judgment roll, reviewing court was bound to presume in support of judgment that there was no conflict between memorandum of decision and findings as signed by trial court and that, if there was, memorandum of decision was changed to conform to such findings. Code Civ.Proc. § 670, subd. 2.

4. Divorce ⇐130

Evidence warranted denial of divorce to wife on ground of extreme cruelty.

5. Divorce ⇐130

Evidence warranted granting husband divorce on ground of cruelty notwithstanding absence of showing of acts of assault and battery.

6. Divorce ⇐27(3)

Showing of acts of assault and battery is not the sole proof by which extreme cruelty warranting divorce can be established.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Suit for divorce by C. William Wittman, Jr., against Marian Wittman, wherein defendant filed cross-complaints. From a decree for the plaintiff, defendant appeals.

Affirmed.

Leo R. Friedman and John P. Beale, both of San Francisco, for appellant.

Edwin V. McKenzie, of San Francisco, for respondent.

STURTEVANT, Justice.

[1, 2] From the judgment of the superior court awarding a decree of divorce to her husband, the plaintiff, and denying her a divorce on the allegations contained in her cross-complaint, the defendant wife has appealed. In his complaint the plaintiff prayed for a decree based on the ground of cruelty. The defendant answered the complaint and at the same time filed a cross-complaint. Later she

filed an amended cross-complaint. In the latter pleading she prayed for a divorce based on the ground of cruelty. By the stipulation of the parties the allegations contained in the amended cross-complaint were deemed denied. The first point made by the defendant is that the trial court did not determine the allegations set forth in her amended cross-complaint. It is not contended that the trial court did not make findings on said allegations. The point is presented in this manner. The appeal was taken and presented under section 953a, Code of Civil Procedure. The defendant has brought up what purports to be the judgment roll certified by the clerk. She has also brought up a transcript of the evidence certified by the reporter and also certified by the judge presiding at the trial. After the action had been tried the said judge wrote a memorandum of decision apparently for the assistance of counsel in the preparation of findings and the framing of a decree. Among other documents contained in the purported judgment roll the clerk included the said memorandum. Pointing to certain language contained in said document the defendant predicates the point above stated. For several different reasons the point may not be sustained. The contents of the judgment roll are specified in the statute. Code Civ.Proc. § 670, subd. 2. It is perfectly clear that the memorandum above mentioned is not one of the documents specified in said statute. The fact that the document was, notwithstanding, inserted in the purported judgment roll and certified as being a part thereof does not give said document any additional standing. Sutcliffe v. Sutcliffe, 220 Cal. 398, 401, 31 P.2d 195. Conceding that in some instances a court of review will for certain purposes examine such a memorandum, it is settled law that the court of review will not examine such a memorandum for the purpose of defeating the judgment of the trial court. Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179; 24 Cal.Jur. 924. We find nothing at variance with what we have said in the cases cited by the defendant. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 749, 47 P.2d 273; Hayes v. Khinoo, 1 Cal.App.2d 572, 37 P.2d 133.

[3] As this record is presented this court is bound to presume in support of the judgment that there was no conflict whatever between the memorandum of opinion and the findings as signed by the trial court, or, if there was, that the memorandum of opinion was changed to conform to the findings as signed by the trial court.

[4] The overt acts of cruelty on which the defendant relied and on which she contends the trial court should have made findings of fact in her favor, she alleged occurred on December 28, 1935. That was the day the plaintiff and the defendant separated. On that date the defendant alleged the plaintiff said he did not love her and that he wished she would leave their home. She further alleged that she refused and thereupon the plaintiff left the home and had not returned. The record shows the defendant was not free from blame. We cannot say the trial court erred in making findings against her.

[5, 6] The defendant makes two other points. They are to the effect that the findings are not supported by the evidence and that the findings do not support the judgment. Neither contention may be sustained. In his complaint the plaintiff alleged a course of conduct extending from the date of the marriage of the parties down to the date of their separation in December, 1935. The trial court found said allegations to be true. There was evidence to sustain each finding. As we understand her the defendant seems to contend that the plaintiff was bound to show acts of assault and battery. But to sustain an action in divorce based on the ground of extreme cruelty it was decided at an early date that such a showing was not the sole proof within the meaning of the statute. Barnes v. Barnes, 95 Cal. 171, 30 P.2d 298, 16 L.R.A. 660.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

32 Cal.App.2d 130

Ex parte INMAN.

Cr. 2065.

District Court of Appeal, First District, Division 1, California.

April 11, 1939.

1. Divorce ⇐332

Where child was legally residing in California with his mother under an original custody decree of a foreign court and father sought custody of the child in habeas corpus proceeding based upon a subsequent decree of foreign court setting aside former decree, California court was not bound by subsequent foreign decree nor precluded by it from acting upon paramount considerations of child's welfare.

2. Habeas corpus ⇐85(1)

In habeas corpus proceeding to secure custody of child, the legal residence of mother and child in California raises a presumption that mother is in rightful possession of child.

3. Habeas corpus ⇐14

Where divorced mother had legal residence in California with presumed rightful possession of her child under a foreign custody decree and father sought custody under a subsequent decree of the foreign court, writ of habeas corpus was not a proper proceeding to try the issue of custody, in the absence of some imminent danger as to the child's safety, health, morals, or reasonable comfort.

4. Divorce ⇐303(2)

A custody decree in a divorce action, whether the decree is by a California court or by a court of a sister state, will not be modified except under a change of circumstances which makes a modification of the custody decree advisable for the welfare of the child.

5. Habeas corpus ⇐3

Where a divorced mother legally resided in California with presumed rightful possession of her child, the issue of custody as between the father and mother should have been raised by an action on the merits in trial court and not by habeas corpus proceeding in appellate court.

In the matter of the application of Chas. Wade Snook for a writ of habeas corpus of Ronald F. Inman, a minor, wherein it is sought on behalf of the divorced father to take the minor from the custody of his mother.

Writ denied.

Snook, Snook & Chase, of Oakland, for petitioner.

Louis R. Deadrich and Harrison F. Travers, both of Oakland, for respondent.

TYLER, Presiding Justice.

Petition for a writ of habeas corpus. The petition charges that Ronald F. Inman, a minor, is unlawfully restrained of his liberty by Anna Steuble at San Leandro, county of Alameda, state of California. It is recited therein that the custody of said minor was awarded to petitioner on the 25th day of November, 1938, by order and decree of the district court of the state of Colorado; that said Anna Steuble, named in the proceedings as Anna Inman, appeared personally in said district court of Colorado when the order was made; that she obtained the custody of the person of the minor in the city of Denver through fraud and transported him to the county of Alameda, state of California, where she still retains said custody without authority of law.

The return to the writ shows that about the 29th day of February, 1928, William F. Inman, also known as Floyd Inman, and respondent were married and thereafter lived together as husband and wife; that there was born to the parties a son, Ronald F. Inman, who is now of the age of approximately five years and nine months; that in the year 1933, respondent commenced an action for divorce against William F. Inman in the district court at Denver, Colorado, and on the 3d day of November, 1933, said court made and entered its interlocutory decree of divorce, in which it was provided that respondent have the care, custody and control of their minor child, and in which provision for its support was made in the sum of $2 a week. Said interlocutory decree contained no restriction as to the removal of said child from the state of Colorado, and the final decree made none. It is charged in said return that the only contribution ever made by William F. Inman was $6 worth of groceries, and that Inman told respondent that he never would contribute anything toward the support of her or their child.

The return further shows respondent was informed that subsequently, on the 25th day of November, 1938, said district court

granted the custody of said minor to William F. Inman, but respondent denies that she appeared personally in such proceedings, it being stated in this connection that at the time of the making of such purported order she was neither present nor did she appear by counsel; that at said time both she and the minor were in California, having established their residence here. She avers that the district court of Colorado had no jurisdiction to change the order of custody entered in the interlocutory and final decrees and that she had a right to remove said minor to the state of California; that upon the advice of counsel, however, before removing said child to this state, she procured an order therefor from the court, permitting her to so remove the child. She further alleges that she is a fit and proper person to have the care, custody and control of her minor child; that at present she is residing in San Leandro, California, with her present husband, Arthur H. Steuble, who is regularly employed and who receives a salary of $200 a month; that said Arthur H. Steuble is able to support said Ronald Inman and is ready and willing to assume full financial responsibility. It is alleged in the return that William F. Inman is not a fit and proper person to have the care and custody of the minor child. In this connection it is alleged that William F. Inman and his father importuned respondent to turn over her property to them when she was only sixteen years of age; that the father and son disposed of said property and dissipated the proceeds thereof in the purchase of pool rooms, eventually losing the whole of said property and dissipating the proceeds of the same; that at about the time the infant child was born petitioner did not contribute anything toward the support of respondent and failed to procure any medical aid or attention for her, nor did he call to see her at the hospital although he well knew that she was in a critical condition; that after leaving the hospital respondent lived with her mother outside of Denver for nine months and said petitioner herein failed to make any provision for the support of his wife and child; that by reason thereof respondent was forced to seek employment, which she obtained in Denver, Colorado, receiving approximately $12 a week. During this time, she could not have the child with her, so she placed him to board with the mother of petitioner in Denver, where she could be near him. Respondent agreed to and did pay the mother the sum of $8 a month for the support of the child, beside furnishing clothes and other necessities. She further alleges that one of the sisters of said petitioner, who formerly resided with the grandmother of the minor, is now confined in the state prison of Colorado for robbery, and respondent is informed and believes that such sister will soon be released from prison and will return to the home of her mother; that the environment in which said grandmother lives is not conducive to the best interests and welfare of the child.

It is the claim of respondent that in a case like the present one a writ of habeas corpus is not the proper proceeding to determine the right as between parents to the custody of the minor child where the child is in possession of the mother, and both mother and child are now residing lawfully in California (In re Dowell, 4 Cal.App.2d 688, 41 P.2d 596; In re Culp, 2 Cal.App. 70, 83 P. 89); that the proper method of raising such issue is by an action for that purpose by one of the parents against the other, wherein said matter can be heard on its merits, with the right to apply to the higher courts of the state of California. Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719.

[1-3] We are of the opinion that under all of the circumstances, habeas corpus is not a proper remedy and that the courts of California are not bound by a decree subsequently made by the Colorado court, setting aside its order awarding the custody of the minor to the mother; that the best interests and welfare of the child are of paramount consideration. As above stated, the custody of the minor was awarded to respondent in the matter by a decree of a Colorado court, without any restriction whatever as to his removal from that state. Respondent, therefore, had the right to remove the child from the state of Colorado to the state of California. This she did in August of 1938, having previously acquired a legal residence in California. Therefore, since the respondent and the child were both at the time of the commencement of the above-entitled proceeding legally residing and domiciled here, it will be presumed that she is in rightful possession of the child. Under such circumstances, the writ of habeas corpus is not a proper proceeding as between the parents to try the issue of the custody of the child unless the child is in some im-

minent danger as to its safety, health, morals or reasonable comfort.

In a previous hearing in this matter, the superior court in and for the county of Alameda, state of California, inquired as to the condition of the health, safety, welfare and reasonable comfort of the child, at which time it appeared that respondent's present husband is able and willing to assume the financial obligation of supporting the minor; that he and respondent own their own home in a good residential district; that the child has a room of his own; that he is healthy, well cared for and is content. The court on this showing dismissed the writ of habeas corpus.

The reason for the refusal of courts to permit matters of custody to be determined upon proceedings in habeas corpus is well expressed in the concurring opinion in the case of In re Culp, supra. The child being within this jurisdiction, the courts of the state are not precluded by any judgment or order of a sister state from inquiring into and determining on his own behalf what are the best interests of the child. The decree of a sister state is never a bar to inquiry as to the best interests of a child.

[4] The decree awarding custody of a minor child to either of the parties to a divorce action is final in the sense that it is not possible for the dissatisfied party to keep the courts continually occupied with suits seeking to change the former order of the court, and until some change of circumstances arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will refuse to make any modification thereof whether the decree was made by a court of this state or of a sister state. Foster v. Foster, supra.

Where, as in the present case, the mother and child are residing legally in this state, it will be presumed that the mother is in the rightful possession of her child of tender years; and the right of habeas corpus cannot be used in the appellate courts to try an issue raised thereon, but resort should be had to the trial courts; although if the child were in imminent danger as to its safety, health, morals or reasonable comfort, the writ would be the proper remedy. In re Dowell, supra.

[5] As above stated, the proper method of determining such issue is by an action commenced for that purpose by one of the parties against the other, wherein said matter can be heard on its merits, with the right to apply to the higher courts of the state of California, and it appears from the record that such action, entitled "Anna Steuble, Plaintiff, vs. William F. Inman, Defendant", has heretofore been commenced by respondent in the superior court of Alameda county and that said action is now there pending.

For the reasons given, the writ is denied.

We concur: KNIGHT, J.; WARD, J.



32 Cal.App.2d 201

HADDOCK v. REPUBLIC PRODUCTIONS, Inc., et al.

Civ. 12079.

District Court of Appeal, Second District, Division 2, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Attorney and client ⇐166(1)

Where attorney was discharged as counsel for motion picture company, but subsequently aided in defense of action brought against company and its former president and his wife, evidence sustained finding that attorney's services were rendered in behalf of former president and his wife, who engaged him, and that motion picture company was not indebted to attorney for services rendered.

2. Account, action on ⇐5
Account stated ⇐5

That attorney, who aided in defense of action brought against motion picture company and its former president and his wife, sent statements to company did not entitle attorney to recover against company on causes of action alleging an open book account and an account stated, where there was no evidence of acknowledgment of indebtedness by company.

Appeal from Superior Court, Los Angeles County; E. R. Brand, Judge.

Suit by N. Haddock against the Republic Productions, Inc., and the Mascot Pictures

Realty Corporation, as assignee of a debt allegedly owed by defendants for legal services performed by Gordon W. Levoy. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Harry J. Miller, of Los Angeles, for appellant.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz, of Los Angeles, of counsel), for respondents.

WOOD, Justice.

Plaintiff, holding an assignment from Gordon W. Levoy, asks a judgment against defendants under an allegation that "defendants became indebted to Gordon W. Levoy for and on account of legal services rendered and performed by the said Gordon W. Levoy for the defendants, at the instance and request of the defendants, in the reasonable sum of $5,000.00". The complaint contains an additional count based upon allegations of an account stated, and a third count based upon allegations of indebtedness upon an open book account. Findings and judgment went for defendants and it is the contention of plaintiff on this appeal that the evidence does not sustain the findings and that the uncontradicted evidence compels a judgment for plaintiff. It is argued on behalf of plaintiff that Mr. Levoy rendered services with the knowledge and acquiescence of defendants and that defendants accepted substantial benefits therefrom, resulting in a liability on the theory of an implied contract.

Gordon W. Levoy became attorney for Mr. and Mrs. Nat Levine in 1930 or 1931 and thereafter performed legal services for them. In June, 1935, Levoy became attorney for defendant Republic Productions, Inc., upon a monthly retainer basis, Mr. Levine being at that time vice-president and later president of Republic Productions. Mr. Levine was also president of Mascot Pictures Realty Corporation. Mr. Levoy's employment by defendants was at the instance of Mr. Levine and was on a monthly retainer basis until his employment ceased on April 27, 1937.

A lease of certain real estate was made by Guarantee Liquidating Corporation to Mascot Pictures Realty Corporation under date of December 22, 1934, for five years containing a provision against assignment without the consent of the lessor. An agreement was made on October 12, 1935 between Mrs. Levine and Republic Productions whereby Mrs. Levine sold to the last mentioned corporation all of the stock of the Mascot Pictures Realty Corporation and thereupon Republic Productions was placed in possession of the premises which were the subject of the lease. It was provided in the agreement that Republic Productions would pay to the Levines the purchase price of the Mascot stock in monthly instalments during the term of the lease and that if the lease should be canceled by a court judgment for any cause arising before the date of the agreement all payments by Republic Productions to the Levines would cease. The Levines owned a substantial stock interest in Republic Productions.

[1] An action was commenced by Guarantee Liquidating Corporation in August 1936, in one count of which it was sought to cancel the lease held by the Mascot Corporation on the ground that the activities of the defendants had amounted in fact to an assignment of the lease without the consent of the lessor, and in the second count it was sought to recover damages against the Levines for fraud in connection with the lease. On instructions from Mr. Levine the law firm of Finlayson, Bennett & Morrow was engaged to act as counsel for the defendants in the action commenced by Guarantee Liquidating Corporation and they formally appeared in the action. Early in April, 1937 the new president of Republic Productions, M. J. Siegel, discharged Levoy as attorney for defendant corporations, according to his testimony, because of conflict between the Levines and defendant corporations. Mr. Levoy was instructed by Siegel to "turn over all matters he was handling for Republic and its affiliates to Mr. Huebner". Mr. Levoy complied with these instructions. In May, 1937 Mr. Levoy commenced an action against Republic Productions on behalf of one Zobel, but before doing so obtained Siegel's consent for the reason that Levoy while attorney for Republic Productions had taken part in the preparation of the contract which was the subject of Zobel's suit.

The action filed by Guarantee Liquidating Corporation came to trial on July 22, 1937 at which time Mr. Morrow presented a motion to associate Eugene Breitenbach as attorney of record for the respondents herein and for the association of Mr. Levoy as attorney for Mr. and Mrs. Levine. The next day the litigation was settled out of court. During the period between April 27,

1937 and July 22, 1937 Levoy performed services in aid of the defense in the action pending against defendants and the Levines, the testimony showing that a larger percentage of the work was done in connection with the defense to count 1. Mr. Levoy's services during this period form the basis of plaintiff's claim of liability on the part of defendants. On the other hand defendants contend that Levoy's services were rendered only on behalf of the Levines and that the Levines have already compensated him. Mr. Siegel testified that he did not know that Mr. Levoy was claiming or purporting to represent defendant corporations at any time after he ceased to be their attorney in April, 1937. The two counts of the complaint of Guarantee Liquidating Corporation were interwoven and there is evidence that the services rendered by Mr. Levoy were such as should be rendered in behalf of his clients, the Levines. It is apparent that the findings are sustained by the facts shown in evidence, together with such inferences as the trial court could reasonably draw therefrom.

[2] There is no merit in plaintiff's contention that he is entitled to recover on the causes of action alleging an open book account and an account stated. Mr. Levoy sent to defendants statements of his bill but there is no evidence of an acknowledgment of indebtedness or any assent express or implied that any balance was due.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



C. S. SMITH METROPOLITAN MARKET CO., LIMITED v. LYONS et al.*

Civ. 11033.

District Court of Appeal, First District, Division 2, California.

April 7, 1939.

Rehearing Denied May 5, 1939.

Hearing Granted June 1, 1939.

Injunction ⇐101(1)

Picketing and advertising employer's business as unfair to organized labor because of employer's refusal to force employees to join meat cutters and butcher's union was properly enjoined since acts complained of were unlawful and against public policy.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by C. S. Smith Metropolitan Market Company, Limited, a corporation, against Jack Lyons, individually and as business agent of the Amalgamated Meat Cutters and Butchers Workmen, Local Union 284, an unincorporated association and others, to restrain defendants from maintaining pickets at plaintiff's place of business and from advertising such business as unfair to organized labor. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Rosecrans & Emme, and Bayard R. Rountree, both of Los Angeles, and Harry Albert, of Long Beach, for appellants.

Pierson & Block, of Los Angeles, Jonah Jones, Jr., of Long Beach, and Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

Luce, Forward & Swing, of San Diego, amici curiæ in support of respondent.

Henry B. Lister, of San Francisco, amicus curiæ on behalf of the Local Joint Executive Board of the Hotel and Restaurant Employees International Alliance and Bartenders' Union.

NOURSE, Presiding Justice.

Plaintiff sued to restrain defendants from maintaining pickets at plaintiff's place of business and from advertising such business as unfair to organized labor. The defendants answered admitting the essential facts alleged, and the cause was tried on its merits.

The trial court found that no labor dispute existed between the employer and any of his employees; that the plaintiff paid his employees more than the union scale of wages with hours of labor less than the union scale prevailing in the vicinity; that the plaintiff had not discriminated against any member of the local labor union represented by defendants, and had not objected to any of his employees joining such or any other labor union; that no one of said employees had requested said local union to represent him in any manner of negotiations with the employer; that all of said employees have expressed the desire to bargain with the employer through represen-

*For subsequent opinion see 106 P.2d 414.

tatives of their own choosing and not through any of the defendants; that the purpose of all the activities complained of was "to compel the plaintiff *to force its employees to join* the defendant unincorporated associations and labor unions and their locals, even though such joining would be against the will and *without the voluntary consent* of such employees". (Italics ours.)

The injunction which followed was based upon the ground that the acts complained of were unlawful because they were designed to compel the employer to execute a contract which was declared to be unlawful and against public policy. For the reasons stated in McKay v. Retail Auto Salesmen's Local Union No. 1067 et al., Cal.App., 89 P.2d 426, this day decided, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



McKAY et al. v. RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067 et al.*

Civ. 11034.

District Court of Appeal, First District, Division 2, California.

April 7, 1939.

Rehearing Denied May 5, 1939.

See 90 P.2d 113.

Hearing Granted June 1, 1939.

1. Constitutional law ⇐70(1)

Court cannot indulge in conjecture as to what legislators had in mind when passing on validity of a statute but must take the enacted legislation as it reads and leave to the Legislature the function of amendment.

2. Constitutional law ⇐81

All rights of the individual are subordinate to governmental control under police power for the protection of the health, safety and general welfare of the public at large.

3. Master and servant ⇐10½, 15

The statute prohibiting "yellow dog" contracts by which employer can compel his employee upon penalty of dismissal either to join a labor organization sponsored by employer or not to join any labor organization are based upon the principle that in abridging the right of the individual to contract, the general welfare of those engaged in labor and of the public at large is protected. Gen.Laws Supp.1933, Act 4104; St. 1937, p. 208, §§ 921–923.

4. Statutes ⇐188

Plain words used in a statute according to their known and accepted meaning do not call for judicial construction.

5. Constitutional law ⇐70(3)

The declaration of public policy relative to conditions of employment is a matter belonging exclusively to the Legislature within constitutional limits.

6. Master and servant ⇐10½

Statutes prohibiting "yellow dog" contracts and giving employee full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate terms of employment do not authorize an employer to contract with a labor union to compel employees to join such union. Gen.Laws Supp.1933, Act 4104; St. 1937, p. 208, § 921.

7. States ⇐21

"Jurisdiction" is the legal power, right or authority to hear and administer the law in the premises, the authority of the sovereign power to govern, legislate and adjudicate and no individual or group of individuals has independent power to exercise any of such essential governmental functions.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

8. Statutes ⇐227

Where Legislature within constitutional limits declares certain acts to be unlawful, no individual or group of individuals has jurisdiction to adjudge that such laws should not be obeyed.

9. Courts ⇐2

Where Legislature has declared public policy, courts will protect the individual in his substantive rights arising under it from aggression by those who do not concur in the wisdom of the legislation or who for their own end reject legislation as economically unreasonable.

10. Master and servant ⇐10½, 15

Under statutes prohibiting "yellow dog contracts" and declaring it to be a misde-

* Subsequent opinion 106 P.2d 373.

meanor for any person to coerce another to enter into an agreement not to join or become a member of any labor organization as a condition to employment, trade unions could not compel employer to contract to force employees to agree not to join or to remain a member of the labor organization of their own choosing and to join trade union since to do so would be to force employer to commit a crime denounced by the statute. Gen.Laws Supp.1933, Act 4104; St. 1937, p. 208, §§ 921–923.

11. Injunction ⇐34, 57

Equity may grant injunctive relief against the unlawful injury or interference with the property or contracts of another.

12. Constitutional law ⇐89(1)

There is no constitutional or statutory right or power in any person or group of persons to compel another to execute a contract against his will, since meeting of minds is essential and there can be no true agreement without capacity and freedom to accept or reject the thing proposed.

13. Injunction ⇐101(1)

A strike or picket conducted solely to compel an employer to sign a particular contract or contract declared to be unlawful is for an unlawful purpose and is proper basis for injunctive relief.

14. Torts ⇐10

Generally picketing is lawful in most cases where bona fide labor disputes exist between an employer and his employee or where employer fails to abide by valid contract with employees relating to terms and conditions of employment or where he refuses to bargain with employee in relation to condition of employment or where his conduct is in fact unfair to organized labor.

15. Master and servant ⇐16

The right of individual workman of full freedom of association and self-organization is individual right not subject to the control of the majority of all the employees of a particular plant nor of the majority of any group not of his own free and voluntary choosing and when employee exercises his right and chooses a bargaining agency to represent him, such agency alone may act as his representative. St.1937, p. 208, §§ 921–923.

16. Principal and agent ⇐8

No one may act as the agent of another without the principal's choice or consent.

17. Injunction ⇐94

Privilege of freedom of association, self-organization and designation of representatives of workman's choosing is a substantial right which may be protected by injunction.

18. Injunction ⇐101(1)

Under statutes prohibiting "yellow dog" contracts and declaring it to be a misdemeanor for any person to coerce another to enter into an agreement not to join or become member of any labor organization as condition to employment, employer was entitled to injunctive relief against boycott and picketing activities of trade unions which sought to compel employer to contract to force employees to join trade unions as condition of employment. Gen.Laws Supp.1933, Act 4104; St.1937, p. 208, §§ 921–923.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Suit by James F. McKay and others against Retail Automobile Salesmen's Local Union No. 1067 and others, to enjoin defendants from picketing plaintiffs' place of business and from boycotting and advertising such business to be unfair to union labor. From an adverse judgment, plaintiffs appeal.

Reversed.

I. M. Peckchan and Sol A. Abrams, both of San Francisco, for appellants.

Cullinan, Hickey & Sweigert, Rogers & Clark, and Webster V. Clark, all of San Francisco, amici curiæ.

Mathew O. Tobriner, of San Francisco, for respondent Retail Automobile Sales men's Local Union No. 1067, etc., et al.

John Francis Neylan and Bartley C. Crum, both of San Francisco, for respondent Howard Automobile Co.

Clarence E. Todd, of San Francisco, amicus curiæ in support of California State Federation of Labor.

NOURSE, Presiding Justice.

The plaintiffs have appealed from a judgment denying their application for an injunction following an order sustaining defendants' demurrer to their complaint. The plaintiffs are thirty-two salesmen employed by the Howard Automobile Company. The defendants are several organized labor unions and their local officers,

the San Francisco Labor Council and its officers, and the Howard Automobile Company. The allegations of the complaint, which are all taken as admitted in this proceeding, are that in May, 1937, the plaintiffs formed a voluntary labor organization among themselves and designated three of their members as their bargaining representatives to negotiate with their employer rates of pay, wages, hours, and all conditions of their employment. The corporation-employer thereupon recognized said committee as bargaining agents for the entire sales force, to-wit, all the plaintiffs. No labor dispute of any kind, and no controversy concerning terms or conditions of employment exists between any of the plaintiffs and their employer. None of the plaintiffs is a member of any of the labor unions named as defendants, and none of the plaintiffs, nor said employer, has at any time requested any of said defendants to act for plaintiffs as their collective bargaining agency. The defendant salesmen's union has placed a picket line around the employer's place of business which it threatens to maintain "until the said company compels plaintiffs to join said union or discharges said plaintiffs." The co-defendants of said union (other than the corporation-employer) have joined with said union in maintaining such picket lines and in boycotting the plant of plaintiffs' employer to the effect of closing the plant, stopping all work therein, and destroying the business, "and the said company intends to, and, unless the co-defendants of said company are restrained by this court, will discharge all the plaintiffs from their said employment, or demand that plaintiffs and each of them join the said union". None of said pickets has been or is an employee of said company, on strike or otherwise. The co-defendants of the Salesmen's Union (other than the corporation-employer) have joined with it in a concerted plan to force the employer to execute the contract demanded and have endorsed the picket line and have maintained a boycott, or secondary boycott, on the business of the employer by advertising it to be unfair to union labor.

Injunctive relief is sought on the ground that all these activities are designed to compel the employer to enter into an agreement denounced as unlawful by the State Labor Code. As we will rest our decision upon these provisions of the Labor Code, it is well to quote them here somewhat at length.

Section 921, enacted in 1937 (St.1937, p. 208), and based on the special labor statute of 1933 (Gen.Laws Supp.1933, Act 4104) provides in part: "Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is *contrary to public policy* if either party thereto promises any of the following:

"(a) *To join or to remain a member of a labor organization* or to join or remain a member of an employer organization,

"(b) *Not to join or not to remain* a member of a labor organization or of an employer organization,

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization. * * *"

The section contains the further provision that such a contract shall not afford any basis for legal or equitable relief against a party thereto, which is another way of saying that the contract would be void as against public policy and unenforcible in law or equity.

Section 923 provides that: *"the public policy of this State* is declared as follows: Negotiation of terms and conditions of labor should result from *voluntary agreement* between employer and employees. * * * Therefore it is necessary that the *individual workman* have full *freedom of association, self-organization,* and designation of representatives *of his own choosing,* to negotiate the terms and conditions of his employment. * * *" (Italics ours.)

Section 922, enacted at the same time, and based on section 679 of the Penal Code, reads: "Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

[1] The parties concede that these sections were enacted to prohibit the "yellow dog" contract, a contract whereby the employer compels his employee, upon penalty of dismissal, either to join a labor organization fostered and dominated by the employer, or not to join any labor organization of any character. It is commonly known that the "yellow dog" con-

tract has been a source of bitter complaint by the labor organizations for many years, but where the parties to this litigation differ is this: the respondent labor unions contend that those who fostered the legislation had no other purpose in view than to prohibit the "yellow dog" contract, and that we should interpret the statutes accordingly; the appellants contend that, though subdivisions (b) and (c) of section 921 fully cover the subject of the "yellow dog" contract, subdivision (a) is much broader and blankets the entire controversy in this litigation. It is the policy of this court to take the law as it finds it. We will not, therefore, indulge in conjecture as to what some legislator, or some group of legislators, had in mind when voting for the statute. We will take the enacted legislation as it reads and leave to the proper body the function of amendment.

Little need be said in reply to the mass of material found in the briefs and in the oral argument relative to the constitutional rights of the parties—the right of free speech and of free assembly, the right to picket and to boycott, and the right to be protected in one's business, property, and employment. All these may be assumed, subject to the qualifications hereinafter noted, with the observation that those who would assert them must be prepared to concede them to others. In an opinion rendered by Judge Emmet Wilson in C. S. Smith Metropolitan Market Co. v. Lyons et al., Cal.App., 89 P.2d 425, which has been called to our notice, this principle is stated as follows:

"The most elementary principle of bills of rights is that men possessed rights before government was formed. Human rights existed prior to the establishment of government or state. Human rights and property rights are inseparable, and unless government protects both alike it fails in the fulfillment of its functions. If the law—the government—is unable or unwilling to give complete protection to property, its protection of human rights will be deficient in the same measure.

"* * * Included in the constitutionally protected inalienable rights is the right of every man to make contracts for the purchase and sale of property, and contracts for personal services which amount to the purchase and sale of labor as a means of acquiring property, and it makes but little difference whether this right is designated as a personal right or as a property right. Brennan v. United Hatters, 1906, 73 N.J.L. [44 Vroom] 729, 65 A. 165, 9 L.R.A.,N.S., 254, 118 Am.St.Rep. 727, 9 Ann.Cas. 698. * * * To deprive the laborer and the employer of this right to contract with one another is to violate both state and federal Constitutions in that they would be deprived of their liberty and of their property without due process of law. Mathews v. People, 1903, 202 Ill. 389, 401, 67 N.E. 28, 63 L.R.A. 73, 95 Am. St.Rep. 241. A person's occupation or calling, by means of which he earns a livelihood and endeavors to better his condition, and to provide for and to support himself and those dependant upon him, is property within the meaning of the law, and is entitled to protection as such. Gray v. Building Trades Council, 1903, 91 Minn. 171, 182, 97 N.W. 663, 63 L.R.A. 753, 103 Am.St.Rep. 477, 1 Ann.Cas. 172; Blanchard v. Golden Age Brewing Co., 1936, 188 Wash. 396, 63 P.2d 397; State v. Stewart, 1887, 59 Vt. 273, 9 A. 559, 59 Am.Rep. 710."

[2, 3] We may take all these inalienable rights for granted and concede to respondents the right to peacefully picket an employer in a bona fide labor dispute so long as such acts are for a lawful purpose. But there is no legal principle more firmly settled than the principle that all rights of the individual are subordinate to governmental control in the exercise of its police power for the protection of the health, safety, and general welfare of the public at large. It is upon this ground only that the congress and the legislature have been permitted to declare that the so-called "yellow dog" contracts are void as against public policy and these enactments have been sustained upon the sound principle that, in thus abridging the right of the individual to contract, the general welfare of those engaged in labor and of the public at large is thus protected.

[4-6] Upon this basis and this alone can the provisions of section 921 of the Labor Code, prohibiting contracts with "company unions" be sustained. But upon the same basis the legislature is authorized to proscribe contracts which destroy the right of the "individual workman" to enjoy the "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment." Section 923. This declaration of

the public policy of the state in relation to the conditions of employment is a matter which belongs exclusively to the legislature within constitutional limits. It is not contended by any of the parties that the legislation offends any provision of the Constitution. Respondents argue that those who fostered the law in behalf of organized labor had in mind the prohibition relative to the "yellow-dog" contract only; that the partisans of "organized labor" did not intend that the statute should have the broad application to all contracts. But we must take the statute as we find it. Laws are not to be interpreted on the basis of what some interested parties intended the legislature should enact. They are to be "construed" by judicial decree when the language used is plain and unambiguous. When a statute in plain and in simple English declares that no such contract shall be valid the courts may not, under the guise of judicial interpretation, declare that the statute means that *some* of such contracts may be valid if it appears to judicial minds that such exception would be a reasonable economic policy to follow. Plain words used in a statute according to their known and accepted meaning do not call for judicial construction.

[7] The respondent employer argues that this is but a "jurisdictional" dispute. The respondent local union bitterly assails this position and argues that a "jurisdictional" dispute can arise only between "permanently organized groups which bargain with employers through the implement of non-employee representation" such as the American Federation of Labor and the Congress for Industrial Organization. Both parties are indulging in a fruitless by-play. Jurisdiction is the *legal* power, right, or authority to hear and administer the law in the premises; the authority of the sovereign power to govern, legislate, and adjudicate. No government concedes to any individual or group of individuals, organized or unorganized, the independent power or authority to exercise any of these three essential governmental functions. And no group of individuals, no matter by what name they may assume to act, can, independently of the forces of the government, legislate upon or adjudicate between the inalienable rights of the individual which the government is designed to protect. We accordingly concede no power to any individual or group of individuals to determine by rule or decree what the constitutional rights of others shall be or to adjudicate between individuals as to how, when, or where these inalienable rights shall be enjoyed.

[8, 9] In deciding the question before us we fully accede to the argument of respondents that their constitutional rights of free speech and free assembly ordinarily accord them the right to peacefully picket and boycott an employer charged with unfair labor practice, but we do not concede that, in the exercise of these rights, they may deny or destroy the inalienable rights of any other individual which he enjoys under the very same constitutional grant. The issues of this case cannot rest upon the mystification of organized power over the human rights of the individual, nor upon the Draconian theory of rule by force and coercion. They must rest squarely upon the assumption that when governmental forces, legislating within constitutional limits, declare certain acts to be unlawful, no individual or group of individuals has "jurisdiction" to adjudge that such laws should not be obeyed. In determining these issues we must yield to the legislature the exclusive power of declaring the economic policy of the state for the benefit and general welfare of the public at large. And when this policy has been so declared, within constitutional limits, the courts will protect the individual in his substantive rights arising under it from aggression by those who do not concur in the wisdom of the legislation or who, for their own ends, reject the legislation as economically unreasonable.

Turning to the statutes involved in this controversy, we find that the legislature has declared in plain and simple language that the economic policy of this state requires that "the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment" (section 923), and that any contract by which the employer compels the individual workman "to join or to remain a member of a labor organization" (section 921) is contrary to such public policy, and hence void. It should be here repeated that no one of the parties to this litigation questions the constitutional power of the legislature to enact these statutes. The statutes do not admit of any interpretation which does not give full weight to every word used in its common and accepted meaning. In banning

all such contracts obligating any employee to join or remain a member of "a labor organization" section 921 becomes general in its terms and of uniform operation, and it may be doubted whether it would not have been subject to the constitutional objection of discrimination if it had been made to apply to but one type of such organization. In this connection it should be borne in mind that this policy is not alone the policy of the State of California. It has been adopted by the national congress and by the legislatures of many other states. In section 7 of the National Labor Relations Act, 29 U.S.C.A. § 157, it is provided: "Employees shall have the *right to self-organization,* to form, join, or assist labor organizations, to bargain collectively through *representatives of their own choosing,* and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (Italics ours.) In section 8, 29 U.S.C.A. § 158, it is declared to be an unfair labor practice for an employer "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157", or "To dominate or interfere with the formation or administration of any labor organization." Since the legislature in enacting these sections of the Labor Code in 1937 copied much of the language of the National Labor Relations Act of 1935, 29 U.S.C.A. § 151 et seq., it is pertinent to note the definition of "labor organization" found in section 2 of the federal act, 29 U.S.C.A. § 152, "The term 'labor organization' means any organization of any kind, *or any agency or employee representation committee or plan,* in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Italics ours.) It should also be noted that a similar policy was declared in the Railway Labor Act of 1926 (U.S.C., Title 45, § 151 et seq., 45 U.S.C.A. § 151 et seq.) wherein section 2, subdivision 3, provided: "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." These provisions of the act were sustained in Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 432, 74 L.Ed. 1034, 1044–1046, where the Supreme Court said: "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of section 2 of the act (45 U.S.C.A. § 152, subd. Third) providing that, 'Representatives, for the purposes of this act, shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.'

"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect. * * *

"* * * *Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme.* All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safe-

guarded. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. * * *

"* * * *Such collective action would be a mockery if representation were made futile by interferences with freedom of choice.* Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." (Italics ours.)

In a case involving a statute of the State of Wisconsin similar to our labor code the Circuit Court of Appeals of the Seventh Circuit analysed and applied the statute in this language: "The pertinent provisions of the Wisconsin Labor Code (St.Wis.1933, § 268.18 et seq.) are not materially different from the provisions of the Norris-La Guardia Act. In substantially the same manner they seek to carry out the declared public policy of that State with respect to employees. That policy is substantially the same as the national policy and states that an employee shall have 'full freedom of association, self-organization, and designation of representatives of his own choosing, * * * and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' Section 268.18, Wis.Stats. 1933.

"* * * The controversy, rather, seems to be a unilateral one with the sole object of coercing appellee to compel its employees to join the appellant union, in order that it may represent the employees in their dealings with the employer. Appellants seek to accomplish that result by picketing and damaging the employer's business. *But, under the Norris-La Guardia Act and the Wisconsin Labor Code, it would amount to a violation of both the federal and state law if appellee complied with appellants' demands, for under those laws the employer is specifically enjoined from influencing his employees in their choice of a union or their representative.* The employees have refused to join the appellant union, they have organized their own union and have selected their own representative without interference or participation of their employer, and their rights in these respects are as fully protected by the laws as are those of appellants.

"The declared public policy of both the nation and State of Wisconsin establishes the substantive rights of appellee's employees which the courts will protect by injunction, though no specific provision therefor be contained in either Act. (Citing authority.) It being unlawful for appellee to dictate to its employees what organization they should join, or what representative they should select, and likewise unlawful to refuse to recognize the agency which they had selected, and recognize another representative which they had rejected, it follows that appellants' demand upon appellee was unlawful." Lauf et al. v. E. G. Shinner & Co., Inc., 82 F.2d 68, 71, 72. (Italics ours.)

It is true that the Lauf case was taken over by the Supreme Court, 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872, which held that the facts there did constitute a "labor dispute" within the meaning of the Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq. The case was reversed upon the ground that an injunction would not lie, but the reasoning of the Circuit Court of Appeals upon the purposes of the Wisconsin Act was not disapproved.

The policy of self-organization and freedom of choice upon which the first decision in the Lauf case relied was followed by the Supreme Court in National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U.S. 1, 57 S.Ct. 615, 622, 81 L.Ed. 893, 909, 910, 108 A.L.R. 1352, where the court said: "Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right. *Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and rep-*

resentation is a proper subject for condemnation by competent legislative authority. * * * Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. *We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice.* Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, 'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.' Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034, supra." (Italics ours.)

[10] Those cases cited by respondents wherein the courts expressed their respective opinions as to what the public policy should be are of no value in this controversy where such policy has been expressly declared by the legislature. There being no constitutional objection to the legislation this court follows the statute as it is written. When, therefore, we observe that in section 922 of the Labor Code it is declared to be a misdemeanor for any person to coerce another "to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment", and that the complaint here alleges that the purpose of the picketing is to compel the employer to sign a contract whereby it will force the plaintiffs to agree not to join or to remain a member of a labor organization of their own choosing, we see that the acts complained of are acts designed to force the employer to commit a crime denounced by the statute. It should not be necessary to add that such acts of the defendants would also be unlawful.

[11] This leaves for consideration the single question of remedy. There is no law in this state prohibiting an injunction in labor disputes. Herein lies the distinction between this case and those arising under the federal statutes and in those state jurisdictions having provisions similar to the Norris-La Guardia Act. Our courts of equity are clothed with power to grant injunctive relief against the unlawful injury or interference with the property or contracts of another. In J. F. Parkinson Co. v. Bldg. Trades Council, 154 Cal. 581, 603, 604, 98 P. 1027, 1036, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, the Supreme Court said: "Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare." Prior to the enactment of the Labor Code (St.1937, p. 185) many cases were written holding that peaceful picketing and the boycott were permissible if conducted for a lawful purpose and in a lawful manner. The learned trial judge herein upon sustaining the demurrer emphasized these principles in a written opinion from which we quote: "The courts will not tolerate physical violence, or threats of violence, physical intimidation *or misrepresentation of the facts*, and where these exist they must be unhesitatingly enjoined. * * * It (picketing) is an appeal to as much of the public as may be influenced by the facts to withhold its patronage.

"So carried on the picketing must be both peaceful and truthful. No facts must be presented to the public that are not true. No steps must be taken that are not peaceful. *The utterance or publication of what is false,* the resort to any violence or physical intimidation directed toward the employer, his employees or any member of the public, can not and will not be tolerated by the courts. Upon so much all courts and all right thinking people must be agreed." (Italics ours.)

[12, 13] It is one thing to say that "peaceful picketing is lawful" and another to say that "picketing must be for a lawful purpose". The first statement is not a rule of law, but a mere catch phrase used loosely in argument. Peaceful picketing is not lawful if it is expressly prohibited by law or is conducted for an unlawful purpose. To illustrate: if a competitor of one of the counsel for the respondent unions should picket his place of business and should falsely advertise through the public press and the mail that such counsel was "unfair to organized labor", the unlawfulness of the purpose would be obvious. Illustrations of unlawful purposes which may form the basis for injunctive

relief are advertising the employer to be unfair to organized labor because he refuses to commit an act declared to be unlawful, advertising one to be unfair to organized labor where there is no labor dispute or controversy, advertising one to be unfair to organized labor when the sole controversy is between conflicting factions of labor organizations in which the employer takes no part. Here the complaint alleges, and the demurrer admits, that the sole purpose of the picket and boycott is to compel the employer to sign a contract whereby he will either force the plaintiffs to join a designated labor union or discharge them from their employment. There is no constitutional or statutory right or power in any person or group of persons to compel another to execute a contract against his will. From the early Roman law a contract has been known as a meeting of minds, the first essential element of which is assent, and there can be no true agreement without the capacity and freedom to accept or reject the thing proposed. A strike or picket conducted solely to compel an employer to sign a particular contract or a contract declared to be unlawful is for an unlawful purpose and, under the rule of all the cases cited herein, is a proper basis for injunctive relief. For these reasons we must read the Parkinson case and all other decisions coming before the enactment of the Labor Code, as well as those from other jurisdictions not having these statutory limitations, as qualified by the express provisions of the code which declare the enumerated activities to be unlawful.

[14] It would be difficult to enumerate all the acts which may or may not be done legally in relation to a labor controversy. It is sufficient to state generally, by way of illustration, that, in the absence of prohibitory statutes or local ordinances, picketing is lawful in those cases where a bona fide labor dispute exists between an employer and his employees, where the employer fails to abide by a valid contract with his employees relating to terms and conditions of employment, where he refuses to bargain with them in relation to any of the conditions of their employment, where his conduct is in truth and fact "unfair to organized labor" as for instance when he refuses to employ or discharges from his employment those affiliated with a labor organization upon that ground alone, or carries on a course of conduct of unreasonable or unjustified discrimination against such employees because of their union affiliation.

From the foregoing these conclusions follow:

The state policy declared in the Labor Code renders unlawful every contract between an employer and employee wherein the latter agrees to join or remain a member of any labor organization.

[15, 16] The same policy declares that the individual workman shall have "full freedom" of association and self-organization. This is an *individual* right not subject to the control of the majority of all the employees of a particular plant, nor of the majority of any group not of his own free and voluntary choosing. When the "individual workman" exercises this self-organization and voluntarily chooses bargaining agencies to represent him, such agencies alone may act as his representatives. Thus, any individual workman may join with one or more other employees of the same employer and form their own "labor organization", either on the basis of the respective crafts represented in the employment, or on the basis of race, color, or religion, or upon no basis other than that it is of their "own choosing". Thus, when several distinct crafts are represented in one employment, each may, irrespective of their number, select "representatives of (their) own choosing" and such representatives become the bargaining agency with the employer "to negotiate the terms and conditions of employment" of all those employees who have voluntarily chosen them for that purpose. This policy is based upon the sound principle that no one may act as the agent of another without the principal's choice or consent.

[17] When acting thus under the statute any "individual workman" or group of individual workmen has the right to bargain with his employer "free from the interference, restraint, or coercion" of the employer, directly or indirectly. The statute having fixed the duty of the employer in such matters, no "individual workman" and no group of employees or others may force the employer to breach that duty by picket, boycott, secondary boycott, or any other means. The privilege of "freedom of association, self-organization, and designation of representatives of his own choosing" is the meat of the declared

state policy, and this is a substantial right which may be protected by injunction. To this end the State has declared that it is for the greatest benefit of the employer and the employee, and the general public at large, that controversies over conditions of employment should be settled by negotiation, arbitration, and conciliation, rather than by force or intimidation on the part of either employer or employee. We should add that we are not expressing herein our own philosophy in relation to the many controversies arising between employers and employees, nor to those arising between certain groups of employee organizations. We are merely stating the policy the legislature has adopted as the law controlling such relations.

[18] Since all the activities complained of are alleged to have been conducted for the purpose of forcing the employer to breach his duty to these plaintiffs, the complaint states a cause of action, and the demurrer should be overruled.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



E. H. RENZEL CO. v. WAREHOUSEMEN'S UNION I. L. A. 38–44 et al. *

Civ. 11032.

District Court of Appeal, First District, Division 2, California.

April 7, 1939.

Rehearing Denied May 5, 1939.

Hearing Granted June 1, 1939.

Injunction ⇐101(1)

Under statute prohibiting contracts between employer and employee whereby either party undertakes or promises to join or to remain a member of some specific labor organization, and providing penalties for violation, picketing and boycott activities of trade union to force employer to contract to compel employees to join labor union or be discharged were properly enjoined, since trade union acts were designed to compel employers by unlawful means to do an act which is by statute declared unlawful. Gen.Laws Supp.1933, Act 4104, §§ 1, 2.

*For subsequent opinion see 106 P.2d 1.

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Suit by E. H. Renzel Company, a corporation, against Warehousemen's Union I. L. A. 38–44, an unincorporated association, and others to restrain defendants from picketing plaintiff's place of business and from interfering with conduct of its business by means of boycott, secondary boycott and similar activities. From an order granting a temporary injunction, defendants appeal.

Affirmed.

Richard Gladstein, Aubrey Grossman, and Gladstein, Grossman & Margolis, all of San Francisco, for appellants.

I. M. Peckham, of San Francisco, and H. A. Gabriel, of San Jose, for respondent.

Henry B. Lister, of San Francisco, amicus curiæ in behalf of Local Joint Executive Board of Hotel and Restaurant Employees International Alliance and Bartenders' Union.

Nathaniel H. Janes, Jerome R. Hellerstein, and Carol King, all of New York City, amici curiæ on behalf of the International Juridical Ass'n.

Osmond K. Fraenkel, of New York City, amicus curiæ on behalf of American Civil Liberties Union.

NOURSE, Presiding Justice.

Plaintiff applied for an injunction restraining the defendants from picketing its place of business and from interfering with the conduct of its business by means of boycott, secondary boycott, or similar activities. Defendants appeared by demurrer only. Upon the return to an order to show cause, a temporary injunction was issued from which the appeal is taken.

The allegations of the complaint which are here admitted to be true, are that plaintiff, engaged in the wholesale grocery business in the city of San Jose, had in its employ about forty employees in the capacity of warehousemen and teamsters, none of whom was a member of a labor organization; that for a long time past the plaintiff had paid its employees wages in excess of the prevailing labor union scale and had no labor dispute with any of its employees regarding wages, working conditions, or otherwise. That the defendant Warehousemen's Union I. L. A. No. 38-44 was an unincorporated labor union having not more than six members. That on July 15, 1937, the defendant Montes, as business

agent of that union, called upon plaintiff and "demanded that plaintiff sign a contract with them whereby all its employees would be compelled to join said labor union or be discharged and that plaintiff should agree to employ union men exclusively". That plaintiff refused to sign such a contract, whereupon defendants caused pickets to be placed in front of plaintiff's warehouse carrying signs reading "unfair to organized labor". That, in addition to the use of such pickets, the defendants placed a boycott, or "secondary boycott", upon plaintiff's business by circularizing its customers with letters announcing that plaintiff was "unfair to organized labor" and by following plaintiff's trucks in the delivery of merchandise and by visiting and soliciting the customers not to trade with plaintiff.

The temporary injunction from which the appeal is taken was entered on August 11, 1937. At that time, the effective statute declaring the policy of the state in relation to agreements between employers and employees was the act of May 26, 1933 (Deering's Gen.Laws Supp. 1933, Act 4104). Section 1 of that act declared the public policy to be that: "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. * * * Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment * * *." Section 2 of the act then declared that every "promise hereafter made * * * between any employee or prospective employee and his employer * * * whereby either party thereto undertakes or promises to join or to remain a member of some specific labor organization * * * is hereby declared to be contrary to public policy * * *."

It is argued by appellants that the statute was designed to prohibit only the so-called "yellow dog" contract whereby an employer forced his employees to become and remain members of a company union, organized and dominated by the employer, or forced them to agree not to join any union. But it is manifest that the statute went far beyond that when it denounced a contract requiring the employees to join "some specific labor organization".

Here it is conceded that all the acts of defendants of which the plaintiff complained were acts designed for the sole purpose of compelling the employer to force his employees to join in the type of contract denounced by the act. By stipulation of the parties the cause was argued and heard with McKay v. Retail Automobile Salesmen's Local Union No. 1067 et al., Cal. App., 89 P.2d 426, this day decided and, for the reasons stated therein, the acts of the defendants herein were conducted for an unlawful purpose since they were all designed to compel the plaintiff by unlawful means to do an act which was expressly declared unlawful.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



32 Cal.App.2d 111

URE v. MAGGIO BROS. CO., Inc., et al.

Civ. 2404.

District Court of Appeal, Fourth District, California.

April 10, 1939.

1. Damages ⇐96

Considerable leeway should be allowed the jury in exercising its discretion in awarding speculative and indefinite general damages.

2. Death ⇐99(5)

$6,000 general damages was excessive by $1,500 to compensate a 79-year-old mother for loss of household services, possible nursing services, and the society, comfort and protection of her deceased daughter.

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action by Margaret Grove Ure against Maggio Bros. Company, Inc., and James D. Casey, to recover damages for the death of plaintiff's daughter fatally injured in an automobile accident. Verdict for plaintiff for $6,000 general damages in addition to special damages, and from judgment thereon defendants appeal.

Judgment modified, and affirmed as modified.

Hugh B. Rotchford, of Los Angeles, and Kelley & Hews, of Riverside (Robert E. Ford, of Los Angeles, of counsel), for appellants.

Arthur W. Henderson, of Pittsburgh, Pa., and Kenneth Evan Schwinn, of Riverside, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to recover damages for the death of her daughter, which occurred as a result of an automobile accident on March 28, 1936. On a previous appeal this court reversed a judgment for $10,000 general damages on the ground that that amount was excessive. Ure v. Maggio Bros. Co., Inc., 24 Cal.App.2d 490, 75 P.2d 534. On a retrial of the action, a jury awarded the plaintiff $6,000 general damages in addition to the special damages allowed. From the ensuing judgment the defendants have appealed.

There is no dispute as to the amount of the special damages and the main ground of this appeal is that the amount of the general damages, $6,000, is excessive.

The general facts and the pertinent rules of law are set forth and discussed in the opinion on the former appeal and need not be here repeated. The respondent was 79 years old when her daughter was killed and had a normal life expectancy of 5.80 years. She lived in Pittsburg, Pa., and from 1928 to 1935 the deceased lived with her in an apartment. During that time the deceased did a large share of the housework except for scrubbing, cleaning and laundry, which was done by outside help. The deceased had no income and her mother paid all of the expenses of maintaining the home and furnished her daughter with clothes. During a part of 1933 and the year 1934 the mother was ill and the deceased also acted as a nurse in caring for her. The mother testified at this trial, which occurred in July, 1938, that she recovered from her illness by April, 1935, that since that time she had been in good health and was able to do everything she was doing before her illness and that since that time she had had no need for any such services as a practical nurse would give.

An employee of the Pittsburg State Employment Service, after stating her qualifications and saying that she had heard the testimony with respect to the services which were rendered by the deceased to her mother prior to this accident, testified as to the value of such services. She testified that these services, during the time the deceased was acting as practical nurse for her mother, were worth $25 a week, from which should be deducted the value of her board and room, which would average from $8 to $10 a week. She then testified that such services, excluding those of a practical nurse, were worth from $10 to $15 a week, from which should be deducted the value of her board and room, averaging from $8 to $10 a week.

The respondent, taking a salary of $25 a week with the lowest amount named as the value of board and room, $8 a week, arrives at a figure of $5,127 as the value of the services of the deceased for the expectancy of 5.80 years and argues that a proper allowance for comfort and society easily brings this figure to the amount of the judgment.

[1, 2] It appears that the respondent had required no nursing services for about two years and four months from the date of the accident to the date of the second trial. She was then in good health and there is no basis in the evidence for assuming that she would require such nursing services during the entire remainder of her life. Taking the evidence most favorable to the respondent, the services she could have expected to receive from the deceased, aside from nursing, had a net value of $7 per week above the value of board and room. This would have amounted, during the period of normal expectancy, to $2,111. From that should be deducted the value of clothes furnished to the deceased by the respondent, the yearly amount of which the respondent was unable to estimate. Unquestionably, a further allowance would be proper because of the pecuniary loss arising from the deprivation of the society, comfort and protection of the decedent. It is entirely possible that a further allowance would be proper based upon the possibility that the respondent may require nursing services during a portion of the remainder of her lifetime. These are indefinite things at best and, under well-settled rules, considerable lee-way should be given to the jury in exercising a sound discretion in such matters. The judgment allows nearly $4,000 for those items and, in our opinion, this plainly exceeds the pecuniary loss suffered in these respects, in so far as shown by the evidence in this case. If

nursing services should be required in the future for a period of two years the additional value thereof, under the evidence, would be only about $1,000. Considering the age of the respondent a similar allowance on account of the loss of comfort, society and protection would be ample, if not generous. It is not possible to exactly fix the amount of the loss within a few hundred dollars. While we think the judgment is excessive, we think it might be held to be sustained by the evidence up to $4,500.

The judgment is modified by reducing that part of it covering general damages to the sum of $4,500 and, as so modified, the judgment is affirmed. Each party to pay its own costs.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 151

PEOPLE v. YUEN et al.

Cr. 1648.

District Court of Appeal, Third District. California.

April 14, 1939.

Hearing Denied May 13, 1939.

See 90 P.2d 291.

1. Criminal law ⇐121

In riot prosecution, trial court did not abuse its discretion in refusing to grant defendants a change of venue, where affidavits showed that defendants had been accosted by strangers in the street and ordered to leave the city, but failed to show any widespread hostility toward the defendants.

2. Criminal law ⇐121

Whether defendants in riot prosecution could have obtained a fair trial without change of venue rested largely in trial court's discretion.

3. Criminal law ⇐1150

The trial court's action in riot prosecution, in denying motion for change of venue, would not be disturbed on appeal, in absence of an abuse of trial court's discretion.

4. Jury ⇐82(2)

The fact that juror in riot prosecution had been previously summoned by the coroner, who was himself later disqualified as an elisor, did not disqualify the juror, where he was again summoned by a qualified elisor.

5. Jury ⇐83(1)

One who worked in department of streets and waterworks of city and was a special peace officer of that city, but who was not deputized by the sheriff, and did not receive any orders from the sheriff, was not subject to challenge under statute. Pen.Code, § 1074, subd. 2.

6. Witnesses ⇐246(2)

In riot prosecution, trial court did not err in interrupting attorneys for defendants and for the people, to ask questions of the witnesses for the purpose of eliciting material points.

7. Criminal law ⇐655(1)

The trial court in a criminal prosecution is not confined to the role of sitting as a mere arbitrator between opposing counsel, but has duty to see that errors or extraneous matters are not brought into the case to cloud the issue or confuse the jury.

8. Criminal law ⇐696(5)

Where improper questions are asked in a criminal prosecution, the trial court is acting within the proper scope of its duty in striking out the offending question, whether or not objections were previously made thereto.

9. Criminal law ⇐696(3)

In riot prosecution, witness' statement that "the sheriff lost his head completely" was properly stricken out as a conclusion of the witness.

10. Criminal law ⇐670

In riot prosecution of pickets, trial court properly refused to rule on offer of defendants' counsel to prove by the sheriff that he had an agreement with certain persons, not mentioned, to break the picket line and escort the strike breakers to the mine, where court stated that he would pass on each question as propounded to the witness.

11. Riot ⇐6

In riot prosecution of pickets, evidence that certain deputies of the sheriff destroyed a news reporter's camera and films, containing negatives of events occurring between the date of the riot and a subsequent date, in an attempt to show a general conspiracy on part of the sheriff and deputies to unlawfully break the strike, was irrelevant and inadmissible.

12. Riot ⇐2

In riot prosecution of pickets, it was no defense that the sheriff allegedly made an unlawful attack on the pickets, which they resisted, since it is the duty of a citizen to obey the commands of a peace officer given in his line of duty, and if the officer exceeds his authority, to have recourse to the courts rather than to open resistance.

13. Criminal law ⇐829(1)

In riot prosecution, trial court properly refused to give defendants' requested instruction which was on a subject which had already been covered in an instruction already given.

14. Riot ⇐7

In riot prosecution of pickets, trial court properly refused to give defendants' requested instruction which was objectionable in that it justified a secondary boycott.

15. Criminal law ⇐834(3)

In riot prosecution of pickets, trial court properly modified instruction so as to inform jury that use of physical force and violence was not peaceful picketing.

16. Criminal law ⇐1001

An application for probation is addressed to the sound discretion of the trial court.

17. Criminal law ⇐1001

The trial court did not abuse its discretion in refusing to grant probation to those who were found guilty of riot, where the sentences were not harsh nor excessive, and the record clearly indicated that defendants were guilty and disclosed no valid reason on which they could base a plea for probation.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Henry Yuen and others were convicted of riot, and they appeal.

Judgment affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

George R. Andersen, Herbert Resner, and George G. Olshausen, all of San Francisco, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These defendants were charged by an information with the crime of riot, a misdemeanor. They were tried by a jury, and a verdict of guilty as charged was returned against them. From the judgment of conviction and the order denying a motion for a new trial they now appeal.

The information charges in the following words:

"* * * that on or about the twentieth day of January, 1938, in the County of Nevada, State of California, they did wilfully and unlawfully acting together and with one Grant Spear, and without authority of law, used force and violence, disturbed the public peace, and threatened to use force and violence, which said threats were accompanied by immediate power of execution."

Briefly, it appears that on January 14, 1938, a strike was called by certain mine, mill and smelter workers against the Murchie Mine, situated near Nevada City in Nevada county, and a picket line was established at a point where the road leading to the mine joins the main highway. This picket line, made up of from 60 to 80 men, was continued until the morning of January 20th, when the offense for which the defendants stand convicted occurred.

At about 7 o'clock on the morning of that day Sheriff Tobiassen, together with several of his deputies and state highway patrol officers, proceeded to the junction of the main highway and the Murchie Mine road. The men on picket duty were grouped along the side of and across the Murchie road, and the officers were apparently on the main highway nearby. In a short time a caravan of automobiles bearing mine workers made its way from Nevada City along the highway, and when it arrived at the junction of the two roads, the first car in line stopped, causing the following cars also to come to a stop. There is a dispute as to whether this first car stopped voluntarily or whether it was forced to stop due to the acts of the defendants. The sheriff testified that the first car turned up the Murchie Mine road about 100 feet and stopped. Immediately in front of this car when it stopped was about 75 or 80 striking miners in close formation across the road, and they caused the car to stop. This testimony is amply supported by other reliable testimony.

In this picket group, among others, were defendants Circle, who was immediately in front of the car, and Vassion and Yuen, who were standing in the road and very close to the right side of the car. The

sheriff then informed the group that he was there in his official capacity, and told them they constituted an unlawful assemblage and ordered them to disperse. He heard Vassion say, "Come on boys, we can't let them go through. We will die first. President Roosevelt is behind us, and we stand on our constitutional rights. They shall not go through; we will die first." The sheriff then saw Vassion pick up a rock while others seized the running board of the automobile and raised the car off the ground in an attempt to upset it. Circle then shouted, "Tip the damned thing over, —they won't go through." Witnesses, including the sheriff, testified they saw the hood of the car raised, and saw Yuen at that time throw water on the motor, and saw Vassion throw a rock through the windshield, striking one of the occupants. Others saw Zderich throw rocks at the officers. A pine log was then thrown across the roadway. Other witnesses saw Yuen throwing rocks under the car, letting air out of the tires, and attempting to plug up the exhaust pipe. Circle was seen trying to lift the car over or push it back, exhorting the men to stand on their rights. Vassion, in addition to throwing rocks, also attempted to open the car door. The other defendants were also seen engaged in similar acts of lawlessness. The sheriff threw a gas bomb in the group, and at the same time directed his officers and the highway patrol to clear the road, which was quickly done.

The defendants testified that in the sheriff's car were several guns of various types together with several gas bombs, and attempted upon that account to find fault with him for being thus prepared for an emergency. As to that and to the apparent self-control of the sheriff under great provocation, no criticism can be directed nor to the acts of any of his men. They were officers of the law engaged in assisting persons lawfully entitled thereto, to pass along the Murchie road without let or hindrance. These defendants had purposely gathered on the Murchie Mine road to test the power and temper of the officers of the law. That the officers were sufficiently able to cope with the situation is to their credit.

Upon the conviction of these defendants, after a trial lasting approximately ten days, four days of which were consumed in obtaining a jury, they were found guilty as charged. Their applications for probation were denied, and these defendants were then sentenced to fines and imprisonment from which this appeal is taken.

As grounds for reversal of the judgment and order, appellants set forth these nine specifications of error:

1. The court erred in denying a change in venue;

2. The jury was in the custody of the sheriff, who was a witness and whose acts were an issue at the trial;

3. Erroneous denial of challenges for cause;

4. Misconduct of the trial judge;

5. Erroneous rulings on evidence;

6. Refusal of a vital instruction;

7. The evidence was insufficient to support the verdict against defendant Zderich;

8. The evidence was insufficient to support more than disturbing the peace against any defendant;

9. Legal errors and disqualification of judge resulting in denial of due process of law at the sentencing of defendants.

[1] We will consider such specifications in the order named. As to the order denying a change of venue, we find no error. Some six or eight affidavits were presented, two by defendants herein, alleging instances of threats and bodily harm to affiants, if they did not leave town, etc., and gave details as to the clash between the pickets and the officers on the morning of January 20th; and averring that there was an organized group of vigilantes in Nevada county, intimidating these affiants and others. There was also received in evidence copies of two local newspapers, the Union and Nuggett. Upon this showing the court denied the motion for a change of venue, without prejudice. Some ten days thereafter, and after partial selection of the jury, the motion was renewed and again denied.

[2, 3] The affidavits failed to show any widespread hostility toward these defendants. It is true that the affidavits related instances of these defendants being accosted by strangers in the streets and ordered to leave the city, but who these persons were and how numerous, or acting under whose instigation, or how widespread, is not shown. It might have been and probably was a group as small and as partisan as that of the defendants, and were purposely attempting to make it appear they represented the spirit of the entire

community. Whether or not these defendants could have obtained a fair trial rested largely in the discretion of the trial court, and will not be disturbed unless abuse thereof is shown.

Appellants attempt to show that a concerted attack was being made upon the labor organization known as Congress of Industrial Organization by an organized group of citizens, but the record does not bear out the charge. These defendants were not accused of being members of any organization, nor was criminal syndicalism an issue. The only issue before the court was the charge of rioting. The contention that there was an organized group of vigilantes in Nevada county is not established. It does not appear what the vigilantes were, nor for what they were contending, nor how strong numerically they were in the community. As far as the record discloses the so-called vigilantes may have consisted of a very few individuals, acting upon their own initiative, contrary to the ideas of the large bodies of law-abiding citizens of that county. Until further facts are shown neither the trial court, nor can this court hold that such a course of conduct as set forth in the affidavits would prevent defendants from having a fair and impartial trial. It is not sufficient to show that there was some excitement in the county, nor that personal encounters took place upon the streets in certain isolated instances.

Even when we consider the renewed motion after a partial impanelment of the jury we cannot say that defendants were entitled to a change of venue. Upon the voir dire it appeared that some of the jurors had formed an opinion which they readily admitted, and were promptly excused. Others had discussed the occurrences of the rioting with their friends and neighbors, and had read articles and accounts thereof in the public press, but said they could nevertheless act impartially upon the evidence. It is a matter of general knowledge that in instances of this kind many citizens are seeking to avoid jury duty, and if they can do so by relying upon a fixed opinion, they are inclined to seize upon that as an opportunity to avoid jury duty. The fact that so many prospective jurors voluntarily disqualified themselves is an indication that they were not seeking to become members of the jury, as they could have done if they were trying to qualify as jurors in order to convict these defendants.

From an examination of the entire record we find no error in the refusal to grant the order for a change of venue, nor an abuse of the discretion vested in the trial court in denying such motion.

The second ground is that it was error to place the jury in charge of the sheriff. The record shows, however, that the jury, upon retirement, were delivered into the care of two men, as to whom no objections were made.

[4] The next ground of error is the denial of certain challenges for cause, addressed to certain jurors. These prospective jurors admitted having an opinion, but, it, they said, could be laid aside. Other opinions were based upon conversations with others, or what had appeared in the local press. Mr. Nye admitted having discussed the riot of January 20th, with a great many people, none of whom, however, were, as far as he knew, actual witnesses to any of the events. He did mention the matter to Sheriff Tobiassen, although he had no discussion with him. In the case of Mr. Sutton, he had had numerous discussions with neighbors and members of his family, but characterized such discussions as gossip. As to Mr. Stennett, he could not recall with whom he had discussed the case; that he had formed an opinion therefrom, but he could set it aside and grant the defendants a fair trial. This juror was subjected to a long and sometimes involved examination; the answers to questions in some instances might be deemed disqualifying while other answers seem to qualify the juror, he stating that he could lay aside any prejudice or preconceived opinion, and decide the case solely upon the evidence. It is claimed that juror Harnden was disqualified because he had been previously summoned by the coroner, who was himself later disqualified as an elisor but Mr. Harnden had been again summoned by a qualified elisor. Such a circumstance does not disqualify a juror. That situation arose and was commented upon, although not decided, in the case of People v. Yoakum, 53 Cal. 566, and was directly passed upon in Woolfolk v. State, 85 Ga. 69, 11 S.E. 814; State v. Yordi, 30 Kan. 221, 2 P. 161; Hisaw v. State, 13 Okl.Cr. 484, 165 P. 636, and the reasons there given are acceptable to this court.

[5] Mr. Manuell was working in the department of streets and water works of the city of Grass Valley, and was a special peace officer of that city. He was not deputized by the sheriff, nor did he receive any orders from the sheriff. He was challenged under section 1074, subd. 2 of the Penal Code, but the facts do not support the challenge.

Mr. Still testified he had formed an opinion based upon general conversations, but could set such opinions aside and decide the case upon the evidence.

About seventy-five pages of appellants' opening brief are devoted to citations of errors and misconduct by the trial judge, who is accused of being partisan and indicating a belief in the guilt of the defendants, expressions of opinion derogatory to the interest of defendants, interruption of defendants' counsel, unnecessary brusqueness and sarcasm toward defendants and their counsel, sustaining objections to questions asked of defendants where no objections were interposed, errors in admission and rejection of evidence, and in refusing certain instructions. It is also claimed the judge was disqualified to pass sentence, and that he denied probation solely because defendants had entered pleas of not guilty.

[6-8] It would extend this opinion unduly to consider in detail these many citations of error. This cause required several days of trial. Counsel were vigorously representing their clients in every stage of the proceeding, and perhaps the relationship between court and counsel at times became somewhat strained, but nothing was said or done by the court that could be construed as misconduct nor that could have adversely affected the rights of defendants. At times, too, the case was apparently dragging, and an undue amount of time and emphasis was being given to minor matters. It is to be noted that these defendants were on trial for merely a misdemeanor, yet some ten days were consumed in the trial of the case. Upon several occasions the court interrupted both the attorneys for the People and for the defendants, to ask questions for the purpose of eliciting material points. This was within the power of the court, and no error can be based thereon. Defendants seem to assume that the trial of this case was a contest between counsel, and that the rules of the game were more important than the development of the facts. Assuming that the court did cut short certain lines of examination, the facts were before the jury, and quite evidently time was saved thereby. It is quite evident also that in several of the instances where the court took a hand in the examination the particular witness was deliberately evasive and inclined to quibble. We find no error in this assumption that the court was guilty of partisan cross-examination. It is also charged the court sustained objections, which in fact were not made. The court is no longer confined, if such ever was the rule, to the role of sitting as a mere arbitrator between opposing counsel. It is the function of the court to see that errors or extraneous matter are not brought into the case, which might have the effect of clouding the issue or confusing the jury. Where improper questions are asked the court is acting within the proper scope of its duty in striking out the offending question whether or not objections had been previously made thereto.

[9-11] Certain rulings upon the admissibility of evidence are also cited as error. In one instance a witness stated "the sheriff lost his head completely". This was properly stricken out as clearly being the conclusion of the witness. The facts could have been detailed as they later were, from which the jury could and probably did draw their own conclusions. Upon another occasion counsel for defendants offered to prove by the sheriff that he had an agreement with certain persons, not mentioned to break the picket line and escort the strikebreakers to the mine. Upon this offer the court very properly refused to rule, stating he would pass upon each question as propounded to the witness. So, also, an attempt to show that certain of the sheriff's deputies destroyed a news reporter's camera and films, containing negatives of events occurring between January 20th and April 5th, claiming such conduct indicated a general conspiracy on the part of the sheriff and deputies to unlawfully break the strike. This evidence was not relevant, nor would the pictures if offered for such purpose, have been admissible. Neither the sheriff nor his deputies were on trial. They were peace officers, sworn to uphold the law, and we must assume they were doing their duty and not conspiring to break the law.

[12] Appellants largely based their defense upon the theory they were engaged in peaceful picketing and that the officers

of the law exceeded their authority in dispersing them. They attempted to justify their resistance upon the ground that they were entitled to resist an unlawful attack upon them by the sheriff. That, however, is not the law. It is the duty of a citizen to obey the commands of a peace officer given in his line of duty. If the officer is exceeding his authority, the recourse of the citizen is to the courts and not to open resistance. The course of conduct contended for by defendants would result in a breakdown of all law and order. So, too, the sheriff and his deputies were justified, prior to the morning of January 20th, in studying the various methods which might be employed to disperse the picket line if their orders were ignored, and such officers are not to be censured for their preparation to meet possible or anticipated violence. The fact that they armed themselves with the necessary implements to compel obedience to their commands, was within their province.

[13, 14] The court properly refused to give the following instruction upon two grounds: First, upon the ground that the subject was covered in an instruction already given; secondly, that the proposed instruction is objectionable in that it justified the secondary boycott.

"Defendants instruction No. X. You are hereby instructed that the right of united labor to strike in furtherance of trade interests is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, in the discharge of one employee, or the engagement of another—in brief, in any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employees may engage in a boycott or maintain a peaceful picket line. They may induce others sympathetic with their cause by fair oral or written persuasion or withdraw their social intercourse and business patronage from the employer. They may persuade other workers to respect their picket line and not work for the employer. They may use moral intimidation and coercion of threatening a like boycott of others if the latter do not withdraw their patronage from or refuse employment by the employer."

[15] The court, in Instruction No. XII, also properly modified that instruction by informing the jury the use of physical force and violence was not peaceful picketing.

Appellants claim the evidence was insufficient to justify any verdict against defendant Zderich, claiming he did nothing until after he was gassed. Whether Zderich engaged in the scuffle before or after the gas was discharged in the midst of the picketers is immaterial, for as we have heretofore stated, it was not for them to determine whether or not the sheriff was acting within the limits of his authority and to attempt to meet the order to disperse with force. Sections 726 and 727 of the Penal Code provide:

"Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and the constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse.

"If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county."

The sheriff acted under these sections. He thrice ordered the men to disperse. They were, to the number of 75 or 80, in close formation extended across the road to the mine. Zderich was one of that assemblage. Upon command of the sheriff he, with others, refused to clear the road, and were united in refusing to disperse.

So, also, every physical fact impels to the conclusive belief that these men were acting in concert. In fact the rallying cry of Circle was, "Hold the line." "Tip this car over;" and that of Vassion, "Hold the road; don't let them open it," clearly indicated a concert of action, for each of these defendants is placed by witnesses in the picket line across the road, and were particularly engaged in some active and overt act.

Appellants claim they were not unlawfully assembled and therefore the order of the sheriff to disperse was without authority. The implied finding of the jury was to the contrary. Upon the occasion in ques-

tion some 75 or 100 men had gathered to prevent others continuing their work at the mine. The pickets were not parallel to the road but were in close formation across the road. It does not require 75 men to peacefully picket a narrow roadway. Peaceful picketing does not contemplate the stopping of cars or individuals; if they wish to voluntarily stop and listen to the argument of the pickets that is proper, but if one is coerced, either by violence or threats of violence or intimidation or annoyance or by the mere presence of numbers, such is not peaceful picketing.

Appellants point to the fact that no physical violence had occurred on the picket line prior to the morning of January 20th, but it is also stated that no underground miners had attempted to go into the mine except on a Sunday to attend a meeting. The conduct of some of these defendants on the morning of January 20th does not lend much support to the contention that this body of men were on a twenty-four hour picket line merely to peaceably discuss with their fellow employees working conditions in the Murchie Mine. We rather believe, as apparently did the striking miners, that it was not advisable for one to differ too radically from the views of the 75 pickets. Desiring to return to work, it may be presumed they asked the sheriff for protection, which was their right.

Lastly, it is claimed the trial judge was disqualified in imposing sentence upon these defendants upon the grounds urged in a motion for disqualification filed and heard prior to the commencement of the trial, and secondly, because it is claimed the judge adhered to a rule that probation would be granted only after a plea of guilty. This last charge we think is answered in the statement of the court at the time of imposing sentence, as follows:

"It is well settled that the matter of granting or denying probation rests in the sound discretion of the court.

"The facts and circumstances which move the court in the exercise of that discretion are numerous and varied. For instance, if the defendant is convicted after trial by a jury or the court, and the evidence of his guilt is very strong and there are no mitigating circumstances, the chances of securing probation are far less than if such defendant had pleaded guilty to the charge. This is only one of the many factors which influence the court in the exercise of its discretion. Others to be considered are the nature and character of the offense and the attitude of the defendant at the trial and the strength of the case made out against him.

"This court has never laid down the hard and fast rule that probation will not be granted after trial under any circumstances. The records of this court will show that it has granted probation after trial by jury. Each application must be considered by itself. No two are ever exactly the same."

[16, 17] From this statement it is apparent that probation was not denied solely upon the ground that defendants had not entered pleas of guilty. There is no doubt that an application for probation is addressed to the sound discretion of the trial court, and in view of the circumstances here shown we find no such abuse. The sentences were not harsh nor excessive, and the record clearly indicates the guilt of these defendants, and discloses no valid reason upon which they could base any plea for probation.

After a careful examination of this lengthy record, we find nothing therein justifying a reversal of the judgment or order. The judgment and order must therefore be affirmed. It is so ordered.

We concur: THOMPSON, J.; STEEL, Justice pro tem.

PEOPLE v. SPEAR.

Crim. 1661.

District Court of Appeal, Third District, California.

April 14, 1939.

Hearing Denied May 13, 1939.

1. Riot ⇐6

In riot prosecution, evidence sustained conviction of picket, notwithstanding that picket allegedly did nothing until sheriff allegedly acted illegally in his effort to disperse picket, since the remedy of a citizen for an unlawful act of a sheriff is in the courts rather than by a breach of the peace.

2. Torts ⇐10

Though peaceful picketing is a lawful weapon in a contest between capital and labor, it must in truth be peaceful, since the courts will not tolerate physical violence, or threats of violence, physical intimidation, or misrepresentation of the facts.

3. Sheriffs and constables ⇐77

The law gives to a citizen a right of action against a sheriff for an unlawful exercise of his authority, and if the citizen attempts to decide for himself whether the sheriff is acting within the scope of his authority, the citizen does so at his peril.

4. Riot ⇐1

The law does not countenance a breach of the public peace by a riot in order to enforce a private right, since courts are created for the purpose of determining private rights.

5. Criminal law ⇐1158(3)

In riot prosecution, trial court, who heard the entire examination on voir dire, was by law the judge of the qualifications of a juror, in absence of abuse of discretion.

6. Jury ⇐97(3), 99(1)

In riot prosecution of picket, trial court did not abuse his discretion in overruling a challenge of a juror for cause, where juror stated that she would consider defendant innocent until proven guilty, and that whether or not he was a member of union or went on strike would not influence her as to his guilt or innocence, and that she had read nothing about the case and had heard very little of it discussed.

7. Criminal law ⇐1158(3)

The question whether a prospective juror is or is not actually biased is to be determined by the trial judge.

8. Criminal law ⇐1158(3)

Where answers of prospective juror through a long examination by both the people and the defendant were conflicting, the trial court's denial of defendant's challenge for cause was conclusive.

9. Riot ⇐6

In riot prosecution of picket, trial court did not err in refusing to permit picket to show that it was sheriff's intention to take miners through picket line in automobiles regardless of pickets' rights of persuading miners to stay away, since to stop automobiles for such purpose was a violation of the fundamental right of privacy.

10. Judges ⇐49(2)

Trial judge was not disqualified to try riot prosecution of picket by reason of remarks made by him at the time of the sentence of certain defendants in another riot prosecution, that members of same union to which those defendants belonged as well as the accused, published a paper in which the judge was attacked, that thousands of postcards addressed to the judge demanded that the defendants be dismissed, that inasmuch as neither those defendants nor their counsel had repudiated such actions, the judge would assume that they approved thereof, and that one of the defendants should not have used the name of the President of the United States in defense of lawlessness and civil disorder.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Grant Spear was found guilty of riot, and he appeals.

Judgment affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

George R. Andersen, Herbert Resner, and George Olshausen, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant herein was charged by information with the crime of riot, was found guilty, and now appeals from that judgment of conviction.

This case is identical as to the facts with the case of People v. Yuen et al., Cal.App., 89 P.2d 438, which we have heretofore considered and this day filed. As there

pointed out, a strike was in progress at the Murchie Mine near Nevada City. A picket line had been established at the junction of the main highway and the mine road. About 7 o'clock in the morning on January 20th, about 75 or 80 pickets were gathered there in close formation across the road and extending up on either bank. At this point the road is just about wide enough for two cars to pass and the banks on each side are some 2 or 3 feet high. Sheriff Tobiassen of Nevada county drove up on the morning in question, and shortly after his arrival a caravan of automobiles approached the intersection coming from Nevada City. This caravan contained men who wished to proceed to the mine to go to work. When the leading car approached the Murchie road, the pickets lined up across the road and on to the adjacent banks and the car came to a stop "right up against those men". A group of men were "directly in front of the automobile". A man named Circle who was "right up against the bumper of the car and sometimes on the bumper", was waiving his hands and shouting, "they cannot pass; we cannot let them go through; we will die first", and called upon his associates to assist him in holding the road. A rock was thrown through the windshield and the car was seized and attempts were made by the pickets to overturn it. It was then or just prior thereto that the sheriff ordered the group to disperse. Upon their failure so to do, tear gas was discharged into the group of pickets, and a scuffle ensued between the officers of the law and the striking miners.

[1] It is the contention of Spear, the appellant, that he did nothing until after the discharge of the gas and that he was standing on the bank beside the road, and when the gas was used he jumped down into the road. Witnesses for the prosecution, however, testified that Spear was on the bank at the side of the road, and jumped from the bank on to the back of a deputy sheriff, knocking the latter down, and then proceeded to pummel him with his fist. It was also testified by another witness for the prosecution that while another picket held the deputy sheriff, Spear struck him.

The principal argument of appellant seems to be that the sheriff acted illegally in his effort to disperse the pickets, and that he, Spear, was justified in replying thereto with force. We find ample evidence in the record to show that these pickets were not engaged in peaceful picketing and that the sheriff was entirely justified in his course of action. It is undisputed that between 60 and 80 men were standing in close formation in and across the narrow Murchie road awaiting the approach of the cars. These men were not standing along the side of the road nor parallel thereto, as would be the natural position had they intended merely to speak to the men in the cars as the cars passed along the road, but were blocking the highway.

[2] As was said by Judge Dooling in an opinion rendered by him in the trial of the case of Howard Automobile Company Employees v. Retail Salesmen's Local Union No. 1067, cited in 13 California State Bar Journal, page 13:

"Picketing in the public mind is associated with violence and intimidation. There was a time, and not so long ago, when the courts of California, in common with most of the courts of the country, were committed to the idea that there could be no such thing as peaceful picketing. With the decision of the Lisse case, supra, Lisse v. Local Union, etc., 2 Cal.2d 312, 41 P.2d 314, our Supreme Court finally turned its back on this now generally outmoded doctrine. But while peaceful picketing is now recognized as a lawful weapon in the contest between capital and labor, it must in truth be peaceful. The courts will not tolerate physical violence, or threats of violence, physical intimidation or misrepresentation of the facts, and where these exist they must be unhesitatingly enjoined. As so limited, peaceful picketing consists of bringing the facts to the attention of the general public by means of one or more persons stationed about the place of employment which is being picketed. So conducted, peaceful picketing is an attempt to bring to bear upon the picketed employer the pressure of the opinion of such portion of the public as may be sympathetic to the objects of the picketing organization, by inducing that portion of the public to cease dealing with the picketed business. * * * The resort to any * * * physical intimidation directed toward the employer, his employees or any member of the public, cannot and will not be tolerated by the courts. Upon so much all courts and all right thinking people must be agreed."

It would seem clear that such a large body of men, even if not gathered for that

purpose, would nevertheless have the effect of intimidation or coercion, and to that extent picketing in the instant case was a violation of the law, and the sheriff was within his rights in ordering them to disperse. Even if we were to assume the defendant was justified in resisting the use of gas by the sheriff he was not justified in attacking the deputy, as there is no claim that the deputy had done anything to Spear prior to Spear's assault upon him.

Undoubtedly this large group of men were there for the purpose of seeing to it that no underground miners went through to the mine. It did not require actual or physical violence to accomplish this purpose, for their presence alone in such numbers, and under the circumstances then existing, would result in intimidation and fear, or at least would constitute an annoyance to passers by. This being true, such act would constitute an unlawful obstruction of the road and prevent the lawful use thereof by the public by interfering with traffic thereon, and it was to that extent an unlawful assemblage. The sheriff was not only justified, but in duty bound, to disperse this unlawful gathering, and the refusal to disperse upon the command of the sheriff was a violation of the law. These conditions existed prior to any force used by the sheriff, and if defendant Spear remained in the group after being ordered to disperse, his presence there was illegal and the sheriff was justified in using sufficient force to clear the highway.

[3, 4] It is not within the bounds of reason to expect a jury or this court to believe that the attempt to tip over the car of a third person, throwing rocks through the windshield of a nearby car, the pouring of water upon its distributor, or the stopping of cars proceeding along the road, was done merely to indicate a lawful resistance to an officer of the law. The law gives to a citizen a right of action against a sheriff for an unlawful exercise of his authority, but if the citizen attempts to decide for himself whether or not the sheriff is acting within the scope of his authority he does so at his peril. The law does not countenance a breach of the public peace in order to enforce a private right. Courts are created for the purpose of determining those rights, and any other rule would result in private battles going on at various times and places, to the great inconvenience of the general public. Such a rule is not to be accepted or approved.

The point is made in this case, as it was in the case of People v. Yuen, supra, that the appellant's motion for a change of venue was improperly denied. Practically the same showing was made in this case as was made in the former case, and we are impelled to the same conclusion.

So, also, were appellant's challenges for cause properly denied. He cites the case of juror Goodnight, claiming that she admittedly had an opinion. Appellant attempted to show that Mrs. Goodnight was prejudiced against him because of the organization to which he belonged. In answer to this question by the court, "Do you believe he was guilty because he belonged to a Union or because he was a picket," she answered, "No, because there might be things happen that might make it look like he was guilty when he wasn't. He might have been there in the gang when he might not have been guilty." She also stated in answer to various questions that she would consider him innocent until he was proven guilty, and that whether or not he was a member of the C. I. O. or went on strike would not influence her as to his guilt or innocence, and that she would decide the case according to the evidence and the law. She also stated that she had read nothing about the case and had heard very little of it discussed, and knew nothing as to whether it was right or wrong.

[5, 6] We appreciate that where it is impossible, as here, to set forth the entire examination on voir dire of the juror, it is difficult for a reader of an opinion by a court to get the effect thereof, but having read the transcript, we agree with the trial judge, who heard the entire examination, and who is by law the judge of the qualifications of a juror in the absence of abuse of discretion, that juror Goodnight was qualified to act as a juror, and the record supports such conclusion.

[7, 8] In the case of juror Bice, a somewhat similar condition existed. He was carried through a long examination by both the People and appellant and his answers conflicted from time to time. But, as said in the case of People v. Riggins, 159 Cal. 113, 112 P. 862, the question of whether or not a prospective juror is or is not actually biased is to be determined by the trial judge. If the answers were con-

flicting, the decision of the trial court is conclusive upon this court.

[9] It is claimed the court erred in refusing to permit defendant to show that it was the intention of the sheriff to take the miners through the picket line regardless of the pickets' rights of persuading them to stay away. To begin with, we cannot assume that the pickets were attempting to form a "line," if we mean thereby a solid formation across the road, and we cannot assume that they were lined up with the intention of compelling an automobile to stop in order that they might talk to the occupants. Such would be a violation of the fundamental right of privacy. Southern California Iron & Steel Co. v. Amalgamated Association, 186 Cal. 604, 200 P. 1; Allis Chalmers Co. v. Iron Moulders' Union, C.C., 150 F. 155. In other words, a picket line is nothing more substantial than an advertisement of a fact to be read or not, as one would read a billboard. We do not believe that the refusal to permit the witness to answer the question as to the intention of the officers in proceeding to the junction of the highways is material. It is what they did in which the court is concerned.

[10] It is claimed that the trial judge was disqualified to try this case by reason of the remarks made by him at the time of the sentence of the defendants in the case of People v. Yuen, supra. In his remarks the trial judge called attention to the fact that members of the same union to which those defendants belonged, as well as appellants here, published a paper in which they attacked the judge and other county officials of Nevada county, and that thousands of postcards addressed to the judge demanded that the defendants be dismissed. Inasmuch as neither those defendants nor their counsel had repudiated such actions, the court stated he must assume they approved thereof. The judge referred to the fact that some of those defendants at various times appeared before labor groups in an endeavor to raise funds for their defense, in which they claimed to be martyrs in the cause of labor. He also criticized one of the defendants for using the name of the President of the United States in defense of lawlessness and civil disorder. We can see nothing in these remarks that indicate any personal animosity toward this defendant nor his cause.

Appellant cites the case of Briggs v. Superior Court, 215 Cal. 336, 10 P.2d 1003, as authority for disqualification of the judge. In that case a judge had definitely expressed himself at the time of the hearing upon the question of his disqualification to the effect that prior statements published in a certain newspaper were unqualifiedly false. The statements in the newspaper were the gravamen of the offense. Here the trial judge at no time expressed himself as saying that he believed the statements made by the Yuen defendants were in any manner false. As a matter of fact he stated that the postcards he received were false because they were not in accord with the testimony of those defendants on the witness stand. Nowhere does it appear that he had any animosity against defendant Spear, who was not a defendant in the Yuen case, and the only witness whom he criticized was a man named Irwin, who did not testify in the Spear case. The qualifications of Judge Tuttle were attacked prior to the trial of this case, and his qualifications were passed upon by Judge Landis, who heard the evidence and considered the various affidavits submitted, found Judge Tuttle to be impartial and not disqualified. There is nothing in the showing here made that would justify us in disturbing the findings of Judge Landis.

As to the so-called rule of Judge Tuttle as to probation, we have already considered that in the Yuen case and need not again repeat what we there said.

Having read the record in these cases, and the briefs in opposition and support of the judgment, we are satisfied that this defendant was properly found guilty, and no errors affecting his substantial rights were committed.

The judgment and the order, therefore, must be affirmed, and it is so ordered.

I concur: THOMPSON, J.

32 Cal.App.2d 204

CORNELL v. HOLLYWOOD TURF CLUB et al.

Civ. 12083.

District Court of Appeal, Second District, Division 2, California.

April 17, 1939.

1. Appeal and error ⇐931(1)

Every presumption is to be indulged in favor of judgment of trial court, and findings must be given a construction that will support judgment if such construction can reasonably be placed upon them.

2. Appeal and error ⇐931(1)

On appeal, it is to be concluded that trial court based its judgment upon such finding which, being sustained by the evidence, is sufficient to support the judgment.

3. Trial ⇐395(1)

Findings of trial court that there was oral contract of employment of plaintiff as publicity director for defendant turf club entered into with president of defendant, and that contract was made by exchange of telegrams between plaintiff and president of defendant, supported judgment permitting plaintiff to recover for breach of contract.

4. Appeal and error ⇐1071(1)

Where finding of trial court that there was oral contract of employment of plaintiff as publicity director for defendant turf club was amply sustained by evidence and sufficient to support judgment permitting plaintiff to recover for breach of contract, uncertainty in other finding that contract was completed by exchange of telegrams between plaintiff and president of defendant was immaterial.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Roscoe C. Cornell against the Hollywood Turf Club and others for the amount unpaid upon a contract for the employment of plaintiff for the period of one year. From a judgment for the plaintiff, the named defendant alone appeals.

Affirmed.

Freston & Files, of Los Angeles, for appellant.

Bautzer & Ryan, of Hollywood (Bernard M. Silbert, of Hollywood, of counsel), for respondent.

WOOD, Justice.

Defendant Hollywood Turf Club appeals from a judgment awarding plaintiff $4,147.33, the amount unpaid upon a contract for the employment of plaintiff for the period of one year at a salary of $125 per week. Plaintiff commenced work on September 21, 1936, and his services were discontinued on January 18, 1937, without fault on his part. The amount awarded was for plaintiff's compensation during the remainder of the period, less certain sums which plaintiff earned elsewhere.

The appellant corporation authorized its president, Alfred E. Green, to employ a publicity director to assist in the promotion of the affairs of the corporation, the object being to open a race track in July, 1937. Mr. Green met Mark Kelly, a sports writer, and discussed the availability of plaintiff, who was then employed by United Artists theatre in San Francisco at a salary of $125 per week. Mr. Green told Mr. Kelly that he would pay plaintiff the sum of $125 per week plus expenses and would guarantee him a year's employment and asked Mr. Kelly to "contact" plaintiff on the subject. Mr. Kelly thereupon communicated with plaintiff and discussed with him the terms of the proposed employment. Mr. Kelly was also asked by Mr. Green to communicate with Harry Brand, who was at that time in position to give permission to plaintiff to leave the service of United Artists theatre. Mr. Green later communicated with Mr. Brand, who testified at the trial: "Mr. Green said to me, 'We cannot pay him $150 a week. We can just pay him what you are paying him, the United Artists, $125 a week.' I said, that wasn't quite fair to Mr. Cornell because he was doing a good job, meaning he ought to give him an increase. Mr. Green promised if at the end of the year he did a fine job he would increase his salary to $150 a week." Following these conversations a series of six telegrams passed between plaintiff and Mr. Green. These telegrams follow:

"San Francisco Calif

"1 1056 A 1936 Sep 1 am 11 31

"Al Green Columbia Studios Hollywood Calif

"Harry relayed proposition to me my understanding $125 a week with legitimate expenses and increase when track opens if I do the job you expect thats OK with me and thanks please wire me confirmation by

Western Union here so that I can arrange to leave when do you want me

"Duffy Cornell United Artists Theatre"

"1936 Sep 1 pm 1207

"Hollywood Calif 1 1147A

"Duffy Cornell, Care United Artists Theatre 1077 Market St

"Would you be interested accepting publicity directorship of new summer track starting immediately stop if so wire me Ambassador Hotel full particulars regards

"Alfred E. Green"

"San Francisco Calif

"1 1248P Sep 1 pm 12 59

"Alfred E. Green Ambassador Hotel Los Angeles

"Glad to accept thanks Harry told me 125 and legitimate expenses this acceptable with provision for more when track opens provided I do job expect ready come any time must give theatre some notice please confirm if agreeable and advise when you want me regards

"Duffy Cornell"

"Los Angeles Calif

"2 706P 1936 Sep 2 pm 7 19

"Duffy Cornell Care United Artists Theatre 1077 Market St. SFran

"Will verify appointment Friday with board of directors stop am sure everything will work out regards

"Al Green"

"1936 Sep 8 pm 1 17

"Los Angeles Calif 8 1233P

"Duffy Cornell 1077 Market St Care U A Theatre

"When can you leave publicity should start at once regards

"Al"

"San Francisco Calif

"8 1936 Sep 9 am 224

"Alfred Green Hotel Ambassador LosA

"Obtained release from theatre week from Saturday gave notice today please wire me condition of job salary and so forth assume position good for year as first meeting ten months away have assurance of support from valuable sources happy be with you prepared to give you high class campaign regards.

"Duffy Cornell."

After the receipt of the last telegram appellant's board of directors authorized Mr. Green to engage the services of plaintiff on the terms mentioned therein. Following the sending of the telegrams plaintiff and Mr. Green conversed over the telephone concerning the proposed contract and on September 21, 1936 plaintiff met Mr. Green in Los Angeles and again discussed the terms of the contract of employment. Mr. Green at that time orally agreed that there would be a year's work for plaintiff and on the same day plaintiff actually commenced work for the corporation. On October 28, 1936 a temporary permit which had been issued to appellant was revoked and Mr. Warner assumed control of the corporation's business. On his orders expenses were cut and nearly all of the corporation's employees, including plaintiff, were discharged.

On the subject of the contract of employment the trial court found: "That commencing on or about the 1st day of September, 1936, in the City of Los Angeles, County of Los Angeles, there was an exchange of wires between the plaintiff and said Alfred E. Green for and on behalf of the Hollywood Turf Club, a California corporation, wherein and whereby the corporation contracted to employ the plaintiff at a salary of One Hundred and Twenty-five ($125.00) Dollars per week and legitimate expenses for a period of one year from the date when he should commence his duties with said corporation. That on or about the 21st day of September, 1936, the said offer was reiterated by the corporation, through its President, to the plaintiff in person, and said offer was duly accepted by the plaintiff on the said date, and on the same date, the plaintiff commenced his duties with the said corporation * * *."

Appellant contends that there is an irreconcilable conflict in the findings; that the contract was completed by the exchange of the first five telegrams, which do not provide for the definite term of employment; and that the contract is unenforceable because of the absence of definite agreement as to its terms.

[1-4] We are satisfied that the court has found the parties entered into a complete and binding oral agreement on September 21, that this finding is supported by the evidence and in turn supports the judgment. It is elementary that every presumption is to be indulged in favor of the judgment and that the findings must be given a construction that will support the judgment if such a construction can reasonably be placed upon them. On appeal it is to be concluded that the trial

court based its judgment upon that finding which, being sustained by the evidence, is sufficient to support the judgment. American National Bank v. Donnllan, 170 Cal. 9, 148 P. 188, Ann.Cas.1917C, 744. We do not perceive any contradiction in the findings. The trial court found that there was an oral contract for the period of one year and also found that the same contract was made by the exchange of "wires". If the telegrams should be eliminated from consideration it is clear that the court's finding on the oral contract would be amply sustained by the evidence. An examination of the telegrams in evidence discloses that they fail to show that the parties had come to a definite agreement. The first two telegrams apparently crossed, neither one being an answer to the other. The first telegram from Mr. Green merely inquired if plaintiff would be interested in accepting the position. The second telegram from Mr. Green informed plaintiff that he, Green, would verify the appointment with the directors and expresses confidence that "everything will work out". The third telegram from Mr. Green asked when plaintiff could leave San Francisco. This was followed by a telegram from plaintiff in which he stated that he "assumes" that the position would be good for a year and asked for the "condition of job, salary and so forth". Apparently no one on behalf of appellant answered this telegram, although Mr. Green testified that he had sent a "wire" to plaintiff "accepting his proposal and asking him to come as soon as he possibly could". Some uncertainty is placed upon this testimony in view of the fact that the witness further testified that all of the wires were in evidence. If Mr. Green did in fact send the wire referred to in his testimony plaintiff's right of recovery was complete for in that event it must be held that the terms were finally agreed upon by an instrument in writing. If on the other hand appellant did not convey its acceptance of plaintiff's terms by the telegram mentioned by Mr. Green it necessarily follows that the contract actually made by the parties was the oral agreement found by the court to have been made on September 21, the day when plaintiff commenced to render services. In either event the judgment for plaintiff must be upheld.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

32 Cal.App.2d 217

PEOPLE v. TELLEZ et al.

Cr. 441.

District Court of Appeal, Fourth District, California.

April 17, 1939.

1. Larceny ⇐68(1)

Evidence that defendants moved automobile four miles from where it was left by owner and there stripped automobile of tires, wheels and other personal property, presented issue of fact whether automobile was taken by defendants with intent to permanently deprive owner of it.

2. Criminal law ⇐568

Intent may be proved by circumstantial evidence and may be inferred from the circumstances surrounding the crime.

3. Automobiles ⇐339

Statutes making it a crime to take any automobile for purpose of temporarily using or operating it without permission of owner is intended to prevent unauthorized "joy-rides" in other people's automobile, and is a crime distinct from theft. Pen.Code, § 499b.

4. Automobiles ⇐357

Where evidence showed that defendants moved automobile four miles from where it was left by owner and there stripped automobile of tires, wheels and other personal property, trial court properly refused to instruct jury relative to statute penalizing crime of taking automobile for purpose of temporarily using or operating it without permission of owner. Pen.Code, § 499b.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Benjamin Tellez and George Valencia were convicted of grand theft, committed by the stealing of an automobile, and Benjamin Tellez alone appeals from the conviction and the order denying his motion for new trial.

Judgment and order affirmed.

Edward B. Patterson, of El Centro, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendants were charged with grand theft, committed by the stealing of an automobile. Three prior convictions of felonies were alleged against Valencia. Tellez appeals from the judgment and the order denying his motion for new trial.

Tellez presents three grounds which he urges require a reversal of the judgment and order: (1) That the evidence does not show that defendants took the automobile with the intent to permanently deprive the owner of the same; (2) that the trial court erred in submitting to the jury, as a question of fact, defendants' intent in taking the automobile; (3) that the trial court erred in refusing the request of the attorney for Tellez to instruct the jury by giving either the text or substance of section 499b of the Penal Code.

Tellez admits he is guilty of petit theft and urges us to modify the judgment by finding him guilty of that crime and not guilty of grand theft.

On the evening of November 20, 1938, Guadalupe Perez, the owner of the automobile, parked it in front of a dance hall in Holtville in Imperial county. He locked the ignition and took the key with him into the dance hall. At about twelve o'clock midnight he found his car missing. About an hour and one-half later it was found on a dirt road about four miles from Holtville. Its wheels and tires had been removed and a robe and some small tools were missing.

When defendants were arrested they admitted moving the automobile from Holtville to the place where it was found. They also admitted taking the missing property. As they could not start the engine of the Perez car, Valencia guided it while Tellez, driving his own automobile, pushed it from in front of the dance hall to the spot where it was found. Both defendants admitted taking the tires, wheels and other personal property with intent to appropriate them to their own use but denied any intent to permanently deprive Perez of the balance of his automobile. They further admitted that they did nothing towards helping Perez recover his car and did not care whether or not he ever recovered it.

[1] Under these circumstances the question of intent was one of fact which the trial court properly submitted to the jury. The facts of the case justify the reasonable inference which the jury drew from them; that defendants intended to permanently deprive Perez of his automobile. That inference having been drawn by the jury, its implied finding is final and conclusive here even though the same facts might have supported a contrary inference.

[2] What we have already said also disposes of Tellez's second contention. Under the record here the intent of defendants was an issuable fact properly submitted to the jury. Intent may be proved by circumstantial evidence and may be inferred from the circumstances surrounding the crime. People v. Arnold, 17 Cal.App. 68, 118 P. 729. Instructions on the question of intent quite similar to those given in the instant case were held proper in People v. Bones, 35 Cal.App. 429, 170 P. 166.

[3, 4] The trial judge did not err in refusing to read section 499b of the Penal Code or to give a summary of it to the jury. That section makes it a crime for any person to take any automobile for the purpose of temporarily using or operating it without the permission of the owner. It is clearly intended to prevent unauthorized "joy riding" in other people's automobiles. It defines a crime separate and distinct from and not necessarily related to theft. Under the facts before us there was no occasion to give any instruction on the provisions of that section.

The judgment and order are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

BUCKLEY et al. v. SHELL CHEMICAL CO. et al.

Civ. 2243.

District Court of Appeal, Fourth District, California.

April 17, 1939.

Rehearing Denied May 15, 1939.

1. Sales ⇐267

Written order containing agreement that seller of fertilizer should not be held responsible for "productiveness or quality" of buyers' crops barred buyers' action for breach of alleged oral warranties of quantity and quality of potato crop in absence of fraud.

2. Evidence ⇐441(9)

Written order for fertilizer was presumably a complete expression of the entire agreement between the parties unless obtained by fraud, as respects alleged oral warranties.

3. Sales ⇐267

Agreement that seller of fertilizer should not be held responsible for productiveness or quality of buyers' crops was not limited by assignment of weather hazards as reason for agreement so as to permit action by buyers for breach of alleged oral warranties where crop was not in fact affected by weather hazards.

4. Principal and agent ⇐140

The general rule is that an undisclosed principal may elect to take the benefits of a contract made by an agent in his own name.

5. Principal and agent ⇐140

The general rule that an undisclosed principal may elect to take the benefits of a contract made by an agent in his own name prevails in California.

6. Principal and agent ⇐143(3)

Undisclosed manufacturer of fertilizer was entitled to take advantage of written agreement exacted by retailer from buyers that retailer should not be held responsible for productiveness or quality of buyers' crops.

7. Trial ⇐203(1)

Each of the parties to an action is entitled to have his theory of the case presented to the jury in the instructions.

8. Trial ⇐250

In action by buyers of fertilizer against retailer and manufacturer for damages because of allegedly fraudulent representations, where controversy existed concerning relations if any, between retailer and manufacturer, giving of instruction dealing with relation of master and servant in an attempt to correctly define an independent contractor as contrasted with other relationships, including that of master and servant, and not intended as instruction on the relation of master and servant, was not erroneous.

9. Appeal and error ⇐928(4)

Where the record does not disclose at whose request any instruction was given and fails to show that any instruction was given by the trial judge on his own motion, presumption on appeal is that any erroneous instruction was given at request of appellant.

Appeal from Superior Court, Kern County; H. E. Schmidt, Judge.

Action by Jennie R. Buckley and J. A. Buckley, individually and as copartners, doing business in their joint names as a copartnership, against Shell Chemical Company and others. From a judgment for defendants, plaintiffs appeal.

Judgment affirmed.

Harvey, Johnston & Baker, of Bakersfield, for appellants.

Borton, Petrini & Conron, of Bakersfield, and Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

MARKS, Justice.

This is an appeal from a judgment rendered after defendants' motions for nonsuit on plaintiffs' first cause of action had been granted, and after a jury had returned a verdict in favor of defendants on the second cause of action. The first cause of action was based on an alleged breach of warranties and the second was for damages resulting from alleged fraud and deceit.

Plaintiffs, mother and son, are farmers with about 52¼ acres of land near Wasco, in Kern county, upon which they raise potatoes. The Shell Chemical Company is a corporation which manufactures a fertilizer known as Shell Anhydrous Ammonia, to which we will refer as Shell Ammonia. The Greening-Smith Company is a partnership engaged in the business of selling and distributing fertilizers, among which

is Shell Ammonia. Paul Greening is a partner in Greening-Smith Company and a salesman for it. Elmer Anderson is the father-in-law of J. A. Buckley and on and after February 4, 1936, was salesman for Greening-Smith Company.

In the summer of 1935, Anderson read advertisements of Shell Ammonia and called the attention of J. A. Buckley to them. As Buckley was contemplating planting potatoes for a fall crop he was interested in the advertisements and Anderson contacted Greening-Smith Company which sent Paul Greening to Kern county. He went with Anderson to plaintiffs' farm where the two interviewed Buckley. Greening made a sales talk on the virtues of Shell Ammonia as a fertilizer. Among other things he told Buckley that during the year 1935, as an experiment, Shell Ammonia had been applied as a fertilizer on potatoes, for the first time, in the neighborhood of Wasco on a farm known as the Lachenmaier ranch, a few miles distant from the Buckley farm; that a report of this experiment was being prepared. This report was delivered to Anderson in December, 1935. He read it and gave it to Buckley. Buckley admitted receiving the report. He also admitted reading one page of it, turning other pages and glancing at them but denied reading them.

About a month later Greening and Anderson again met Buckley at the Wasco farm where Buckley signed an order to Greening-Smith Company for five thousand pounds of Shell Ammonia to be applied to fifty acres of potatoes by Greening-Smith Company. The order concluded as follows:

"Because of weather hazards which affect the productiveness and, or, quality of growing crops, it is understood and agreed that Greening-Smith Company shall not be held responsible for productiveness and, or, quality of the undersigned's crops.

"Salesman E. M. Anderson
"Purchaser J. A. Buckley"

Buckley planted the fifty acres to potatoes and they were fertilized with Shell Ammonia. He also planted an adjoining 2¼ acres to potatoes which were fertilized with Ammonia Sulphate. The land fertilized with Ammonia Sulphate produced a good normal crop of potatoes. The fifty acres fertilized with Shell Ammonia produced about one quarter of a normal crop. The potatoes were of an inferior quality. Plaintiffs estimate their damage, solely by reason of the small crop and its poor quality, at $30,322.47.

Plaintiffs base their first cause of action on the breach of express verbal warranties alleged to have been made by Greening which they summarize in their brief as follows:

"1. That Shell Anhydrous Ammonia as applied by respondents in the amount of one hundred (100) pounds per acre during the crop season was a proven fertilizer for potatoes, was entirely out of the experimental stage, and no other fertilizer for appellants' crops was required.

"2. That Shell Anhydrous Ammonia so used and applied as aforesaid as a fertilizer for potatoes always produced a yield equal to and of better quality than that produced from use of Ammonium Sulphate.

"3. That Shell Anhydrous Ammonia would be by respondents equally distributed over appellants' potato ground and to the potato plants.

"4. That Shell Anhydrous Ammonia so used and applied, always softened the soil and thereby produced a smoother and a better marketable grade of potatoes than that produced from use of Ammonium Sulphate.

"5. That respondents were skilled and experienced in the method of applying Shell Anhydrous Ammonia to potato crops, and through their methods they promised to apply said chemical to said crop so that said 50 acres of potato land would produce a 1936 crop in yield and quality better, or at least equal to potatoes grown with Ammonium Sulphate, as theretofore applied by appellants."

Plaintiffs urge that the trial court erred in granting the motion for nonsuit to the first cause of action because the warranties made by Greening went far beyond the terms of the disclaimer of warranties which we have quoted, and because that disclaimer was expressly conditioned on unfavorable weather which did not exist during the 1936 cropping season as that season was ideal for potato raising.

[1, 2] The parol warranties upon which plaintiffs rely were all pointed to the production of a large crop of good quality potatoes. If those warranties had been made and had they been fully performed no other result could have been expected. In other words, the substance of those

warranties is: We warrant the qualities of Shell Ammonia and that it will be applied by us with skill so that your potato crop will be equal to or better in quality and quantity than your former crops raised and fertilized with Ammonium Sulphate. Thus those warranties were simply of the quality and quantity of the potatoes to be raised. Plaintiffs' evidence of breach of them was confined to proof of lack of quality and quantity in the potato crop. The written waiver of warranties in the order was to the effect that plaintiffs could not hold Greening-Smith Company liable for failure of the productiveness (quantity) or quality of the potato crop. This is a complete disclaimer of the warranties upon which plaintiffs rely (Larson v. Inland Seed Co., 143 Wash. 557, 255 P. 919, 62 A.L.R. 444) and as it is in writing it is presumed to be a complete expression of the entire agreement between the parties, unless obtained by fraud, which is not established here. Heffner v. Gross, 179 Cal. 738, 178 P. 860. Thus this disclaimer of warranties in writing must be controlling here and defendants cannot be held liable because of poor quality or lack of quantity of the crop. Couts v. Sperry Flour Co., 85 Cal.App. 156, 259 P. 108; Davis Co. v. Bertrand Seed Co., 94 Cal. App. 281, 271 P. 123.

[3] To escape the foregoing conclusions plaintiffs urge that the phrase in the disclaimer of warranties, "Because of weather hazards which affect the productiveness and, or, quality of growing crops", are words establishing a condition under which the disclaimer of warranties will only come into effect; that because there was no proved weather hazards nor unfavorable weather, there was no disclaimer of warranties. We do not so understand this phrase in the disclaimer. This phrase is not a condition limiting the disclaimer. It is merely the statement of a reason why the Greening-Smith Company refused to warrant the quality and quantity of the potato crop. It leaves the disclaimer binding on the parties to it regardless of good or bad weather conditions.

Plaintiffs attack the order granting the motion for nonsuit of the Shell Chemical Company because the written waiver of warranties expressly ran to the Greening-Smith Company and by its clear terms did not include the Shell Chemical Company.

Plaintiffs purchased the Shell Ammonia from the Greening-Smith Company which delivered and placed it on their land. They had no knowledge that the Shell Chemical Company was connected with the transaction until after the first application of the Shell Ammonia. They sought to hold the Shell Chemical Company as the undisclosed principal of the Greening-Smith Company which they maintain acted as its agent.

[4] It is a general rule that an undisclosed principal may elect to take the benefits of a contract made by an agent in his own name. This rule is thus stated in 2 American Jurisprudence 320: "Where an agent makes a simple contract for his principal, but, contracting as if he were principal, conceals the fact that he is an agent, the principal may at any time appear in his true character and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent. It has accordingly been held that any benefit or advantage derived by the agent in the nature of a warranty, either express or implied, inures to the benefit of the undisclosed principal."

[5] These principles prevail in California. In Schader v. White, 173 Cal. 441, 160 P. 557, 559, it was said: "Appellants' second objection is that of lack of mutuality in the contract, herein arguing that because Mrs. Schader had not herself signed the executory contract, she could not have compelled specific performance, and therefore it was inequitable to decree specific performance against her. But it is sufficient, in addition to what has been said herein, to add that as an undisclosed principal she could sue or be sued. Eldridge v. Mowry, 24 Cal. App. 183, 140 P. 978; Walton v. Davis, 22 Cal.App. 456, 134 P. 795; Ford v. Williams, 62 U.S. (21 How.) 287, 16 L.Ed. 36; Pomeroy Spec. Per. (2d Ed.) § 89; 31 Cyc. 1416." To the same effect are Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Cowan v. Tremble, 111 Cal.App. 458, 296 P. 91.

[6] It follows that as plaintiffs are attempting to impose liability on the Shell Chemical Company as the undisclosed principal of Greening-Smith Company, the former may take advantage of the dis-

claimer of warranties which by its terms runs in favor of the purported agent.

In support of their second cause of action for damages because of false and fraudulent representations, plaintiffs rely upon the same statements and representations alleged to have been made by Greening which form the basis of their action for breach of warranties. As we have already quoted their summary of those representations we will not repeat them here.

The evidence is in sharp conflict on the question of whether or not those representations were ever made. If in fact the great preponderance of the evidence on this question is not in favor of defendants, there is sufficient in the record to support the implied finding that they were not made. There is also evidence to support an implied finding that the partial failure of the potato crop was due to poor farming rather than to the use of Shell Ammonia as a fertilizer. Plaintiffs tacitly admit the correctness of these conclusions by failing to argue the insufficiency of the evidence to support the verdict and judgment.

Plaintiffs complain of nine instructions given by the trial court on the questions of master and servant, authoritative control and independent contractor.

[7] It is the theory of plaintiffs that the relationship of principal and agent existed between the Shell Chemical Company and Greening-Smith Company. It is the theory of defendants that there was no relation of agency between the two companies. Each of the parties was entitled to have his theory of the case presented to the jury in the instructions. The portions of the instructions dealing with the relation of master and servant evidently were inserted in an attempt to correctly define an independent contractor as contrasted with other relationships including that of master and servant and evidently were not intended as instructions on the relation of master and servant. We find no error in these instructions.

Plaintiffs complain of other instructions which are not models of excellence. After a study of all of the instructions we have reached the conclusion that, taken as a whole, they are not sufficiently erroneous to justify a reversal of the judgment, even if those not exactly correct were proposed by defendants.

[8] We have examined the record carefully and cannot find any information even suggesting which party proposed any instruction. Neither does the record suggest that any instruction was given by the trial judge on his own motion. Under such a state of the record it is held that "on appeal and in support of the judgment, it will be assumed that, if any one of the instructions was erroneous, it was given at the request of the defendants." (Appellants here.) Fitzgerald v. Quinn, 131 Cal. App. 457, 21 P.2d 656, 658. "It is the settled law of this state that no one may claim the trial court erred in giving an instruction which such person requested, and that one who claims error must produce a record which shows the error." Craig v. Boyes, 123 Cal.App. 592, 11 P.2d 673, 675.

[9] As it cannot be determined from the record that the challenged instructions were either requested by defendants, or that any of them were given by the trial judge on his own motion, we cannot presume error that the record does not disclose.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 124

In re SPIERS.

Civ. 6077.

District Court of Appeal, Third District, California.

April 10, 1939.

1. Infants ⇐16

In proceeding to place minor in custody of probation officer where probation officer testified that he had made service of citation by personally handing to the mother a copy of citation, juvenile court had jurisdiction. St.1915, p. 1225.

2. Process ⇐127

Jurisdiction does not depend upon proof of service but upon the fact that service has been made.

3. Infants ⇐16

A probation officer is not a "party" to a juvenile court proceeding so as to be disqualified from making service of citation on

minor's mother. Code Civ.Proc. § 410; St. 1915, p. 1225.

[Ed. Note.—For other definitions of "Party," see Words & Phrases.]

4. Infants ⇐16

Where petition recited that proceeding to place child in custody of probation officer was instituted under statutory provisions relating to minor who refuses to obey or is beyond control of parent and alleged facts showing that minor had no parent or guardian actually exercising proper parental control over her and that minor was in need of such control, finding that there was violation of statutory provision relating to minor who has no parent or guardian actually exercising parental control was not a variance from petition. St.1915, p. 1225, § 1, subds. 2, 8, 9, 11.

5. Infants ⇐16

Petition alleging that minor had no parent or guardian actually exercising proper parental control over her and that minor was in need of such control was not at variance with findings of court that allegations of petition were true and placing minor in custody of probation officer. St.1915, p. 1225.

6. Infants ⇐16

A judge of the superior court sitting in juvenile court is vested with wide discretion in disposing of a motion showing such change of condition with respect to home environment of a minor which would require modification of order placing child in custody of probation officer. St.1915, p. 1232, § 9.

7. Infants ⇐16

Juvenile court judge was not compelled to modify order placing child in custody of probation officer upon showing that child's mother remarried and had a good home and desired to have child with her, where it could be concluded that mother's acts were not sufficient assurances that mother would have any greater degree of control over the child than she had before it was placed in custody of officer. St.1915, p. 1232, § 9.

8. Infants ⇐16

Under statute providing that in passing upon motion to modify a previous order placing child in custody of probation officer, such order may at any time be modified or set aside as the judge deems proper, modification of an order rests within "discretion" of judge, which is a decision of what is just and proper under the circumstances. St. 1915, p. 1232, § 9.

[Ed. Note.—For other definitions of "Discretion," see Words & Phrases.]

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Proceeding in the matter of Mary Spiers. From an order of the juvenile court denying motion of Estelle Spiers to set aside and modify an order placing Mary Spiers in the custody of the probation officer, Estelle Spiers appeals.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellant Estelle Spiers Laiblin.

Burt W. Busch, Dist. Atty., of Lakeport, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order of the juvenile court of Lake county denying appellant's motion to set aside and modify an order made by said juvenile court placing Mary Spiers in the custody of the probation officer.

On July 18, 1936, a petition was filed in the juvenile court of Lake county, which contained the following allegations:

"That Estelle Spiers is the mother of said Mary Spiers; that the residence of said Estelle Spiers is Kelseyville, Lake County, California, and that said Estelle Spiers is now confined in the County Jail of the County of Lake; that the father of said Mary Spiers is dead; that at about the hour of two o'clock a. m., on the 4th day of May, 1936, the said Estelle Spiers did take said Mary Spiers to the cabin of James Buchanan, and did knowingly and wilfully permit the said Mary Spiers to remain at said cabin for a period of six days; that said cabin is situate on McGough's Slough in Lake County, and is approximately a half-mile distant from the nearest dwelling-house; that said cabin consists of one large room and a storeroom; that at the time said Mary Spiers was so taken to said cabin, and during all the time said Mary Spiers was so permitted to remain at said cabin, said cabin was occupied by the said James Buchanan, and by no other person excepting Mary Spiers; that said Mary Spiers and James Buchanan during said six day period did cook, eat and sleep in said large room in

said cabin; that said James Buchanan is a man about fifty-five years of age, and is not a relative of the said Mary Spiers or Estelle Spiers; that all of the aforesaid facts were known to said Estelle Spiers during said six day period; that on or about the 10th day of May, 1936, the said Estelle Spiers did wilfully and knowingly permit the said Mary Spiers to ride in an automobile alone with one Tom Smith, from the City of Santa Rosa, Sonoma County, California, to the town of Chowchilla, in Madera County, California; that said Estelle Spiers did wilfully and knowingly permit the said Mary Spiers to remain with the said Tom Smith at Chowchilla, California, for a period of about one week; that said Estelle Spiers furnished no money for the support or maintenance of said Mary Spiers during said period, and that said Mary Spiers had no money for her support, and said fact was known to said Estelle Spiers; that during said period, and while said Mary Spiers remained at Chowchilla, California, the said Tom Smith rented a room for said Mary Spiers; that at least three days and nights of said period, said Tom Smith and said Mary Spiers cooked their meals, ate their meals, and slept alone in said one room; that during said period, and while said Mary Spiers and Tom Smith occupied said room alone, the said Tom Smith had sexual intercourse with said Mary Spiers; that said Tom Smith was of the age of about twenty-seven years, and is not a relative of either the said Mary Spiers or the said Estelle Spiers; that on the night of May 9, 1936, the said Estelle Spiers permitted Mary Spiers to ride in an automobile with two men throughout Lake and Mendocino counties; that both men referred to were over the age of thirty-five years, and were in no way related to either Mary Spiers or Estelle Spiers; that said Mary Spiers and said men did not return home until one o'clock a. m. on the morning of May 10, 1936; that said Estelle Spiers, since the 1st day of January, 1936, has wilfully permitted and encouraged the said Mary Spiers to visit alone at the houses of men many years older than the said Mary Spiers, and has permitted the said Mary Spiers to ride about in automobiles with such men throughout Lake, Sonoma and Mendocino counties, and has permitted said Mary Spiers to accept and receive gifts and presents from such men; that Mary Spiers has no parent or guardian actually exercising proper parental control over her, and said minor child is in need of such control."

Thereafter, citation was duly issued to Estelle Spiers, mother of the minor mentioned in the petition, directing her to appear on the 30th day of July, 1936, at which time the matter came on regularly for hearing in the juvenile court, and the court found that all the allegations in the petition were true. The court entered its judgment to the effect that said Mary Spiers was a person coming within the provisions of the Juvenile Court Law (St. 1915, p. 1225), adjudged her a ward of the court, and placed her in the care and custody of the probation officer of Lake county.

[1,2] It is contended that the court had no jurisdiction in the case, because of the fact that there was no proof of service of citation upon the mother of the minor—Estelle Spiers. We have examined the record and find the contention is without merit. The probation officer, on the witness stand, testified that he made such service by personally handing to the mother, Estelle Spiers, a copy of the citation. This is all that the law required. Jurisdiction does not depend upon proof of service, but upon the fact that service has been made. Vail v. Jones, 209 Cal. 251-255, 287 P. 99.

[3] It is next contended that the probation officer was a party to the action, and that he was disqualified from making service of the citation under the provisions of section 410 of the Code of Civil Procedure, which prohibits the service of a complaint by a party to the action. We are of the opinion that the probation officer was not a "party to the action" in the sense that those words were used in the section last mentioned, any more than a district attorney would be a "party to the action" in a criminal action. In a juvenile court proceeding the People of the state of California are parties to the action, and the other parties may be said to be those upon whom service is required to be made under the provisions of the Juvenile Court Act.

[4,5] It is also contended that the petition of the probation officer recites that the proceedings were instituted under subdivisions 8 and 9, section 1 of the Juvenile Court Act, which, as the law read on August 7, 1936, referred to the use of liquor, cigarettes, or drugs, and to a minor

who persistently or habitually refuses to obey the orders of his guardian or parent, or who is beyond the control of such guardian or parent; whereas, the court found that there had been a violation of subdivisions 2 and 11 of section 1 of the Juvenile Court Act, which subdivisions refer to a minor who has no parent or guardian actually exercising proper parental control, and to a minor who is in danger of leading an idle, dissolute, lewd or immoral life. We are of the opinion that the petition is not to be judged by reference therein to certain subdivisions of the act. In ascertaining the true meaning and purport of the petition, the court must look to the allegations of fact, rather than to a mere mention of certain portions of the act by number. Following this rule and reading the very full statement of facts relating to the charge of delinquency, we are satisfied that there is no real variance between the allegations of the petition and the findings of the court.

It is finally contended that the testimony given on the hearing of this motion showed such a change of condition with respect to the home environment of the minor, that the trial court would be compelled to modify its order and return the child to the custody of her mother. It appears that at the time the original proceedings were had with reference to this matter, the mother of said minor was confined to the county jail, having been convicted of a felony. Subsequently, she appealed her case, and the judgment of conviction was reversed. Thereafter, she married one Charles S. Laiblin, and she is now living with her husband. The latter testified that he was worth some $25,000, and had a good home in Santa Rosa, and desired to have the child with him and her mother. The mother testified that she had received a letter from her daughter, stating that she wished to come home and live with her mother. She also testified that she had plead guilty of the charge of perjury, and was then on probation.

[6–8] We cannot say as a matter of law that the juvenile court judge was compelled to modify the order upon such a showing. It is well settled that a judge of the superior court, sitting in the juvenile court, is vested with a wide discretion in disposing of a motion of this character. This is the rule applied to a motion for a change of custody of a minor child, in an action for divorce, by way of modification of a previous order. Dickerson v. Dickerson, 108 Cal. 351, 41 P. 475; Crater v. Crater, 135 Cal. 633, 67 P. 1049. Furthermore, the Juvenile Court Act (former sec. 9, St.1915, p. 1232, now sec. 745, St.1937, p. 1040), provided, and now provides that in passing upon a motion to modify a previous order, such order "may at any time be changed, modified, or set aside, as the judge deems meet and proper". Discretion has been defined as "a decision of what is just and proper under the circumstances". 1 Bouv.Law Dict. page 537. The portion of the act quoted indicates clearly that the matter of modification of an order of this character rests within the sound discretion of the judge. We have before us in the record the findings of the juvenile court judge in the original proceeding. They cover several pages of the transcript, and follow almost word for word the allegations of the petition. The charges made against the mother, arising out of lack of parental control, are of a very serious nature, and it is quite clear that the child's mother exercised no degree of control whatever over her conduct or actions, although the child was only thirteen years of age. Furthermore, it could be reasonably inferred, from the record, that the mother acquiesced in the acts specified, which acts manifestly tended toward an immoral life upon the part of her daughter. We hold that the trial judge very rightly may have concluded that the mere fact of the subsequent dismissal of the charges against the mother, and her remarriage and acquisition of a new home, were not sufficient assurances that the mother would have any greater degree of control over the child than she had before. In any event we are satisfied that there was no abuse of discretion on the part of the judge of the juvenile court in denying the motion.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

32 Cal.App.2d 135

ALAMEDA COUNTY v. ROSS, County Auditor.

Civ. 6184.

District Court of Appeal, Third District, California.

April 12, 1939.

Hearing Denied June 1, 1939.

1. Licenses ⇐44(3)

Ordinarily, an "easement" is a permanent interest in realty, while a "license," at least so long as it is executory, may be revoked at pleasure.

[Ed. Note.—For other definitions of "Easement" and "License," see Words & Phrases.]

2. Easements ⇐1

A "right of way" is primarily a privilege to pass over another's land and does not exist as a natural right but is created by grant or its equivalent, and may be either public or private.

[Ed. Note.—For other definitions of "Right of Way," see Words & Phrases.]

3. Licenses ⇐61, 62

A license to use property may be revoked either by express words to that effect or by the acts and conduct of the licensor.

4. Contracts ⇐10(1)

Mutuality of obligation is an essential element of a contract.

5. Contracts ⇐10(1)

Where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent.

6. Licenses ⇐48

A license from the United States, revocable at will by the Secretary of War, purporting to authorize the county of Alameda to assume control of the Fruitvale avenue bridge constructed by the United States across Oakland estuary but obligating the county to maintain and rebuild bridge if necessary was void for lack of mutuality and consideration notwithstanding installation of electrical apparatus by government for opening and closing of drawbridges under terms of license prior to its execution. Act Cong. June 25, 1910, 36 Stat. 630; Act Cong. June 25, 1910, § 1, 36 Stat. 661; Pol. Code, §§ 4000, 4001, 4005, 4076; Civ.Code, § 802; Const. art. 4, § 31.

7. Counties ⇐111(1)
Municipal corporations ⇐226

One contracting with a county or municipal corporation is bound to recognize statutory limitations of its power. Pol.Code, § 4000.

8. Counties ⇐38

County boards of supervisors are merely agents of the county. Pol.Code, § 4001.

9. Counties ⇐149
Municipal corporations ⇐858

Powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law. Pol.Code, §§ 4000, 4001.

10. Counties ⇐154(1)

Under license from United States which purported to authorize county of Alameda to assume control of Fruitvale avenue bridge constructed by United States across Oakland estuary and to obligate county to maintain and rebuild bridge if necessary, but reserving in Secretary of War the unqualified right to revoke license at will, proposed expenditure of funds by county for repair of portion of bridge used exclusively by private railroad was in nature of a "gift" and was unauthorized. Act Cong. June 25, 1910, 36 Stat. 630; Act Cong. June 25, 1910, § 1, 36 Stat. 661; Pol.Code, §§ 4000, 4001, 4005, 4076; Civ.Code, § 802; Const. art. 4, § 31.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

Mandamus proceeding by the county of Alameda, petitioner, against Horace P. Ross, as county auditor, to compel issuance of a warrant for payment of materials.

Peremptory writ denied.

Earl Warren, Atty. Gen., and Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley and Robert H. McCreary, Deputies Dist. Atty., all of Oakland, for petitioner.

John R. Ober, of Oakland, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The petitioner seeks by means of a writ of mandamus to compel the respondent to issue a warrant in payment for materials ordered by the board of supervisors of Alameda county with which to repair a part of the Fruitvale avenue bridge across the Oakland estuary, which portion of the bridge is used exclusively for the benefit of the Southern Pacific Railroad Company.

The respondent contends there is no valid contract or legal authorization for the County of Alameda to incur or pay the

indebtedness for maintaining or repairing that portion of the bridge which is used exclusively for the benefit of a private corporation for the reason that such expenditures constitute a gift of money from the county which is prohibited by law, and because the license or agreement from the United States for the County of Alameda to use and maintain the bridge is specifically revocable at will and is therefore invalid for lack of mutuality of obligations and is void for lack of consideration.

This proceeding is presented to this court on a written stipulation of facts.

The cities of Oakland and Alameda are both located in Alameda county adjacent to the eastern shore of San Francisco bay. These cities are separated by a navigable inlet and canal some seven miles in length commonly termed the Oakland estuary. This body of water extends inland from Oakland harbor connecting with Brooklyn basin, which contains docking facilities. A canal unites the lower extremity of Brooklyn basin with the upper point of San Leandro bay, which is an arm of San Francisco bay situated a few miles southeasterly from Oakland harbor. This tidal canal, which connects Brooklyn basin with San Leandro bay, was dredged by the United States government to permit passage of vessels from San Leandro bay to the inner harbor. It is two miles in length and about three hundred feet in width. The entire estuary, including the canal, is navigable for large vessels.

In 1882 the United States condemned three rights of way across this canal between Oakland and Alameda for the construction and maintenance of the Fruitvale avenue, High and Park street bridges. The County of Alameda, the Central Pacific Railroad Company and certain individuals were named as parties defendant in that action. None of the defendants asked for damages. The decree provided that:

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal."

In 1901 the government constructed the Fruitvale avenue bridge and the other two bridges across the estuary, each of which it maintained and operated until 1913. September 3, 1910, the secretary of war issued to the board of supervisors of Alameda county, pursuant to an act of congress authorizing "appropriations for the title construction, repair, and preservation of certain public works on rivers and harbors" (36 U.S.Stats. 630, 661), the revocable license to maintain and operate the three bridges, which license is the subject of controversy in this proceeding. That document reads in part:

" 'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities: Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer;'

"Now Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

"This License is granted subject to the following conditions and provisions:

"1. — That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall bear its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

"2. — That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

"3. — That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tender houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

"4. — That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

"5. — That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic."

November 19, 1913, the board of supervisors of Alameda county adopted a resolution accepting the license according to the terms expressed therein, and thereafter repaired and operated the three bridges. The Fruitvale avenue bridge is a combination swinging span supported by a single central concrete pier which may be opened for the passing of vessels. A portion of that bridge is used exclusively for the tracks of the Southern Pacific Railroad Company. The remaining portion of the bridge is used for vehicles and pedestrians. These two portions of the bridge are separated by an open steel partition. The traffic over that bridge has so increased with the growth of population that an average of more than 4000 vehicles crossed it daily in 1937. During that year the bridge was opened six times a day to permit vessels to pass to and from the inner harbor.

The bridges require expenditures of large sums of money to repair and operate them. It is conceded the Fruitvale avenue bridge now requires the expenditure of considerable money for immediate repairs and that it will soon be necessary to replace it at an estimated cost of approximately $1,250,000. For necessary immediate repairs of the railroad portion of the Fruitvale avenue bridge, for the sole use and benefit of the tracks of the railroad company, the board of supervisors authorized the purchase of iron bolts and materials of comparatively small value, which were furnished and delivered. A claim for the agreed price of said materials was presented, approved and allowed by the board of supervisors pursuant to section 4076 of the Political Code. Upon presentation of that claim the county auditor refused payment on the ground that it is illegal and based on a void contract which he is not authorized to pay. Thereupon this petition for a writ of mandamus was filed to compel the auditor to draw his warrant in payment of the claim.

The claim which is involved in this proceeding is relatively small, but the issues of this case are of great public interest since the County of Alameda soon will be compelled to replace the Fruitvale avenue bridge at a cost in excess of a million and a quarter dollars with a possibility of losing the entire sum of money by an immediate revocation of the license.

The respondent asserts that the claim is illegal and that the County of Alameda is not authorized to incur indebtedness to repair or rebuild, at least, that portion of the Fruitvale avenue bridge which is used exclusively for the benefit of a private railway corporation, because the license is revocable by the secretary of war, at will, which renders it void, and the expenditure of public funds under such circumstances is in the nature of a gift which is prohibited by article 4, section 31, of the Constitution of California.

We are of the opinion the license from the United States does not authorize the County of Alameda to incur indebtedness or to expend public money in repairing or maintaining that portion of the Fruitvale avenue bridge which is used exclusively for the benefit of the Southern Pacific Railroad Company, for the reason that the license is revocable at will by the secretary of war and therefore lacks mutuality of obligations and consideration, which renders it void, and because the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article 4, section 31, of the Constitution of California.

The license in question is an executory agreement authorizing the County of Alameda to retain the use and operation of the estuary bridges for an indefinite length of time, subject, however, to the control of the secretary of war, and absolutely revocable at his will without cause therefor. It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale avenue bridge at an expense of approximately $1,250,000, immediately upon the

completion of which the government may revoke the agreement, appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. Under uniform authorities such an agreement is held to be void for lack of mutuality of obligations and for lack of consideration.

Under certain circumstances a license which is ordinarily revocable at will may become irrevocable by the licensor, when the licensee, acting in good faith under the terms of the instrument, constructs valuable improvements on the property, making it unjust to permit the cancellation without first fully compensating the licensee for his loss and expenditure of money. 2 Tiffany on Real Property, (2d ed.) p. 1206, sec. 349 (2d). But that principle has no application to the present circumstances. The specific terms of this license contemplate payment by the County of Alameda for maintenance, repairs and reconstruction of the bridges with the absolute right of revocation in spite of such expenditures. The county was not deceived into believing it could acquire vested unrevocable rights in the bridges by incurring such expenditures. The language of the license clearly requires the county to pay for maintenance and improvements for the sole benefit of a private railroad corporation, and to maintain, repair and reconstruct the bridges with full knowledge that upon completion thereof the contract is subject to immediate revocation. The board of supervisors had no power to bind the county to such an illegal contract. It is absolutely void for lack of mutuality and consideration. It also constitutes an illegal contribution of public funds for the benefit of a private corporation.

The document, by the terms of which the government authorizes the operation and use of the bridges by the County of Alameda, appears to be a mere conditional license or privilege to use the bridges for the convenience of public traffic, which is revocable at the pleasure of the secretary of war at any time with or without cause. In spite of the use of the term "grant" which is employed in the instrument it seems clear that the government carefully refrained from conveying an easement in the bridges which would include an interest in real property. The instrument provides that:

"The three bridges * * * may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities. * * *

"* * * The Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges. * * *

"This License is granted subject to the following conditions and provisions:

"1. — That the three bridges shall be freely open to all public traffic without charge, * * *.

"2. — * * * Said three bridges shall be under the supervision of the Engineer Officer of the United States Army, * *.

* * * * * *

"4. — The said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve."

[1] Among the burdens or servitudes imposed upon land which may be conveyed, although not attached to land, are rights of way. Section 802, Civ.Code. We may assume that the right or privilege to use the bridges, under the circumstances of this case, constitutes a license and not an easement which is attached to the land. Ordinarily, an easement is a permanent interest in the realty, while a license, at least so long as it is executory, may be revoked at pleasure. 1 Thompson on Real Property, p. 362, sec. 282; Davis v. Tway, 16 Ariz. 566, 147 P. 750, L.R.A.1915E, 604; Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002.

[2, 3] A right of way is primarily a privilege to pass over another's land. It does not exist as a natural right, but must be created by a grant or by its equivalent. Such rights of way may be either public or private. 2 Tiffany on Real Property, p. 1249, sec. 358. A license may be revoked either by express words to that effect, or by the acts and conduct of the licensor. 2 Tiffany on Real Property, p. 1218, sec. 349 (d) and (e). It is clear that the language employed in the license for the County of Alameda to use the bridges for public traffic, expressly reserves the right in the government to revoke that privilege at will, with or without cause. It therefore conveys to the County of Alameda no vested right to retain the operation and use of

the bridges for any specific time notwithstanding the fact that the county has expended large sums of money in maintaining, improving and repairing the bridges. It may also suffer tremendous loss by incurring indebtedness for that purpose in the immediate future. 2 Tiffany on Real Property, pp. 1212, 1213. Although the county may expend $1,250,000 in rebuilding the Fruitvale avenue bridge, it would thereby acquire no vested interest in that bridge which may not be forfeited at any moment by the exercise of the express reservation contained in the license to revoke it at the will of the government.

The instrument in question is in the nature of a promise or agreement on the part of the government to permit the County of Alameda to operate and use the bridges for public traffic. Since it contains an express provision that it may be revoked at will, it creates no vested interest in the County of Alameda, and therefore lacks mutuality of obligations and also lacks consideration necessary to render it binding. In 1 Williston on Contracts, revised edition, page 123, section 43, it is said:

"One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory. * * *

"* * * A promise to give anything whatever which the promisor may choose, or to do or give something whenever the promisor pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. For the same reason if one party to an agreement reserves an unqualified right to cancel the bargain no legal rights can arise from it while it remains executory."

Likewise, it is said in 1 Williston on Contracts that when one of the parties reserves the unqualified right to cancel the agreement at will it fails for lack of consideration. That text, page 352, section 104, reads:

"In any case where a promise in terms or in effect provides that the promisor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration. The same consequences follow where a bilateral agreement in question expressly reserves to one party the right of immediate cancellation at any time."

On page 365, section 105, of the last cited authority it is further said:

"That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled. And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agreement which one party reserves the right to cancel at his pleasure cannot create a contract.

"Since the courts, however, do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel is for cause, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or other objective standard."

[4, 5] Mutuality of obligations is an essential element in every binding contract. In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause. In 13 Corpus Juris, page 337, section 188, it is said:

"Where one party reserves an absolute right to cancel or terminate the contract at any time mutuality is absent. * * * It has been held that a contract which provides that it may be canceled by either party is invalid for lack of mutuality, although the provision for cancellation is limited by an agreement that it shall be 'for just cause', there being no means furnished for determining what may have been the particular cause or causes thereby intended by both parties."

[6] There is not the slightest intimation in the license which is involved in this proceeding that the government reserves the right to revoke the use and operation of the bridges only for "good cause". A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right

to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration.

It has been frequently held that agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party. Hamlin v. Barnhart, 26 Cal.App. 632, 147 P. 1188; Charles Brown & Sons v. White Lunch Co., 92 Cal.App. 457, 268 P. 490; Shortell v. Evans-Ferguson Corporation, 98 Cal. App. 650, 277 P. 519; Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 76 P.2d 663, 115 A.L.R. 476; Motor Car Supply Co. v. General Household Utilities Company, 4 Cir., 80 F.2d 167; Miami Coca-Cola Bottling Co. v. Orange Crush Co., 5 Cir., 296 F. 693; Ellis v. Dodge Bros., D.C., 237 F. 860; City of Pocatello v. Fidelity & Deposit Company of Maryland, 9 Cir., 267 F. 181; Console Master Speaker Corporation v. Muskegon Wood Products Corporation, 3 W.W.Harr. 390, 33 Del. 390, 138 A. 598; Du Pont De Nemours & Co. v. Claiborne-Reno Company, 8 Cir., 64 F.2d 224, 232, 89 A.L.R. 238.

There is no merit in the petitioner's contention that the installation of electrical apparatus by the government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. It is uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private corporation with no assurance of retaining the privilege of operating and using the bridges for a single day.

[7–9] The County of Alameda is a body corporate and politic, possessing only such powers as are specifically granted to it by law, together with such other powers as may be necessarily implied therefrom. Section 4000, Pol.Code. Any person contracting with a county or municipal corporation is bound to recognize such limitations of power. Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308; City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Ellis Landing & Dock Company v. City of Richmond, 70 Cal.App. 720, 234 P. 336; Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316; 18 Cal.Jur. 797, sec. 105; 1 McQuillin's Municipal Corp. (2d ed.) p. 909, sec. 367. Boards of supervisors are merely the agents of the county. Section 4001, Pol.Code; Contra Costa County v. Soto, 138 Cal. 57, 70 P. 1019; County of Modoc v. Spencer, 103 Cal. 498, 37 P. 483. The powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law. Hurst v. City of Burlingame, supra; Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294, Ann.Cas.1915A, 754. Quoting with approval from Linden v. Case, 46 Cal. 171, it is said in County of Modoc v. Spencer, supra, 103 Cal. at page 502, 37 P. at page 484:

"It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and, if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability."

Section 4005 of the Political Code provides that:

"All contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the treasury of said county, and the extent of the claims against the same."

[10] The board of supervisors of Alameda county had no authority to incur indebtedness or expend public funds for the sole benefit of the Southern Pacific Railroad Company, a private corporation. It appears that the materials which are involved in this proceeding are solely for the improvement and benefit of the Southern Pacific Railroad Company tracks across the bridge. The payment of the indebtedness which is here involved is in the nature of a gift or free contribution to the corporation, and it is, therefore, illegal and void. Art. 4, sec. 31, Const. of Calif.; County of Los Angeles v. Jessup, 11 Cal.2d 273, 78 P. 2d 1131; Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510; First National Bank of Orland v. Ball, 90 Cal.App. 709, 266 P. 604; Powell v. Phelan, 138 Cal. 271, 71 P. 335. In Higgins v. San Diego Water Co., 118

Cal. 524, 45 P. 824, 50 P. 670, it was held that a contract by a municipal corporation to pay public funds to a corporation or to an individual for the construction of a railroad is violative of article 4, section 31, of the Constitution and, therefore, void.

The respondent also asserts that the indebtedness which is based on the agreement or license which may obligate the County of Alameda to expend $1,250,000 to rebuild the Fruitvale avenue bridge in the near future is in conflict with the provisions of article 11, section 18, of the Constitution of California, for the reason that it would incur an indebtedness exceeding the limited revenues provided by law for a single current year. It has been definitely determined, as it is said in Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698, 699, that the preceding constitutional provision means:

"Not only that an indebtedness incurred contrary to its express provisions was absolutely void, but that 'each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.'"

But the stipulated facts (paragraph XXV) show that the indebtedness directly involved in this proceeding does not exceed the cash balance which has been appropriated and now remains to the credit of the Fruitvale avenue bridge fund. The issues presented in this proceeding do not necessarily include a determination as to whether an expenditure of money for the reconstruction of the bridge would exceed the revenue available for that purpose in that particular year and therefore be violative of the constitutional provision last mentioned. Accordingly, we refrain from deciding that question.

For the reasons that the agreement or license lacks mutuality of obligations of the respective parties, that it lacks valid consideration because it is revocable by the government at will, without cause, and that the claim involved constitutes an illegal appropriation of public funds for the sole benefit of a private corporation, it is void.

The peremptory writ of mandamus is denied.

We concur: PULLEN, P. J.; TUTTLE, J.

KING v. SCHUMACHER et al.

Civ. 10651.

District Court of Appeal, First District, Division 1, California.

April 17, 1939.

Hearing Denied June 15, 1939.

1. Courts ⇐97(5)
Master and servant ⇐86

The rights and obligations of persons within provisions of Federal Employers' Liability Act depend upon the act and applicable principles as interpreted by federal courts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and servant ⇐204(1)

A railroad employee engaged in interstate transportation assumes risk of dangers normally incident to occupation. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Master and servant ⇐204(1)

As respects principle that injured railroad employee engaged in interstate transportation assumes risk of danger incident to occupation, employee is not under duty to exercise care to discover extraordinary dangers from negligence of those for whose conduct employer is responsible, but employee may assume employer or his agents have exercised proper care for employee's safety, unless want of care and danger arising from it are so obvious that ordinarily careful person under circumstances would observe and appreciate them. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and servant ⇐265(13)

The burden of proof on issue of assumption of risk is upon employer in action under Federal Employers' Liability Act. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Master and servant ⇐288(1)

Unless evidence regarding an employee's assumption of risk is such that ordinary minds would not differ as to proper conclusion, questions of assumption of risk are for jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Master and servant ⇐136

An engineer who was in charge of ditcher repairing railroad and who had knowledge of position of fireman at door of cab

of ditcher was required to exercise reasonable diligence in analyzing the situation, as respects railway company's liability for injuries sustained when wheel of ditcher passed over fireman's foot. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

7. Master and servant ⇐136

As respects duty of agent of railroad engaged in interstate transportation to use reasonable care for safety of another employee, where circumstances are such as to convey to mind of ordinarily prudent person in agent's position that employee is in perilous position, knowledge of danger to employee will be imputed to agent. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

8. Master and servant ⇐286(32)

In action for injuries to foot by fireman on ditching machine mounted on flat car of railroad company engaged in interstate transportation, sustained when fireman was about to enter cab of machine through door usually used by firemen, but where there were no steps, and engineer seeing fireman's position, but not knowing fireman had placed his foot on track of machine to enter door, moved machine in such manner that it crushed fireman's foot, evidence regarding negligence of engineer was for the jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

9. Master and servant ⇐280

In action against railway company for injuries sustained when wheel of ditcher passed over fireman's foot, evidence warranted finding that fireman did not assume risk on ground that negligence of engineer, in starting ditcher while fireman was at door of cab, created without warning a sudden danger which fireman could not reasonably have foreseen. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

10. Appeal and error ⇐1001(1)

In action against railway company for injuries sustained when wheel of ditcher repairing railroad passed over fireman's foot, insufficiency of evidence to support finding that broken axle was proximate cause of accident did not require reversal of judgment for fireman, where evidence was sufficient to support finding that engineer in charge of ditcher was negligent in moving ditcher while fireman was in position of danger. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

11. Trial ⇐330(5)

Where suit is brought upon two different theories, if there is evidence sufficient to sustain either of them and verdict of jury is general, verdict will stand.

12. Appeal and error ⇐1026

That reversible error is committed by trial court in dealing with issue unsupported by evidence does not require that general verdict be disturbed where another issue on which case is tried is sustained by evidence.

13. Trial ⇐330(5)

The rule, that general verdict will not be disturbed for insufficiency of evidence to sustain one issue on which case is tried if another issue on which case is tried is sustained by evidence, is applicable both where issues are alleged in one count and where issues are made subject of separate counts.

14. Master and servant ⇐258(9)

In employee's suit under Federal Employers' Liability Act, employee could allege in one count that accident was proximately caused by two negligent acts, liability under either of which called for application of same measure of relief. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

15. Pleading ⇐406(8)

In suit under Federal Employers' Liability Act, wherein plaintiff alleged in one count that accident was proximately caused by two negligent acts, alleged right of defendants to have such acts made the subject of separate causes of action were waived by failure to demur specially on that ground. Code Civ.Proc. § 434; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

16. Action ⇐66

Where action founded on federal statute is properly brought in state courts, state law is controlling in all matters of practice and procedure, in absence of contrary provisions in federal statutes.

17. Action ⇐66

Determining on appeal whether reversible error was committed by trial court is matter of "practice" and "procedure," within rule that law of state in courts of which action on federal statute is properly brought is controlling in matters of practice and procedure in absence of contrary provisions in federal statute.

[Ed. Note.—For other definitions of "Practice (In Law)" and "Procedure," see Words & Phrases.]

18. Action ⇐66

The words "practice" and "procedure" together include mode of proceeding by which legal right is enforced as distinguished from substantive law which declares the right.

19. Action ⇐66

The word "procedure" means machinery for carrying on suit, including pleading, process, evidence, and practice, whether in trial or appellate court, or in the processes by which causes are carried to appellate court for review, or laying foundation for such review.

20. Action ⇐66

The word "practice" means form, manner, or order of instituting or conducting suit or other judicial proceeding through its successive stages to the end in accordance with principles laid down by law or by regulations and precedents of courts.

21. Master and servant ⇐86, 250¼

The hearing and determination of suit under Federal Employers' Liability Act instituted in state court must be had both in trial court and on appeal in accordance with rules, principles, and precedents governing the practice in the state courts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

22. Master and servant ⇐86, 250¼

A substantive right or defense granted by Federal Employers' Liability Act cannot be lessened or destroyed by a state rule of procedure or practice. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

23. Appeal and error ⇐974(1)

The denial of request for special verdicts is not subject to review on appeal unless there is manifest a clear abuse of discretion. Code Civ.Proc. § 925.

24. Trial ⇐349(2)

In action under Federal Employers' Liability Act wherein plaintiff alleged that accident was proximately caused by two negligent acts, liability under either of which called for application of same measure of relief, denial of request for special verdicts was not abuse of discretion. Code Civ.Proc. § 925; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., by Raymond King against Thomas Schumacher and another, trustees of the Western Pacific Railroad Company, to recover damages for personal injuries alleged to have been sustained by the negligent acts of the defendants. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

For prior opinion, see 81 P.2d 999.

C. W. Dooling and Edwin V. McKenzie, both of San Francisco, for appellants.

George Olshausen, of San Francisco, amicus curiæ for appellants.

Clifton Hildebrand, of Oakland, and Goodman & Brownstone, of San Francisco, for respondent.

PER CURIAM.

An action under the Federal Employers' Liability Act 45 U.S.C.A. § 51 et seq., against the trustees of the Western Pacific Railroad Company to recover damages for personal injuries alleged to have been sustained by the negligent acts of the defendants. A jury returned a verdict for plaintiff and the defendants have appealed from the judgment entered thereon.

The complaint alleged that plaintiff was employed by defendants on a ditcher engaged in repairing the main interstate line of the railroad near Poe, California; that while thus engaged the ditcher was so negligently operated and maintained that plaintiff's foot was run over and injured. The answer denied negligence and alleged as defenses, assumption of risk and that the injury complained of was due solely to plaintiff's negligence. The case was tried on two theories, namely, the negligence of the engineer in charge of the ditcher in moving forward while plaintiff was in a position of danger, and its negligent maintenance in that by reason of a broken axle on the drive shaft it was out of control at the time of the injury. At the conclusion of the evidence defendants moved for a directed verdict upon the ground that the evidence was legally insufficient to sustain a judgment in favor of plaintiff on either theory; also by separate motions they moved that the court withdraw from the consideration of the jury the issue raised by each theory. All of said motions were denied; and later defendants proposed certain instructions, which the trial court refused to give, with-

drawing said issues from the jury, and directing that separate verdicts be rendered thereon.

Three main grounds for reversal are urged: First, that the evidence is legally insufficient to sustain a finding that the ditcher was negligently operated by the engineer, but on the contrary shows that the accident was proximately caused by plaintiff's attempt to do certain things, the danger of which was obvious to him and the risk of doing which he assumed, to-wit, in attempting to get into the cab of the ditcher through a side door, and in attempting to board the ditcher while it was in motion; second, that the evidence is legally insufficient to support a finding that the broken axle was a proximate cause of the accident, and therefore that the trial court erred in refusing to grant defendants' motions for a directed verdict on that issue, and to withdraw said issue from the jury; and third, that the trial court erred in refusing to direct the jury to return separate verdicts on said issues.

The ditcher consisted of a steam shovel mounted on a flat car. The apparatus was set on wheels which moved back and forth on rails laid upon and fastened to the platform of the car. It had what is known as a four-wheel drive, the moving power being transmitted to all four wheels. One lever controlled its movement upon the rails mentioned, and by this means it was moved backward and forward by the engineer. There were no brakes controlling its movements, this being accomplished by reversing the lever or moving it forward. At the time of the accident the axle transmitting power to one set of wheels was broken. This occurred about two weeks before the accident, and both the engineer and the plaintiff knew the fact. The ditcher crew consisted of the engineer and the fireman. On the day of the accident plaintiff was acting as fireman, his duties being to keep steam in the boiler, to sand the rails on the flat car, and otherwise assist in operating the machine, the engineer being his superior. According to plaintiff he was directed by the engineer just prior to the accident to sand the rails on the flat car, the sand being obtained from a nearby locomotive. When the sanding operation was completed he mounted the flat car in order to enter the cab of the ditcher, which he attempted to do through a side door. It was testified that it was usual for the fireman to enter the cab through this door. He had been told by the engineer that the ditcher would not be moved while anyone was standing on the flat car. There were no steps to aid ingress through the door mentioned and a chain was placed across the same. It was his intention to grasp the chain and raise himself. In order to do so he placed his left foot on one of the rails on the flat car. As he did this, the apparatus was moved back slightly and then forward about two feet, one of the wheels passing over his foot and pinning it to the rail. The engineer at the time saw the position of the plaintiff except that from the cab he could not see that his foot was upon the rail. According to the engineer he saw from plaintiff's facial expression that an accident had occurred and he had at once reversed the lever, thus releasing the plaintiff. A part of the foot was crushed and it was subsequently amputated. The ditcher was inspected by the jury and the trial court, and its operation explained, but the evidence was conflicting as to the exact position of the parts immediately preceding and at the time of the injury. The plaintiff testified that when he mounted the flat car the boom was in a position lengthwise with the car and the apparatus was not moving. The engineer directed him to enter the cab but he was unable to do this by reason of the position of the boom. To enable him to enter it was necessary to wait until the boom was swung at an angle with respect to the car, and the apparatus was so constructed that the cab would revolve at the same time. The evidence fairly supports the conclusion that it was unnecessary in order to move the boom that the apparatus should be moved forward on the rails, and that the engineer was aware of the possibility of injuring the plaintiff if such a movement should be made. There was also testimony that the engineer had directed the plaintiff to enter the cab by another door, called the fireman's door, but according to the latter the door which he attempted to use was the usual means of ingress.

[1-9] It is well settled that by the Federal Employers' Liability Act congress took possession of the field of employers' liability in interstate transportation by rail, and that the rights and obligations of persons within its provisions depend upon the act and applicable legal principles as interpreted by the federal courts (St.Louis etc. Ry. Co. v. McWhirter, 229 U.S. 265,

33 S.Ct. 858, 57 L.Ed. 1179; Chicago M. & St. P. R. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 70 L.Ed. 1041) and an employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages. Gila Valley etc. Ry. Co. v. Hall, 232 U.S. 94, 34 S.Ct. 229, 58 L.Ed. 521. However, it is not his duty to exercise care to discover extraordinary dangers that may arise from the negligence of those for whose conduct the employer is responsible, but he may assume that the employer or his agents have exercised proper care for his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. Chesapeake etc. Ry. Co. v. De Atley, 241 U.S. 310, 36 S.Ct. 564, 60 L.Ed. 1016. This has been held to be the rule when the injury arises from a single act of negligence by the employer or his agent, creating a sudden danger to the servant of which the latter is without warning and could not reasonably have foreseen. Chicago R. I. & P. Ry. Co. v. Ward, 252 U.S. 18, 21, 40 S.Ct. 275, 64 L.Ed. 430; Reed v. Director General, 258 U.S. 92, 42 S.Ct. 191, 66 L.Ed. 480; Swank v. Pennsylvania R. Co., 94 N.J.L. 546, 111 A. 44, 254 U.S. 638, 41 S.Ct. 12, 65 L.Ed. 451; Illinois Central R. Co. v. Norris, 7 Cir., 245 F. 926. The burden of proof on the issue of assumption of risk is upon the employer. (Kanawha R. Co. v. Kerse, 239 U.S. 576, 36 S.Ct. 174, 60 L.Ed. 448), and unless the evidence is such that ordinary minds would not differ as to the proper conclusion such questions are for the jury. Chesapeake etc. Ry. Co. v. De Atley, supra. We are unable to agree with the defendants that, as was the case in Atlantic Coast Line Railroad Co. v. Davis, 279 U.S. 34, 49 S.Ct. 210, 73 L.Ed. 601, but one conclusion on both issues might reasonably be drawn from the evidence. As stated, the engineer was aware of plaintiff's position with the one exception, that the latter's foot was upon the rail, and it was his duty to use reasonable diligence in analyzing the situation. We are satisfied that the circumstances were such as to convey to the mind of an ordinarily prudent person that plaintiff was in a position where the movement of the apparatus as described above would imperil his safety, and such movement might reasonably be expected to cause injury. Where this is the case knowledge of the danger will be imputed. We are of the opinion, therefore, that the evidence on this issue, as well as that of assumption of risk, is sufficient to sustain a finding thereon in favor of plaintiff.

[10, 11] As to the other charge, that the ditcher was negligently maintained, the evidence shows that the axle transmitting power to one set of wheels was broken, and it is a fair inference from the testimony that due to this condition the movement forward and backward on the rails would not be as readily subject to control as would otherwise have been the case. However, the record clearly shows that notwithstanding this, the movement forward was stopped immediately upon the discovery by the engineer of the fact of the accident. It would appear, therefore, as defendants claim, that the evidence does not reasonably support the conclusion that the accident was caused or aggravated by said defect or might have been avoided had it not existed. We are unable to agree with defendants, however, that failure of plaintiff to establish liability under this latter charge of negligence serves as ground for reversal of the judgment. As said by this court in affirming the judgment in Walton v. Southern Pacific Co., 8 Cal.App.2d 290, 48 P.2d 108, 115, involving a similar situation in an action founded also on federal statutes: "It is settled that where suit is brought upon two different theories, if there is evidence sufficient to sustain either of them and the verdict of the jury be a general one, the general verdict will stand * * *."

[12, 13] Defendants (in their supplemental points and authorities) concede that the Walton case "is squarely against" the position they have taken on this point, but they contend that the portion of the decision above quoted "is clearly wrong on principle"; and in a later brief they cite cases which they claim support their view. We have found nothing in any of those cases, nor in the arguments advanced by defendants in connection therewith to warrant the conclusion that the doctrine quoted from the Walton case is not the settled law of this state in this class of cases; and the authorities are abundant showing that it is. In California Jurisprudence (vol. 19, p. 675) the law upon the subject is summarized as follows: "A statement in a complaint of several distinct acts of negligence does not render the pleading subject to either a general or a special demurrer.

In such a case a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury or upon all of said acts as operating together or concurrently in causing the damage. Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues. Where each of the acts pleaded constitutes a separate cause of action, they should be separately stated, but a failure to do this merely renders a complaint demurrable upon that ground; it does not render the complaint subject to a general demurrer, or to a special demurrer for uncertainty." Furthermore, the doctrine set forth in the Walton case was restated and again applied by this court in the case of Edgington v. Southern Pacific Co., 12 Cal. App.2d 200, 55 P.2d 553, which was also based on federal statutes; and numerous cases may be found not involving federal statutes but based nevertheless on two or more issues of fact, wherein the same doctrine has been declared and applied. Among them are Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 206 P. 653, and Merrill v. Kohlberg, 29 Cal.App. 382, 155 P. 824, cited in the Walton case; also Worley v. Spreckels Bros. Com. Co., 163 Cal. 60, 124 P. 697; Criss v. Angelus Hospital Association, 13 Cal.App.2d 412, 56 P. 2d 1274; Hume v. Fresno Irrigation District, 21 Cal.App.2d 348, 69 P.2d 483. And it has been definitely held that said doctrine is controlling, notwithstanding reversible error may have been committed by the trial court in dealing with the unsupported issue (Hume v. Fresno Irrigation District, supra), one of the cases so holding being where the trial court erroneously refused to instruct the jury that there was no evidence to sustain such issue. Criss v. Angelus Hospital Association, supra. Moreover, an examination of the various cases discloses that in applying said doctrine the courts have not discriminated between cases like the present one wherein the complaint sets forth two (or more) acts of negligence in one count (Verdelli v. Gray's Harbor etc. Co., 115 Cal. 517, 47 P. 364, 778; Criss v. Angelus Hospital Association, supra; Camozzi v. Colusa Sandstone Co., 26 Cal.App. 74, 147 P. 107, 112), and those like the Walton case, wherein each negligent act is made the subject of a separate count. Sessions v. Pacific Improvement Co., supra; Merrill v. Kohlberg, supra. It has been applied with equal force to both.

[14, 15] A different situation doubtless arises where the complaint contains two separate counts setting forth independent and unrelated causes of action calling for distinct relief such as the application of different measures of damage. But as will be seen, the present case is not of that class. Here plaintiff alleged in one count that the accident was proximately caused by two negligent acts, liability under either of which called for the application of the same measure of relief. This plaintiff had the right to do (Criss v. Angelus Hospital Association), and any claim defendants may have had that said negligent acts should have been made the subject of separate causes of action must be deemed to have been waived by failure to demur specially on that ground. Code Civ.Proc. § 434. Nor is there any analogy between this case and Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481, cited by defendants, for the reason that there one of the two issues submitted to the determination of the jury by the trial court in its instructions was purely an issue of law which the court itself should have decided instead of leaving it to the jury to speculate as to what the law upon the subject was; and such was the real ground of the reversal.

Again referring to the Walton case, attention may be called to the fact that a petition for hearing before the Supreme Court was denied by that court; and later an application for a writ of review was denied by the Supreme Court of the United States (296 U.S. 647, 56 S.Ct. 308, 80 L.Ed. 461); and while in later decisions (Scott v. Industrial Acc. Comm., 9 Cal.2d 315, 70 P.2d 940, and Tipton v. Atchison, Topeka & Santa Fe Ry. Co., 298 U.S. 141, 56 S.Ct. 715, 80 L.Ed. 1091, 104 A.L.R. 831) it was pointed out that a mistaken view was adopted in the Walton case in dealing with the question of the application of the California Workmen's Compensation Act, the particular doctrine with which we are here concerned was in neither of the two later cases called into question.

[16-21] Defendants make the further point that even though the law of this state is as stated in the decision in the

Walton case, it is contrary to the doctrine of reversal followed in like cases in the federal jurisdiction, and that this being an action based on a federal statute, the rule of the federal courts is controlling. In opposition to this view, plaintiff cites certain cases which he contends demonstrate that no substantial conflict exists between the doctrines of the two jurisdictions. But whether or not such conflict does exist is not important, for the reason that it is well settled in both the federal and state jurisdictions, and the parties herein agree, that where as here an action founded on a federal statute is properly brought in the state courts, the law of the state, in the absence of any contrary provisions in the federal statute (and here there are none), is controlling in all matters of practice and procedure; and manifestly the process of determining on appeal whether error was committed by the trial court during the trial of the cause and if so whether such error is prejudicial and therefore constitutes ground for reversal, is a matter of practice and procedure. Referring to the judicial construction given those terms as they are used in the law, it has been said that together and in a larger sense they include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right (Duggan v. Ogden, 278 Mass. 432, 180 N.E. 301, 82 A.L.R. 765; Anderson's Law Dictionary); whereas, singly, the word "procedure" has been defined as the machinery for carrying on the suit, including, pleading, process, evidence and practice, whether in the trial court or the appellate court, or in the processes by which causes are carried to the appellate court for review, or laying the foundation for such review (Jones v. Erie R. Co., 106 Ohio 408, 140 N.E. 366), and the word "practice" is said to be the form, manner or order of instituting or conducting a suit or other judicial proceeding through its successive stages to the end in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts (Black's Law Dictionary, citing among other cases People v. Central Pac. R. R. Co., 83 Cal. 393, 23 P. 303, and Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506.) Here, admittedly the enforcement of the legal rights given and declared by said federal act is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. Taylor v. Southern R. Co., 350 Ill. 139, 182 N.E. 805. It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court. Moreover, a number of adjudicated cases might be cited in support of the conclusion reached herein. For example, the law of the forum has been held controlling with respect to nonunanimous verdicts (Minneapolis & St. Louis R. R. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N.W. 106; see, also, cases cited in 12 A.L.R., note XI, page 713); and as to the submission of a cause on special verdicts (Chesapeake & O. Ry. Co. v. Meadows, 119 Va. 33, 89 S.E. 244; Kansas City So. Ry. Co. v. Leslie, 238 U.S. 599, 35 S.Ct. 844, 59 L.Ed. 1478; Union Pacific R. R. Co. v. Hadley, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751); also as to the matter of directing a verdict (Brenizer v. Nashville, C. & St. L. Ry., 156 Tenn. 479, 3 S.W.2d 1053, 8 S.W.2d 1099; Dutton v. Atlantic Coast Line R. Co., 104 S.C. 16, 88 S.E. 263); and the entry of judgment non obstante veredicto (Marshall v. Chicago, R. I. & P. Ry. Co., 133 Minn. 460, 157 N.W. 638; Robertson v. Chicago, R. I. & P. Ry. Co., 180 Minn. 578, 230 N.W. 585).

[22] It is true, of course, that a substantive right or defense granted by the federal act cannot be lessened or destroyed by a state rule of procedure or practice; but as already shown, unless the act itself modifies or changes those rules of procedure and practice, the cause must be heard and determined in the same manner as would like causes arising under the law prevailing in the state. See 45 U.S. C.A. p. 262, note 443.

[23, 24] Also without merit is defendants' remaining point that the trial court erred in denying their request for special verdicts. Ever since the amendment of 1909 to section 625 of the Code of Civil Procedure, it has been optional with the trial court whether special issues shall be submitted to the jury; and its ruling in the matter is not subject to review on

appeal unless there is manifest a clear abuse of discretion. De Martini v. Wheatley, 126 Cal.App. 230, 14 P.2d 869; Eaton v. Southern Pacific Co., 22 Cal.App. 461, 134 P. 801; Estate of Witt, 198 Cal. 407, 245 P. 197; Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436; 24 Cal.Jur. 904. Here no abuse appears. To hold to the contrary would be to declare that in all negligence cases founded on more than one alleged negligent act, the defendant would be entitled as a matter of right to special verdicts; and obviously the very purpose of the 1909 amendment to said section 625 was to do away with that condition. The case of Plyer v. Pacific etc. Cement Co., 152 Cal. 125, 92 P. 56, cited by defendants, was based on the provisions of said code section as they stood prior to the 1909 amendment.

The judgment is affirmed.

13 Cal.2d 317

TOOMEY v. TOOMEY et al.

Sac. 5138.

Supreme Court of California.

April 21, 1939.

Rehearing Denied May 20, 1939.

1. Trusts ⇐56

In wife's action to annul property settlement providing, among other things, for monthly payments for support of parties' minor daughter and establishing a trust in her favor, daughter should have been made a party.

2. Trusts ⇐56

Minor children are "necessary parties" to an action to terminate a trust established in their favor by a property settlement executed by parents.

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

3. Parties ⇐51(4)

In wife's action to annul property settlement providing, among other things, for monthly payments for support of parties' minor daughter and establishing a trust in her favor, if complaint or any count thereof was good against grounds of demurrer urged, it was trial court's duty to order that daughter be made a party, rather than to dismiss action for her nonjoinder. Code Civ. Proc. § 389.

4. Contracts ⇐270(2)

An action for rescission of a contract for fraud may be barred by laches for delay less than three-year period of limitations. Code Civ.Proc. § 338, subd. 4.

5. Husband and wife ⇐279(2)

Counts of complaint in wife's action to annul property settlement based on fraud and threats of physical violence on husband's part in procuring consent to settlement were demurrable on ground that action was brought too late where wife delayed 21 months after alleged discovery of fraud before bringing action. Civ.Code, § 1691; Code Civ.Proc. § 338, subd. 4.

6. Appeal and error ⇐949

Trial court's decision on question whether delay in bringing action to rescind a contract for fraud amounts to laches will not be disturbed in absence of a clear showing of abuse of discretion. Civ.Code, § 1691; Code Civ.Proc. § 338, subd. 4.

7. Husband and wife ⇐279(2)

In wife's action to annul property settlement, count of complaint alleging that settlement was abandoned by reconciliation and agreement that wife should be restored to all her rights as a wife stated a cause of action as against a general demurrer, even though wife continued to receive and use payments on $15,000 note which had been assigned to her by settlement where husband was alleged to own property worth more than $50,000, and $4,000 of amount of note was to be held in trust by wife for daughter.

8. Husband and wife ⇐279(2)

In wife's action to annul property settlement, where offer to restore unexpended balance of money received under settlement was incorporated by reference into count of complaint implying that upon rescission of settlement husband permitted wife to retain money given her as part of settlement, apparent inconsistency, in absence of a special demurrer directed to that point, should not, on a general demurrer, defeat wife's cause of action.

9. Action ⇐6

If wife seeking to annul property settlement was by agreement restored to her rights as a wife, she was not barred from obtaining a declaratory judgment that upon alleged reconciliation she was restored to those rights because of lapse of nearly 10 years since alleged reconciliation, where there was no showing of any act on part of husband, who was adjudged insane, or his guardian in denial of rights restored which would have required affirmative action by wife.

10. Pleading ⇐64(2)

Where wife seeking to annul property settlement in three separate counts attempted to state causes of action based on fraud, subsequent reconciliation, and threats of physical violence, count based on subsequent reconciliation was not subject to special demurrer as uniting two causes of action merely because it incorporated by reference allegations of count based on fraud.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Elizabeth Toomey against Richard J. Toomey and John T. Toomey, as

guardian of Richard J. Toomey, incompetent, to annul a property settlement. From a judgment for defendants, plaintiff appeals.

Judgment affirmed in part and reversed in part.

Rehearing denied; HOUSER, J., dissenting.

Geary & Geary, C. J. Tauzer, and W. H. Early, all of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, for respondents.

SEAWELL, Justice.

Plaintiff appeals from a judgment entered for defendants after sustaining of a demurrer to her third amended complaint. The action is to annul a property settlement. The defendant husband has been adjudged incompetent, and hence the guardian of his estate is also a defendant. Plaintiff avers that her husband procured her consent to the property agreement by fraudulently misrepresenting the value of his property, and by threat of physical violence to her, and, further, that they became reconciled and resumed marital relations with the understanding that the agreement "was fully abandoned and terminated and that plaintiff was restored to her former rights as a wife."

The property settlement recited that the parties had been living separately for more than a year, and that all property owned or possessed by the husband was his separate property. It assigned to the wife a note which named the husband as payee, in the principal sum of $15,000, secured by deed of trust, and also transferred an automobile to her. It provided that the husband should pay $37.50 a month to the wife for the support of their minor daughter, and that from the $15,000 to be paid on the above note the wife should retain $4,000 in trust for said daughter, to be paid to her when she arrived at the age of twenty-two, with the right to apply said sum to the support of the child if needed. In consideration thereof, the wife relinquished her right to claim support for herself and said child, and all rights in her husband's property, including the right to inherit, and dismissed an action for separate maintenance brought by her.

[1, 2] The trial court was correct in its view that the minor daughter should have been made a party to the action. The property agreement, beside providing for monthly payments of $37.50 for the support of said child, established a trust in her favor. The present action is brought to set aside said agreement, or, as to count 2, to obtain an adjudication that the agreement was set aside by a reconciliation had with the understanding that plaintiff was restored to her property rights as a wife. The question as to the effect of said reconciliation on the rights of the child as beneficiary of said trust is necessarily involved, especially in view of the fact that plaintiff offers to restore to her husband the unexpended balance of the promissory note from which the trust fund for the benefit of the child was to be created. Minor children are necessary parties to an action to terminate a trust established in their favor by a property settlement. Loock v. Pioneer Title Ins. & Trust Co., 4 Cal. App.2d 245, 40 P.2d 526; De Olazabal v. Mix, 24 Cal.App.2d 258, 74 P.2d 787; Crowell v. Pryor, 248 App.Div. 86, 288 N. Y.S. 998.

[3] But if the complaint, or any count thereof, is good against the grounds of demurrer urged, it was the duty of the trial court to order that the child be made a party, rather than to dismiss the action for her nonjoinder. Sec. 389, Code Civ. Proc.; De Olazabal v. Mix, supra. The defendants had not objected to nonjoinder of the minor daughter.

[4-6] We are of the view that as to counts 1 and 3, which rely on fraud and threats of physical violence, the court properly sustained the demurrer on the ground that the action was brought too late, but that count 2 is good as against the general and special demurrer. The property settlement was executed on January 23, 1925. The present action was brought in February, 1935. If it be conceded that plaintiff alleges sufficient reasons for failing to discover the fraud until June 2, 1933, the action was brought within three years of discovery, as provided by the statute of limitations in actions for fraud. Sec. 338, subd. 4, Code Civ.Proc. But an action for rescission may be barred by laches for delay less than the period of limitations. Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Stevens v. Bryson, 135 Cal.App. 684, 27 P.2d 932; 10 Cal.Jur. 549. In the instant case plaintiff delayed twenty-one months after she alleges she discovered the fraud before bringing suit. A party must rescind promptly on discovery of grounds for rescission. Section 1691, Civ.Code. The decision of the trial court as to whether delay amounts to laches will not be dis-

turbed in the absence of a clear showing of abuse of discretion. Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767; 10 Cal.Jur. 554.

[7] In count 2 plaintiff alleges that the property settlement was abandoned and annulled by a reconciliation had with the express understanding that plaintiff should be restored "to all her rights as the wife of defendant". Estate of Boeson, 201 Cal. 36, 42, 255 P. 800, citing cases; 9 Cal.Jur. 827; note, 85 A.L.R. 420. This count is in effect an action to obtain a declaratory judgment that upon the alleged reconciliation plaintiff was restored to her rights as a wife. The alleged reconciliation took place on April 1, 1925, less than three months after the execution of the agreement. Plaintiff thereafter lived with her husband until September 1, 1926, she alleges, when he was adjudged insane and committed to an institution. In October, 1927, he was restored to capacity. She again lived with him from the "early part" of 1928 to "about the end" of 1928, she avers. In February, 1929, he was committed a second time, and is still confined.

It appears that plaintiff continued to receive payments upon the note which had been assigned to her by the property settlement and to use them for the support of herself and her daughter. But the allegations of the complaint are consistent with the theory that said agreement was abandoned and cancelled only in so far as it deprived plaintiff of her property rights as a wife. In view of the fact that the defendant husband is alleged to have owned property worth more than $50,000, he might well permit her to retain the $15,000 note upon their reconciliation. Furthermore, $4,000 of the $15,000 to be received on the note was to be held in trust by the wife for the minor child. We are of the opinion that in the face of only a general demurrer as to this phase of the complaint, this count states a cause of action based upon the rescission of the agreement upon the reconciliation of the parties in 1925.

[8] It is true that in paragraph VIII of the first cause of action the plaintiff offers to restore the unexpended balance of the moneys received by her under the property settlement, and that this allegation is inconsistent with the allegations in count 2 which already have been interpreted as implying that upon the rescission the husband permitted the wife to retain the moneys given her as part of the property settlement. This paragraph was incorporated by reference into count 2. This apparent inconsistency, in the absence of a special demurrer, directed to that particular point, should not, on a general demurrer, be held to defeat plaintiff's cause of action. The true fact as to this point can be developed at the time of trial. If the evidence fails to show a rescission in 1925, with a permissive retention of the moneys received, then plaintiff will have failed to prove her case, and her offer to restore in 1935 would be ineffectual as too late.

[9] If, as plaintiff alleges, she was by express agreement restored to her rights as the wife of defendant, she is not barred from obtaining a declaratory judgment by reason of the lapse of time since the alleged reconciliation. It is not shown that any claim to rights as a wife made by her were refused her by her husband, or his guardian. That is, there is no showing of any act on the part of the husband or his guardian in denial of the rights restored to her which would have required affirmative action on her part.

[10] Count 2 is not subject to defendants' special demurrer on the ground that it unites two causes of action not separately stated. In three separate and distinct counts plaintiff attempted to state causes of action based on fraud, on subsequent reconciliation, and on threats of physical violence, respectively. The second count is not subject to the objection that it unites two causes of action merely because it incorporates by reference allegations of the first count.

The judgment for defendants is affirmed in so far as it applies to counts 1 and 3. As to count 2, the judgment is reversed.

We concur: EDMONDS, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; HOUSER, J.

13 Cal.2d 306

CARPENTER v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

(three cases).

L. A. 16221, 16245, 16246.

Supreme Court of California.

April 19, 1939.

1. Insurance ⇐44

Appointment of insurance commissioner, as conservator of mutual insurance company in rehabilitation proceeding, as liquidator with authority to liquidate, is warranted under statute authorizing commissioner to apply for order to liquidate and wind up the business. St.1935, pp. 540, 541, §§ 1011, 1016.

2. Appeal and error ⇐458(2)
Insurance ⇐44

The statutes governing stay of proceedings on appeal are inapplicable to special proceedings, in absence of express provision to that effect, and supersedeas upon appeal from orders made under the Insurance Code is not automatic but is within court's sound discretion. St.1935, pp. 540, 541, §§ 1011, 1016; Code Civ.Proc. §§ 946, 949.

3. Insurance ⇐44

An appeal from order approving plan of rehabilitation of insurance company did not act as automatic stay of proceedings so as to preclude subsequent entry of order appointing insurance commissioner as liquidator. St.1935, pp. 540, 541, §§ 1011, 1016; Code Civ.Proc. §§ 946, 949.

4. Insurance ⇐44

In proceeding for rehabilitation of insurance company, failure to make formal findings of fact and conclusions of law in order appointing liquidator was not error.

5. Insurance ⇐44

An order to liquidate mutual insurance company, entered pending appeal from rehabilitation order, was not erroneous because of provision vesting title to new company's stock in insurance commissioner as liquidator, as of date of making liquidation order, rather than in commissioner as conservator, as under the rehabilitation order. St.1935, pp. 540, 541, §§ 1011, 1016.

6. Insurance ⇐44

An order appointing insurance commissioner as liquidator, entered pending appeal from rehabilitation order, which referred both to first order appointing conservator, which was subsequently held void, and to second order appointing conservator which was subsequently held valid, was not invalid as based on a void order. St.1935, pp. 540. 541, §§ 1011, 1016.

7. Appeal and error ⇐1096(4)

The rule that affirmance of a void order imports no validity thereto is applicable only where grounds of invalidity were not decided or involved on the prior appeals, and prior affirmance is res judicata on all questions involved in prior appeals.

8. Insurance ⇐44

Where trial court's jurisdiction to make order appointing conservator for life insurance company was involved on appeals from rehabilitation order based thereon, affirmance of rehabilitation order was an adjudication that trial court had such jurisdiction, and was conclusive on appeal from subsequent order appointing liquidator, which was also based on order appointing conservator. St.1935, p. 547, § 1038.

9. Appeal and error ⇐548(1)

On appeal on the judgment roll, the evidence is not before reviewing court and cannot be considered.

10. Insurance ⇐44

An appointment of conservator for mutual insurance company was not invalid because of failure to serve notice of application for such appointment, where the company entered voluntary appearance. St.1935, p. 547, § 1038; Code Civ.Proc. § 416.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Rehabilitation proceedings by Samuel L. Carpenter, Jr., insurance commissioner of the state of California, against the Pacific Mutual Life Insurance Company of California, for rehabilitation of the company, wherein William H. Neblett and others intervened. From an order directing liquidation of the company, William H. Neblett, Alfred F. MacDonald, and Vernon Bettin and another, respectively, appeal. Appeals consolidated by stipulation.

Affirmed.

William H. Neblett, E. Walter Guthrie, A. H. McCurdy, Bettin, Painter & Wait, and Alfred F. MacDonald, all of Los Angeles, for appellants.

Neblett, Warner & MacDonald, William H. Neblett, R. Dean Warner, LeRoy B. Lorenz, and E. Walter Guthrie, all of Los Angeles, for appellant and respondent William H. Neblett.

Bettin, Painter & Wait, of Los Angeles, for appellants and respondents Vernon Bettin and William George Dickinson.

Alfred F. MacDonald, of Los Angeles, in pro. per.

Frank L. Guerena, of San Francisco, and U. S. Webb, Atty. Gen., John J. Flynn, Deputy Atty. Gen., Shepard Mitchell and Mitchell, Silberberg, Roth & Knupp, all of Los Angeles, for petitioner and respondent Samuel L. Carpenter, Jr., Insurance Com'r of California.

O'Melveny, Tuller & Myers and Overton, Lyman & Plumb, all of Los Angeles, for respondent Pacific Mut. Life Ins. Co. of California.

Hugh K. McKevitt, of San Francisco, for respondents Charles Ross Cooper and others.

Rupert B. Turnbull, of Los Angeles, for respondents Rupert B. Turnbull and others, for themselves and for other noncancellable policyholders similarly situated and for Francis Adams, for himself and for other noncancellable policyholders similarly situated.

Manierre & Cuthbertson, of Los Angeles, for respondents George W. Manierre and B. Robert Getts on their own behalf and on behalf of all similarly situated policyholders.

Kenyon F. Lee, of Los Angeles, for respondents E. B. Tilton and others.

H. S. Dottenheim, of Los Angeles, for respondents Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of noncancellable income policies.

Neil S. McCarthy of Los Angeles, for respondents Neil S. McCarthy on his own behalf, Ralph R. Huesman and Broadtown Investment Co.

W. B. Etheridge, of Pasadena, for respondents Dr. Arthur B. Allen and others.

Delvy T. Walton, of Los Angeles, for respondents David Lynn Openshaw and others.

Albert E. Coger, of Los Angeles, for respondent Henry B. Senn.

Herbert E. Freston, in pro. per.

Jacob J. Lieberman and Aaron B. Rosenthal, both of Los Angeles, for respondents Robert J. Webb and Philip M. Klotznick for themselves and all other persons similarly situated.

Lawler & Felix, of Los Angeles, for respondent R. Rabinowitz.

Roscoe R. Hess, and David R. Rubin, both of Los Angeles, for respondent Roscoe R. Hess.

Chapman, Snider, Duke & Landis, of New York City, Hiram W. Johnson, Jr., of San Francisco, and Frank P. Doherty, of Los Angeles, for respondents G. C. Parsons, J. A. Marvin and G. R. Snider and others on behalf of themselves and all other holders of noncancellable policies, and as members of a protective committee for holders of noncancellable income policies.

Rex Hardy, of Los Angeles, for respondents Austin O. Martin and Rex Hardy.

Ivan Merrick, of Seattle, Wash., for respondent William A. Sullivan, Insurance Com'r of Washington.

Arthur E. White, in pro. per., of Los Angeles.

Oscar Lawler and Harold Judson, both of Los Angeles, for respondents George I. Cochran and others.

Shattuck, Davis & Story, of Los Angeles, for respondents William A. Beckett and others.

Paul Overton, of Los Angeles, for respondent Arthur D. Wunner.

Latham, Watkins & Bouchard, of Los Angeles, for respondents C. N. Wesley and others.

Bell, Boyd & Marshall, of Chicago, Ill., and Newlin & Ashburn, of Los Angeles, for respondents Wilbur G. Katz and others.

Carl C. Katleman of Los Angeles, for respondents Carl C. Katleman and others for himself and all others similarly situated.

Andrew J. Copp, Jr., in pro. per., of Los Angeles.

Garnet C. Rainey, of Los Angeles, for respondent Ralph C. Hamlin.

Chapman & Chapman, of Los Angeles, for respondents Rowe Sanderson and others.

Hahn & Hahn, of Pasadena, for respondents Robert Casamajor and others.

Ben S. Hunter, in pro. per., of Los Angeles.

M. W. Purcell, of Los Angeles, for respondents Clara M. Garunan and others.

John P. Oliver, in pro. per., of Los Angeles.

Loeb, Walker & Loeb, of Los Angeles, for respondents Harold S. Cook and others.

William M. Rains, of Los Angeles, for respondents Edwin Janss and others.

D. M. Ellison, of Baton Rouge, La., for respondent E. A. Conway, Sec. of Louisiana.

Cosgrove & O'Neil and John N. Cramer, all of Los Angeles, for respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

A. A. Carmichael, of Geneva, Ala., for respondents J. Parker Evans, on behalf of himself and all other holders of active life noncancellable income policies issued in Alabama who may wish to join with him in the proceeding.

Ray Howard, of Los Angeles, for Percy A. Eisen.

Henry Huntington, of Los Angeles, for Wales MacPerdue and Harry B. Robinson.

PER CURIAM.

The above numbered appeals have been taken by the named appellants, policyholders of the Pacific Mutual Life Insurance Company of California, from an order of the superior court made under section 1016 of the Insurance Code (Stats.1935, chap. 145, p. 496), directing the insurance commissioner to wind up and liquidate the business of the insurance company. The appeals, by stipulation, have been consolidated.

The controversy between the commissioner and the appellants had its origin in 1936 when the commissioner, acting pursuant to the powers conferred upon him by statute, took over the affairs and business of the insurance company, and worked out a plan of rehabilitation. The legality of the seizure and the lawfulness and propriety of the plan of rehabilitation have already been upheld by this court. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, affirmed with opinion, Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. ——. The facts and circumstances surrounding the seizure, and the provisions of the rehabilitation agreement are fully set forth in the above opinions. So far as pertinent here, it appears that on July 22, 1936, the insurance commissioner initiated proceedings against the company by filing an application for an order appointing him conservator of the company. The order was granted the same day, and the commissioner immediately took possession of the assets and business of the company. Because of doubt as to the validity of the first order, on August 11, 1936, the commissioner applied for and secured a new order of the court appointing him conservator. On the prior appeal it was held that the July order was void, but that the seizure of the assets on July 22, 1936, was valid inasmuch as the commissioner may lawfully make such seizure without a court order. After being validly appointed conservator, the commissioner worked out a plan of rehabilitation. After a full hearing, the trial court, on December 4, 1936, made its order approving the plan of rehabilitation submitted by the commissioner, and authorizing its execution. Substantially the same group of appellants as are involved on this appeal, appealed from the rehabilitation order. The order was affirmed, this court holding that the submitted plan was fair and equitable to all concerned, including appellants. The United States Supreme Court held that the plan submitted and the procedure adopted by the commissioner in no way violated appellants' constitutional rights. Carpenter v. Pacific Mut. Life Ins. Co.; Neblett v. Carpenter, supra.

The plan of rehabilitation thus upheld approved the organization by the commissioner as conservator of a new insurance company, the assumption by it of all the policies of consenting policyholders of the old company, and the paying off of nonconsenting policyholders. The plan contemplated that the commissioner would later be appointed liquidator of the old company for the purpose of liquidating the remaining assets of that company and the paying of the claims of nonconsenting policyholders. Appellants are in this last-mentioned group.

[1] The commissioner, as conservator, put the plan of rehabilitation into operation, and then, as contemplated by that plan, in January of 1937, applied to the court below for an order of appointment as liquidator of the old company, and requested authority to liquidate that company. This procedure is recognized by section 1016 of the Insurance Code, which provides in part: "If at any time after the issuance of an order under section 1011 [the section authorizing the commissioner's appointment as conservator] it shall appear to the commissioner that further efforts to proceed under said section would be futile, he may apply to the court for an order to liquidate and wind up the business of said" insurance company. The petition recited the

factual background of the transaction, and contained the requisite legal allegations required by section 1016. The petition prayed for an order directing the liquidation of the company and requested that the court fix July 22, 1936, the date of the seizure of the old company, "as the date and time as of which the rights and liabilities of respondent corporation and of creditors, policyholders, shareholders, and members, and all other persons interested in the assets of said respondent corporation shall be fixed". The petition alleged that this last-mentioned relief was necessary to prevent confusion and conflict, and to protect the rights of all concerned. After the issuance of an order to show cause the appellants filed their return. They did not challenge any of the allegations of the petition, and particularly did not challenge the allegations that further efforts to proceed as conservator would be futile or that liquidation was necessary. The main contention made by appellants in their return was that they had appealed from the rehabilitation order; that the appeal stayed all proceedings on that order; that the liquidation proceedings "are further proceedings upon the judgment of December 4, 1936, and further proceedings upon the matters embraced in that judgment"; that pending the appeal from the rehabilitation order the superior court was without jurisdiction to entertain the proceedings to liquidate. It was also alleged that if the old company were liquidated pending the appeal from the rehabilitation order, appellants would be deprived of the benefits of their appeal from that order.

On February 3, 1937, the court entered its order entitled "Order for Liquidation". It is from this order that the present appeals have been taken. So far as pertinent here, the order recites the facts in reference to the rehabilitation order of December 4, 1936, and what was done thereunder. It is stated that "it is the fact that further efforts on his (the commissioner's) part, to conduct, as conservator, the business or any part of the business of respondent corporation, would be futile". The order also recites the necessity of giving policyholders and creditors an opportunity to file their claims and that it is fair and proper to fix the rights of such persons as of July 22, 1936, and they are so fixed. The commissioner was appointed liquidator of the business of the old company, and as liquidator he was directed to wind up and liquidate the business of that company. Title to the assets of the old company was vested in the commissioner as liquidator.

[2, 3] In their original briefs appellants rely on three main points for a reversal. It is first urged that under section 946 of the Code of Civil Procedure the appeals from the rehabilitation order acted as an automatic stay of proceedings so as to deprive the trial court of power to entertain the order here appealed from while such appeals were pending. The answer to this contention is that the provisions of section 946 of the Code of Civil Procedure, and of the related section 949 of the same code, have no application to a special proceeding such as is here involved. The sections are found in part II of the code which deals only with civil actions. This part of the code has no application to special proceedings of this nature unless specifically made applicable thereto by statute. On the appeal from the rehabilitation order it was expressly held that the proceedings under the Insurance Code are special proceedings and that the procedural sections of part II of the Code of Civil Procedure have no application thereto. The legislature has seen fit to make the provisions of part II of the code expressly applicable to many special proceedings. Its failure to do so in reference to proceedings under the Insurance Code must be held to have been intentional. We must presume that the legislature intended that upon appeal from orders or judgments made under the Insurance Code the supersedeas should not be automatic, but whether one should be granted should rest in the sound discretion of the court in the exercise of its power to grant supersedeas where no statutory stay exists.

[4] It is next urged that it was reversible error for the trial court to fail to make formal findings of fact and conclusions of law. On the prior appeals this identical contention was considered and found to be without merit. It was there held that in making orders under the Insurance Code the trial court is under no duty to make findings of fact and conclusions of law. Carpenter v. Pacific Mut. Life Ins. Co., supra, 10 Cal.2d page 327, 74 P.2d 761.

[5] The third contention of appellants is that the order here appealed from is void, because, it is urged, it attempts to modify the rehabilitation order then pending on appeal, in that, under the rehabilitation order, title to the stock of the new company was vested in the commissioner as conserva-

tor, while the order now under appeal purports to vest title to such stock in the commissioner as liquidator as of July 22, 1936. This contention is unsound. The fact that the order to liquidate provides, in the language of section 1016 of the Insurance Code, that assets theretofore held by the commissioner as conservator shall remain vested in him as liquidator, and that the order fixes July 22, 1936, as the date upon which creditors' and policyholders' rights shall be fixed, does not make the order to liquidate in these respects an amendatory order of the rehabilitation order. These provisions obviously were inserted in the liquidation order (as the statute provides) in order to provide that the alteration in the commissioner's duties in carrying on the business of the old company as conservator, to winding it up as liquidator, should not divest nor disturb his titles. The construction of the order contended for by appellants is unwarranted. The order does not provide that the commissioner's rights in the stock of the new company as liquidator date back to July 22, 1936. His rights as liquidator arose only upon the making of the liquidation order and the trial court did not attempt to provide otherwise. The court did not attempt to date back the change of the commissioner's function and title—all that it did was to fix, pursuant to statutory authority, the date as of which all creditors' rights should be fixed.

After the United States Supreme Court had affirmed the decision of this court upholding the validity of the rehabilitation order, appellants secured leave to file a supplemental brief, admittedly raising new questions described by them as being "wholly jurisdictional and constitutional". Several of the new arguments are based on the contention that both the rehabilitation and liquidation orders, for various reasons, deprive appellants of their constitutional rights. Many of these contentions were considered by the United States Supreme Court on the prior appeal and found to be unsound. These points need not be considered again.

[6] Most of the new contentions, other than those already mentioned, are partially predicated upon the record of the prior appeal, of which appellants contend that we can and should take judicial notice. It is urged that the entire proceedings leading up to and terminating in the appointment of the liquidator, including all proceedings involved on the prior appeal, were and are void. It is urged first that as the law read at the time of the entry of the order here appealed from (the law in this respect has since been changed—Stats.1937, chap. 932, p. 2563), the Insurance Code required that an order appointing a liquidator had to be preceded by a valid order first appointing the commissioner conservator; that in determining whether such prior order was made we are limited to the recitals found in the liquidation order; that that order recites that the commissioner was appointed conservator on July 22, 1936; that on the prior appeal it was determined that this July order was void; that, therefore, the liquidation order, so far as the record before us shows, was not supported by a valid prior order appointing the commissioner conservator. The basic premise upon which this contention is based—that the liquidation order was based solely on the order of July 22, 1936—is unsound. When the trial court entered its order appointing the commissioner liquidator on February 3, 1937, the rehabilitation order was then pending on appeal. On that appeal one of the main questions involved was whether the commissioner had been validly appointed conservator on July 22d or August 11, 1936. It was ultimately held on that appeal that the July 22d order was void and that the commissioner was not validly appointed conservator until August 11, 1936. The trial court in framing the liquidation order referred to both the July and August orders. In other words, while it is true that the liquidation order recites that the commissioner "was appointed conservator on July 22, 1936", it also recites that the "orders of this court appointing said conservator herein made on July 22, 1936, and on August 11, 1936". Stated another way, the order here appealed from recites on its face the making of a valid order appointing the commissioner conservator, and the mere fact it refers to the earlier void order is totally immaterial.

[7, 8] It is next urged, on several grounds, that the trial court never acquired jurisdiction of the rehabilitation proceedings, and therefore, all subsequent proceedings, including the instant proceeding, are invalid. It is contended that the legal effect of this court's opinion on the prior appeal was to ratify the void order of July 22, 1936, and that this deprives the policyholders of due process. It is also urged that the order of August 11, 1936, appointing the commissioner conservator was void because made without notice to the old company,

and without service upon it of the application as required by section 1038 of the Insurance Code; that the jurisdictional requirement of service was not met by the unauthorized appearance of some officers and attorneys of the old company; that such appearance was collusive; that even if such appearances were authorized by resolution of the board of directors of the old company, such resolution was ineffectual to confer jurisdiction on the superior court; that mere seizure by the commissioner without a prior order based on notice and a hearing gave the commissioner no authority to proceed. It will be noted that all of these attacks are not directed against the order from which the present appeals have been taken but at either the rehabilitation order or the order of August 11, 1936. These orders have been affirmed by this court and by the United States Supreme Court. To escape the legal effect of these affirmances appellants in their attempt to relitigate the question of the validity of the rehabilitation order and the order of August 11, rely on the rule that the affirmance of a void order imports no force or validity thereto. Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295, 50 Am.St.Rep. 67. The rule of the Maddux case only applies to questions which were not decided or involved on the prior appeals—as to all questions which were involved on the prior appeals, as to appellants, on this collateral attack, obviously, the prior determinations are res judicata. Lake v. Bonynge, 161 Cal. 120, 131, 118 P. 535. Clearly the question of the jurisdiction of the trial court to make the order of August 11, 1936, was involved on the prior appeals. Some of the points now made by appellants were in fact made on the prior appeals, and decided adversely to their present contentions. Even if some of the points now urged were not made upon the prior appeals, it is perfectly clear that both the trial court and this court in the prior action determined adversely to appellants the question of jurisdiction. From a very early date in this state it has been settled that "the first point decided by any Court, although it may not be in terms, is, that the Court has jurisdiction, otherwise it would not proceed to determine the rights of the parties. For the purposes of the first trial in this Court, the jurisdiction was as much determined as though the point had been made and passed upon; certain it is, that unless made, it cannot now be questioned". Clary v. Hoagland, 6 Cal. 685, 688. As was stated in Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 383, 393, 36 P. 2d 688, 692: "It is plain to us that the decision of the first appeal is res adjudicata on the question of jurisdiction subsequently and now raised by appellant. See White v. Fresno Nat. Bank, 98 Cal. [166], at page 167, 32 P. 979; Clary v. Hoagland, 6 Cal. 685. To hold otherwise on the record here presented would be lending encouragement to dilatory and highly technical procedure subversive of an effective disposition of an appeal fully briefed and decided on the merits." Clearly, by affirming the order of December 4, 1936, this court decided that the superior court had jurisdiction, and that point cannot now be relitigated. It should be mentioned that the United States Supreme Court on the prior appeal interpreted this court's decision as having passed on the question of jurisdiction. Neblett v. Carpenter, supra, page 172 of 59 S.Ct.

[9, 10] In view of this conclusion we do not intend to consider each of appellants' contentions at length. We think it proper to state, however, that on the merits, each of the contentions is unsound. The contention that the legal effect of this court's opinion on the prior appeal was to ratify the void order of July 22, 1936, is entirely unwarranted and is unsound. It was held that the filing of the petition on July 22, 1936, gave the trial court jurisdiction; that the orders made on that date were void; that the order of August 11th was valid; that the seizure on July 22, 1936, could lawfully be made without court order; that the trial court had power to ratify and confirm the commissioner's acts in this regard independently of the order of July 22, 1936. Several of the other contentions now raised are points which could properly be raised, if at all, only upon a full record. Both the present appeals and the prior appeals have been taken on the respective judgment rolls. On such appeals the evidence is not before us and cannot be considered. The contention that the record shows that the order of August 11, 1936, was made without notice to the old company and without service upon it of the application, and that section 1038 of the Insurance Code requires such notice and service, and therefore the order is void, is untenable. Even if the record did disclose these facts, it would not affect the validity of the order. Section 1038 provides that such applications shall be served upon the insurance company "in the manner prescribed by law for personal service of summons". Section 416 of the Code of Civil

Procedure provides that "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him". The record shows such voluntary appearance. The charges of fraud and collusion repeated on this appeal were considered and found to be without merit on the prior appeal.

Appellants make other contentions concerning the validity of the rehabilitation order, some based on alleged constitutional and others on alleged jurisdictional grounds. As already stated, the constitutional grounds were answered by the Supreme Court of the United States adverse to appellants' contentions. The alleged jurisdictional grounds have either been already answered in this opinion or are so clearly unsound as not to merit further discussion.

From what has been said, it follows that the order appealed from should be and hereby is affirmed.

WASTE, C. J., and EDMONDS, J., being disqualified, did not participate in the decision.



13 Cal.2d 322

VALLADAO et al. v. FIREMAN'S FUND INDEMNITY CO.

KATSULAKIS et al. v. SAME.

Sac. 5248.

Supreme Court of California.

April 21, 1939.

Rehearing Denied May 20, 1939.

1. Insurance ⇐311(1)

Violation by insured of co-operation clause of automobile liability policy, which would serve to preclude insured from indemnity under the policy, will bar recovery against insurer by injured person who has unsatisfied judgment against insured.

2. Insurance ⇐514½

A co-operation clause in an automobile liability policy may not be expanded to require insured to combine with insurer to present a sham defense, but neither will the clause be contracted to exclude from insurer a fair statement of the facts.

3. Insurance ⇐514½

Under a co-operation clause of automobile liability policy, the insured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.

4. Insurance ⇐668(4)

The question of what constitutes co-operation or lack of co-operation of insured within meaning of co-operation clause of automobile liability policy is generally a question of fact.

5. Insurance ⇐668(4)

In actions on automobile liability policy, wherein evidence of failure of insured to co-operate with insurer, as required by policy, was not materially in dispute and it was conceded that insured, who was operating truck which was covered by the policy, at time of accident, repeatedly and willfully misrepresented to insurer, over period of five months, actual conditions prevailing at time of accident relating to identity of operator of truck, breach of co-operation clause of the policy was shown as a matter of law.

6. Insurance ⇐311(1)

Where insured who was driving truck covered by automobile liability policy at time of accident, and who had previously been twice convicted of reckless driving, violated co-operation clause in policy by misstating circumstances of accident to insurer and for period of five months misrepresenting identity of driver of truck, prejudice to insurer would be presumed, precluding recovery by injured parties from the insurer, notwithstanding that under "omnibus clause" of policy insurer would be liable for negligence of one operating the truck with consent of insured.

7. Insurance ⇐514½

Prejudice to insurer under automobile liability policy may be presumed from failure of insured to co-operate with insurer as required by policy, where failure interferes with and precludes proper and prompt investigation of accident involved.

8. Insurance ⇐311(1)

Fact that reports of automobile liability insurer's investigators tended to indicate a possible lack of defense on merits to actions by injured persons, did not preclude insurer from availing itself of defense based on substantial breach by insured of co-operation clause of the policy.

9. Insurance ⇐514½

Automobile liability insurer was not precluded from refusing to protect insured as to claims arising out of a particular accident because of failure of insured to co-operate

with insurer as provided by automobile liability policy, on ground that a "forfeiture" which was not provided for in policy would result.

[Ed. Note.—For other definitions of "Forfeit; Forfeiture," see Words & Phrases.]

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Actions brought jointly by Julia Valladao and another, and by Mary J. Katsulakis and another, against the Fireman's Fund Indemnity Company, to recover under automobile liability policies after judgments obtained against defendant's insured had become final and executions were returned unsatisfied. From a judgment for defendant notwithstanding verdict for plaintiffs, the plaintiffs appeal.

Affirmed.

Rehearing denied; SEAWELL, J., dissenting. HOUSER, J., dissenting, citing Ocean Acc. & G. Corp. v. Torres, 9 Cir., 91 F.2d 464, certiorari denied 302 U.S. 741, 58 S.Ct. 143, 82 L.Ed. 573.

For prior opinion, see 79 P.2d 421.

Appelbaum & Mitchell, of Oakland, Mervin C. Lernhart, of Napa, and Lewis H. Cromwell, of Petaluma (Lewis N. Mitchell, of Oakland, of counsel), for appellants.

Bronson, Bronson & McKinnon and John H. Painter, all of San Francisco, for respondent.

Nourse, Betts & Jones, of Los Angeles, Myrick & Deering and Scott, of San Francisco, and Charles H. Goebel, of Los Angeles, amici curiæ for Pacific Automobile Ins. Co.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, Brown & Rosson, of Oakland, Cooley, Crowley & Supple, of San Francisco, Crosby & Crosby and Donahue, Richards & Hamlin, all of Oakland, Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Neumiller & Ditz, of Stockton, and Redman, Alexander & Bacon, of San Francisco, amici curiæ.

WASTE, Chief Justice.

The facts underlying this litigation are not in serious dispute and are practically conceded. It will facilitate matters, therefore, if we adopt, and we do adopt, the following rather full statement of facts heretofore employed in an opinion of the District Court of Appeal of the Third Appellate District, 79 P.2d 421, when the cause was there pending:

"These actions were jointly brought by the plaintiffs against the Fireman's Fund Indemnity Company, a corporation, pursuant to the provisions of the statutes of 1919, chapter 367, being an action after judgments obtained by the plaintiffs against the assureds of the indemnity company had become final and executions returned unsatisfied.

"In November, 1935, plaintiff Julia Valladao and John C. Valladao recovered a judgment in the sum of $7,500 against Edwin J. Davis and Dave McClure, Jr., and on the same day plaintiffs Mary J. Katsulakis and John P. Katsulakis recovered a judgment against these same defendants in the sum of $1,000, which judgments were based upon personal injuries received by Julia Valladao and Mary Katsulakis in September, 1934.

"At the time of the accident there was in full force and effect a policy of insurance in the Fireman's Fund Indemnity Company, insuring Dave McClure, Jr., against liability imposed by law upon him for bodily injuries. It also extended coverage to any person legally operating the automobile covered by the policy.

"The jury returned their verdict in the present action in favor of the plaintiffs, and thereafter, notwithstanding the verdict, the trial court entered judgment in favor of defendant Fireman's Fund Indemnity Company. Thereafter a motion for a new trial on behalf of the plaintiffs was denied. This appeal is from [the] * * * judgment.

"There is little dispute as to the facts, which substantially are that defendant indemnity company issued its combination automobile liability and property damage policy to Dave McClure, Jr., which was in full force and effect and covered the truck being driven at the time of the accident. An omnibus clause also covered 'any other person or persons while * * * legally operating any such automobile * * * if such * * * operation is with the permission of the named assured * * *'.

"The accident happened on the highway north of Santa Rosa, about 10 o'clock on the night of September 24, 1934. McClure was driving his truck at the time, accompanied by one Bert Herbert and Edwin J. Davis. As McClure was proceeding along the high-

way he struck the rear of a car parked on the highway, in which car plaintiffs were seated. When the crash occurred McClure fled the scene of the accident without disclosing his identity to any one connected with the injured parties. [On two prior occasions McClure had pleaded guilty to and had been fined on reckless driving charges.]

"When a traffic officer arrived after the accident, McClure was still absent and Davis told the officer and those at the scene that he, Edwin J. Davis, was the driver. Davis had no operator's license in his own name with him at the time, but had in his possession an operator's license belonging to his brother, John K. Davis. He concealed the fact that McClure had been on the truck and stated to the officer that his name was John K. Davis, whose operator's license he had. The officer then issued a citation for reckless driving in the name of John K. Davis and handed it to Edwin J. Davis. Davis accepted the citation, and in response thereto appeared in the justice's court, and at that time, still posing as John K. Davis, pleaded not guilty to the charge of reckless driving. The first knowledge that the indemnity company had of the accident was received on the forenoon of the day after it occurred, when McClure and Edwin J. Davis reported the accident to defendant's agent in Petaluma. At that time McClure and Edwin J. Davis appeared at the agent's office, and in McClure's presence Edwin J. Davis represented himself as John K. Davis, and told the agent that he was driving McClure's truck at the time of the accident. In answer to questions by the agent, Davis narrated the accident as though he were the driver and told the agent he had borrowed McClure's truck, and that McClure was not in the truck at the time, and that he and Herbert were the sole occupants of the truck, and that he had been arrested for reckless driving. Upon this statement of fact the agent prepared a written report and sent it to the indemnity company. A day or two following this report an adjuster for the defendant interviewed McClure and Edwin J. Davis, when they again confirmed the false statements made at the time of the first report. Some days after these reports were made McClure and Davis again went to the justice's court, at which time Edwin J. Davis, answering to the name of John K. Davis, entered a plea of guilty to the charge of reckless driving under the name of John K. Davis, and paid a fine therefor.

"On November 17, 1934, plaintiffs herein, suing separately, filed actions against McClure and John K. Davis; McClure was sued as the owner and John K. Davis was sued as the operator of the truck. The summons in the case were sent by the defendants to the indemnity company.

"In December, 1934, the indemnity company turned these cases over to its attorneys in Santa Rosa for the purpose of defending McClure and Davis. Early in January, McClure and Davis discussed the facts of the case with these attorneys, and they there repeated substantially the same story they had theretofore told. On the same day, one of these attorneys, with Davis and McClure, visited the scene of the accident and went over the facts in the case, and the same falsifications and concealments were again narrated without correction.

"In due time answers to the complaints were prepared on behalf of McClure and John K. Davis, * * * and by them duly verified and then filed, [tho McClure denies having read same]. These answers affirmatively admitted that McClure's truck was being driven by John K. Davis, but denied negligence upon the part of the operator, and set up contributory negligence as a defense. Again, a month or two later, McClure and Edwin J. Davis called at the office of the attorneys representing them for the purpose of discussing their depositions, which were to be taken by the plaintiffs. At that time they again discussed the facts in detail and again made the same misstatements.

"On * * * the day * * * the depositions of McClure and Davis were to be taken they, accompanied by their personal attorney, Mr. Carpenter, called upon Mr. Murphy, a member of the firm of attorneys who had been retained by the indemnity company to represent them, and then and there informed Mr. Murphy the stories which they had theretofore told were false,—that McClure was driving the truck at the time of the accident, and that Davis was merely a passenger in the truck, and not the driver. At that time McClure also informed Murphy for the first time that he had run away from the scene of the accident and had concealed himself. He said he had done so for the reason that he had been in trouble prior to that time arising out of a charge of driving while intoxicated, and that he was afraid his driver's license would be revoked.

"Immediately following this disclosure Murphy communicated with the San Francisco office of the indemnity company, and then informed McClure and Davis that the indemnity company was withdrawing from their defense, and that Murphy himself and his firm were withdrawing as their attorneys. Murphy also immediately advised the attorney for plaintiffs that his firm was withdrawing as attorneys for McClure and Davis, and that no depositions could be taken at the time set. Later other attorneys were substituted as attorneys for McClure and Davis.

"An amended answer, setting up the true facts was filed, and it was stipulated at the trial that Davis' name was 'Edwin J.' rather than 'John K.'. At this trial, held November 10, 1935, judgments were entered in favor of plaintiffs and against McClure and Davis.

"In March, 1936, the present action was filed. To this the indemnity company set up as an affirmative defense a breach by McClure and Davis of the cooperation clause in the policy of insurance. After a verdict for plaintiffs, the trial judge granted defendant's motion for a judgment notwithstanding the verdict. * * *

"The cooperation clause contained in the policy issued by the indemnity company to McClure, and about which the issues here raised revolve, reads as follows:

" 'Co-operation of Assured:—E. The assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the assured's own cost. The assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever, requested by the Company, and at the Company's expense, the assured shall aid in securing information and evidence and the attendance of witnesses, and shall cooperate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal.' "

[1] Preliminary to a discussion of the issues here involved, it is well to point out that it is now definitely settled here, and in a majority of the states, that in an action of this character the injured person stands in no better position than the assured and that a violation by the latter of a cooperation clause which would serve to preclude the assured from indemnity under his policy will likewise bar the injured person from recovering against the insurer should the judgment in his favor and against the assured remain unsatisfied. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 746–751, 7 P.2d 999, 85 A.L.R. 13.

[2, 3] It may not be denied that aside from the obligation arising from the law of contract, a condition of a policy requiring the cooperation and assistance of the assured in opposing a claim or an action lodged against him by an injured person is material to the risk and of the utmost importance in a practical sense. Without such cooperation and assistance the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense. Of course, as stated some years ago by Judge Cardozo, a cooperation clause may not be expanded to require the assured "to combine with the insurer to present a sham defense". Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443. At the same time, however, it cannot be contracted to exclude a fair statement of the facts. The insurer is entitled to know from its assured the true facts (of which he may have knowledge) underlying an accident and upon which the injured person bases his claim in order that it may determine for itself, in the light of such information, whether it should contest or attempt to settle the claim. Our examination of many authorities indicates the general rule to be that under a cooperation clause the assured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. Coleman v. New Amsterdam Cas. Co., supra; Francis v. London G. & A. Co., 100 Vt. 425, 138 A. 780; Seltzer v. Indem. Ins. Co., 252 N. Y. 330, 169 N.E. 403; Finkle v. Western Automobile Ins. Co., 224 Mo.App. 285, 26 S.W.2d 843. Many other decisions to the same effect might be cited. In Buffalo v. United States Fidelity & Guaranty Co., 10 Cir., 84 F.2d 883, 885, it is stated: "The company is entitled, however, to an honest statement by the insured of the pertinent circumstances surrounding the accident, as he remembers them. Lacking that, the company is deprived of the opportunity to negotiate a settlement, or to defend upon the solid ground of fact. Nothing is more dangerous than a client who deliberately falsifies the facts."

The subject receives the following treatment in Allegretto v. Oregon Auto. Ins. Co., 140 Or. 538, 13 P.2d 647, 648: "We are convinced that the willfully false statement of Harris constituted a breach of the co-operation clause of the policy. It was his contractual obligation to make a full, fair, and complete disclosure of the facts relative to the automobile accident in order to enable the insurance company to determine whether the claim should be contested. Co-operation, within the meaning of the policy, does not mean that the insured is to aid and assist the insurer in the maintenance of a sham defense. It does, however, imply good faith. The insured is not obliged to keep his mouth closed merely because an insurance policy is involved. When he does speak, however, it must be to tell the truth. When the misrepresentation concerns a material matter and substantially affects the rights of the insurer, there is unquestionably a breach of the policy."

[4, 5] It is generally established, and we shall not pause to refer to the authorities, that what constitutes cooperation (or the lack of it) on the part of the assured, within the meaning and effect of a co-operation clause, is ordinarily a question of fact. This is so because a dispute normally exists as to the actual statements and conduct of the assured in the premises or because of the existence of an uncertainty as to the intent or motive underlying his statements or conduct. But where, as here, the evidence addressed to the failure to cooperate is not materially in dispute and it is conceded on all sides that the assured, who was operating the truck at the time of the accident, repeatedly and wilfully misrepresented to the insurer over a period of five months the actual conditions prevailing at the time of the accident in the matter of the identity of the operator, we are of the opinion that the issue became one of law and that the trial court therefore correctly concluded as a matter of law that the assured's conduct constituted a breach of the cooperation clause of the policy warranting judgment for the insurer notwithstanding the verdict. Allegretto v. Oregon Auto Ins. Co., supra; United States Fidelity & Guaranty Co. v. Wyer, 10 Cir., 60 F.2d 856; Buffalo v. United States Fidelity & Guaranty Co., supra. We are satisfied that under circumstances such as are here involved the problem is not the credibility of the evidence but rather the legal consequence thereof. The evidence narrated above warrants but one conclusion, viz., that the assured breached the cooperation clause of his policy by knowingly, wilfully and repeatedly misrepresenting the identity of the person driving the truck at the time of the accident—a fact unquestionably material to the insurer in its investigation and subsequent determination whether to settle or contest any claim arising out of such accident.

But, the appellants assert, this does not furnish a complete solution to the problem. They contend that even an intentional breach of a cooperation clause, such as we have here, does not serve to relieve and exempt the insurer from liability under its policy for an accident as to which there has been such breach, unless and until the insurer can establish that it was prejudiced thereby. In support thereof they urge that inasmuch as the so-called "omnibus clause" of the policy extended its coverage to any person operating the truck with the assured's permission, it was immaterial to the risk whether the assured or Davis was driving at the time of the accident and that the repeated false statements of these two persons over a period of several months that Davis was driving with the permission of the assured (who was continually represented as not being present, when in fact the assured was both present and driving) in no way added to the burden of the insurer inasmuch as it was answerable for the conduct of either person while operating the truck. Particularly is there a lack of prejudice shown, it is asserted, because of the presence of certain preliminary reports to the insurer by its investigators that the matter had best be settled as "there is very little defense that we can offer in this case".

Whether it is indispensable that an insurer make a showing of prejudice resulting from breach of a cooperation clause in order to relieve itself from liability for an accident, is a question upon which there is an absence of unanimity. The Coleman case (N. Y.), supra, is to the effect that prejudice need not be shown. See, also, Hunt v. Dollar, 224 Wis. 48, 271 N.W. 405. There is however, respectable authority which requires the insurer to establish that the assured "failed to cooperate with it in such a way as to prejudice it". Francis v. London G. & A. Co., supra [100 Vt. 425, 138 A. 781].

We do not find it necessary to here definitely determine whether the insurer must make such a showing of prejudice. While it is true that it was so indicated in Hynding v. Home Acc. Ins. Co., supra, upon which case the appellants strongly rely, we are satisfied upon a reading of the decision therein that the subject was there only briefly and incidentally discussed and was unnecessary to the disposition of that cause. The sole issue in that case was whether an insurer might set up as against the *injured person* the defense of breach of the cooperation clause by the assured. Upon this issue it was held that the weight of authority supported the conclusion that in this respect the injured person was in no better position than the assured and that it was therefore error for the trial court in that case to *strike out* the insurer's defense based on breach of the cooperation clause. It was not indispensable that the subject of the presence or absence of prejudice resulting therefrom be discussed and, as already stated, it received only passing and incidental attention. Moreover, it was there indicated that prejudice sufficiently appeared.

In declining to now definitely determine whether the insurer must make a showing of prejudice resulting from breach of the cooperation clause by the assured, we do so for reasons similar to those announced in Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal.2d 81, 87, 53 P.2d 155, 158 (which decision is later in point of time than that in the Hynding case, supra, relied on by the appellants). We there disposed of the contention by declaring:

"Appellant contends that in an action brought by the injured person against the insurance company, before it may rely on a breach of condition to avoid liability it must appear that it has been prejudiced by the breach. Respondent contends that our statement in Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, to the effect that the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby, was unnecessary to the decision, and should be disapproved of in the instant case, as it is contrary to the great weight of authority in other jurisdictions. Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443, note page 1446, see, particularly page 1499; Clements v. Preferred Acc. Ins. Co., 8 Cir., 41 F.2d 470, 76 A.L.R. 17, note page 23, see particularly page 201; note, 85 A.L.R. 20, particularly page 70; St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co., 8 Cir., 40 F.2d 344, certiorari denied, 282 U.S. 882, 51 S.Ct. 86, 75 L.Ed. 778; Jefferson Realty Co. v. Employers' Liability Assur. Corp., 149 Ky. 741, 149 S.W. 1011. Respondent contends that as liability insurance is not compulsory, but voluntary, effect must be given to express conditions between the parties to the contract of insurance, as in the case of other types of contracts, without a showing of prejudice.

"We are not disposed at this time to enter upon a further consideration of the conflicting decisions as to whether prejudice must be shown, for we are of the view in the instant case, as we were in the Hynding Case, supra, that prejudice sufficiently appeared, * * *."

The decision in the Purefoy case then proceeds to point out that prejudice must be presumed from the failure of the assured therein to notify the insurer of the accident for a period of a year and three months (though it learned of the accident from the injured person three and one-half months thereafter) because such conduct precluded prompt investigation of the accident. It was also stated to be immaterial that the assured after giving such belated notice offered to cooperate and that counsel for the injured person gave the insurer full opportunity to defend, of which it did not avail itself. The insurer was said to be "entitled to rely on a substantial breach of so material a condition of its policy."

So it is in the present case. We are satisfied from an examination of the record that as matter of law prejudice must be presumed (if prejudice be essential to the insurer's defense) from the substantial and wilful breach by the assured of the material cooperation clause of the policy. The matter is aptly summed up in a memorandum opinion filed by the trial court at the time of entering judgment for the respondent insurer notwithstanding the verdict for the appellants. The trial judge stated, in part: "The misrepresentations were not mere matters of opinion nor of a nature which could be excused upon the ground of forgetfulness, mistake, or the like. They were wilful, deliberate and

false and made with the intention on the part of Davis and McClure to deceive in order to serve their own purposes. They concerned essential facts in relation to the operation and handling of the car at the time of the collision, the parties present and surrounding circumstances as to which the insurer was under its contract, entitled to a full, fair and complete disclosure. A co-operation clause binds the insured to the exercise of good faith and when he speaks concerning the facts of the accident it must be to tell the truth. To wilfully misstate or conceal facts in such a case is clearly not cooperation or assistance; it is exactly the opposite. Was it, then prejudicial? I see no escape from the conclusion that under all the circumstances here prejudice naturally, inherently and necessarily existed. The insurance company had taken a formal position as to the facts from which it could not recede without great disadvantage. The answer bearing all the forms of verification was on file. The false statements had been made to the traffic officer, the investigator and others. A false plea had been entered before the justice and a false writing subscribed as a report. When the true facts were disclosed, the company had to exactly reverse its position with regard to essential facts and virtually proclaim their parties and chief witnesses to be liars and wholly unworthy of belief. Practically its only props were struck from under it. Better a great deal that there had been an absolute refusal to tell the facts at all than that it should have been deceived into taking a false position and then suffering the disadvantage and detriment of confessing it, thereby utterly destroying the credibility of the principal witnesses to the facts upon which it relied in defense. I am of the opinion that damage and prejudice inheres in and must be presumed to exist in such a case. Hence it is a matter of law and not of fact; a problem for the court and not for the jury."

[6, 7] The fact that the insurer was for several months kept in ignorance that its assured (previously twice convicted of reckless driving) was the operator of the truck undoubtedly misled the insurer in its investigation of the accident and may well have deterred it from seeking to settle the appellants' claims, which it may well be presumed it would have attempted to settle if fully and truthfully apprized of all the facts, including the fact that its assured was a "hit and run" driver, a matter that undoubtedly would weigh heavily with a jury and would suggest settlement. The decision in the Purefoy case, supra, is to the effect that prejudice may be presumed from a failure to cooperate which interferes with and precludes a proper and prompt investigation of the accident.

[8] Moreover, had the insurer proceeded to defend on behalf of its assured, it faced the spectre of having its principal witnesses denounced in open court as perjurers in view of the "about-face" in their stories, reflected in the original actions by two verified but inconsistent and contradictory answers to the complaints of the respective injured persons. The insurer before withdrawing from the defense of the actions was not required at its peril to anticipate that no reference would be made upon the trials thereof to the falsity of the prior assertions of the two principal defense witnesses. At the time the insurer withdrew because of the assured's breach of the cooperation clause, it was warranted in reasoning that the trials would serve to expose its witnesses as perjurers. The reasonableness of such an assumption now stands demonstrated by the record in this case wherein are included portions of the testimony adduced upon the trials of the original actions for damages from which testimony it appears that the principal defense witnesses McClure (the assured) and Davis there testified that the assured was actually operating the truck whereas the testimony of the police officer (who came upon the scene of the accident) disclosed that Davis then and there stated to the witness that he (Davis) was operating the truck when the collision occurred. The answers also reflected such inconsistency in the story of the assured and Davis.

The facts involved in the Oregon case of Allegretto v. Oregon Auto. Ins. Co., cited above, are quite similar to those of the present case. In that case, as here, the assured falsely represented that another was driving the automobile at the time of the accident. On such statement an answer was prepared and filed. Shortly prior to the trial the true facts were learned and the answer was accordingly amended. The insurer then disclaimed liability but conducted the defense (unsuccessfully) under a reservation of its right. In the subsequent action against the insurer, both sides moved for a directed verdict. The

motion of the plaintiff (injured person) was granted and the insurer appealed. The judgment was reversed. Following the statement, quoted at length above, that it is the contractual obligation of the assured to make a true and complete statement of the facts, it was held, in effect, that the motion of the insurer should have been granted upon the ground that the assured's misrepresentation of a material fact constituted a prejudicial breach of the cooperation clause as a matter of law. In so concluding, the opinion therein states "can it reasonably be said that the insurance company's rights were not substantially prejudiced when it was obliged to file an amended pleading which had the effect of apprizing the jury of the fact that Harris has not told the truth in the first instance? * * * The insurance company was the victim of the fraud and deception of one who had agreed to 'render to the company all co-operation and assistance within his power except in a pecuniary way.'" This conclusion was announced even though "so far as the liability of the insurance company is concerned, it was immaterial, under the terms of the policy, whether Harris or Akre was driving the car * * *" In other words, the insurer is entitled to a truthful statement of the circumstances of an accident from its assured even though under a so-called "omnibus clause" it would equally be liable for the negligence of another, if such other actually operated the automobile at the time of the accident and had not been wilfully misrepresented by the assured as being the operator at such time. As we have already indicated, the identity of the driver might well constitute a material factor in the insurer's consideration and determination of the problem of settling or opposing the injured person's claim. Nor do we think that preliminary reports of the insurer's investigators tending to indicate a possible lack of defense on the merits to an injured person's claim, precludes the insurer from availing itself of a defense based on a substantial breach of the cooperation clause. We are not now in a position to conjecture as to what settlement or defense on the merits the insurer may have worked out had it been originally fully and truthfully advised by the assured and had it not been forced to withdraw because of its assured's false statements. The notice of withdrawal was timely and adequate in scope.

In conclusion, we note the appellants' contention that nowhere in the policy is there a forfeiture clause and that inasmuch as forfeitures are not favored either in law or equity none should be here enforced. The case of Finkle v. Western Auto. Ins. Co., supra, 224 Mo.App. at page 295, 26 S.W.2d at page 846 suggests an answer to the contention. It there appears:

"Nor is there any doubt about the contention of counsel for plaintiff that courts abhor forfeitures, and refuse to read such a drastic provision into a policy of insurance when the parties themselves have not unmistakably inserted it therein. In such an instance as this, however, we do not understand that any forfeiture of the policy is involved. If the insurer is fortunate enough to escape liability, it is not necessarily by a forfeiture of the policy, for the policy may well remain in full force and effect as to those losses sustained by the assured where the conditions of the policy have been met, while a recovery may be defeated as to a particular loss in connection with which the assured was remiss in the performance of his obligations under the contract.

"By this we mean that the condition of the policy requiring cooperation by the assured is in the nature of a condition precedent to liability on the company's part for the loss growing out of a claim with the disposition of which the assured's assistance is demanded; and we see no reason why we should hold that a breach of such condition in a given instance should have the effect of nullifying and vitiating the contract for all time and purposes. In other words, the failure of the assured to aid in securing information and evidence when requested by the company will not terminate the company's entire liability as a matter of law, the policy not expressly making such failure a cause of forfeiture, but, in an action by the assured for indemnity to cover a particular loss sustained, his failure will be evidence for the company on the vital question of whether he was guilty of such a breach of his contract as to serve to defeat his action, and to relieve the company from liability therein."

[9] Applying this reasoning to the case now before us we find that the insurer in its written notice of withdrawal to the assured merely expressed its "refusal to protect [the assured] under their above numbered policy *for claims arising out of the*

accident referred to in the said actions." The answer filed in each of these actions by the insurer in response to the complaint of the respective appellants alleged that in so far as the assured was concerned "no insurance coverage existed * * * *in respect to any of the matters alleged in said complaint."* It is obvious from the foregoing that the insurer was merely disclaiming liability for the accidents to the appellants and was not declaring a forfeiture of the policy. The reasoning of the case last quoted from is therefore applicable. (However, even if the insurer were seeking a forfeiture of the policy generally, so long as it is entitled to avoid liability for this particular accident, it is questionable whether the appellants would be in a position to object thereto.)

The Purefoy case, supra, 5 Cal.2d at page 91, 53 P.2d at page 160, reaches a similar conclusion in the following manner: "The policy of liability insurance did not insure Austin only against liability on account of this particular accident, but also against liability for other accidents during the life of the policy, which was one year from December 15, 1929. We are of the view that by retaining the premium the insurer may have waived the right to declare the policy forfeited, and thereby have protected Austin as to other accidents during the life of the policy, but that it did not waive the right to rely on the breach of condition to defeat liability as to this particular accident."

The record and many briefs herein, including the several Amici Curiae briefs, have been examined and we are of the view that sufficient has here been said on the many arguments expounded by counsel. It is impossible to here refer to and discuss the many cases cited in the several briefs.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; EDMONDS, J.

HOUSER, Justice (dissenting).

I dissent. Notwithstanding the possible trend of precedents to the contrary, I am unwilling to subscribe to a doctrine which either will, or may, encourage the perpetration of fraud, or afford a favorable opportunity to unscrupulous insurance companies (if any) or to their agents, through collusion with an assured, to defeat the just rights of one who may be injured through the negligence of an insured person. It is obvious that, under the rule that has been announced in the majority opinion, as a consequence of a possible collusion between an insurance company and an impecunious owner of an automobile, an insured person might be induced to "cooperate" with an insurance company even up to any moment of a trial, and then, under some pretext, or for no reason whatsoever, either fail or decline to continue in his "cooperation",—with the result that, however meritorious the cause of action of a plaintiff might be, the insurance company would become absolved from liability, to the irreparable loss of the injured person.

I am of the opinion that, by virtue of the exercise of police power, not only is the public entitled to assert and to maintain an interest in every automobile insurance policy, but also that, by its contract, an insurance company impliedly holds out to the world an assurance that it will answer for the actionable negligence of the insured person. Likewise, and in consequence, am I convinced that until and including the instant when an accident insured against may occur, the contract of insurance should be interpreted as one made not only for the benefit of the person with whom such contract has been entered into, but also for the benefit and protection of the third person who may be injured in such accident; furthermore, that to permit an insurance company, because of its agreement with its assured to that legal effect, to evade liability that already may have ensued against it, solely for the reason that thereafter the assured has failed to "cooperate", amounts to nothing less than legal encouragement and an implied invitation to commit a fraud as far as the rights of the injured person are concerned. Such an agreement should be condemned as contrary to public policy and adjudged wholly void. In other words, my conclusion is that, after an accident has occurred, by no act, omission, or agreement of any kind, by or in behalf of the parties to the contract, should the assumed rights of interested third persons therein be adversely affected. The following authorities have at least an indirect bearing upon the situation herein presented:

In the case entitled Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W. 2d 473, 476, 72 A.L.R. 1368, the court said: "* * * in Blashfield's Cyclopedia of Automobile Law (1927) vol. 3, p. 2637,

the case of Dickinson v. Maryland Casualty Company [101 Conn. 369, 125 A. 866, 41 A.L.R. 500], supra, is referred to as holding that: 'Where an automobile liability insurance policy extended indemnity to third parties driving with assured's permission, and permitted suit against the insurer by persons injured by the operation of the car, slight deviations, by one permitted by the insured to drive home to change his clothes, from the route to the home of the driver, does not destroy the insurer's liability for injuries to a guest of the driver.'"

Referring to the Dickinson case, the court proceeded to say: "In construing the policy, we think the Supreme Court of Errors of Connecticut correctly placed emphasis upon the purpose of the named insured to protect any person injured by the operation of the car by giving him a cause of action against the insurer, in the event of the insolvency or bankruptcy of the person responsible in law for injuries inflicted in the operation of the car. *This object or purpose is in accord with the trend of public opinion, which, in some jurisdictions has resulted in legislation requiring owners and operators of automobiles to carry insurance for the protection of persons who may be injured by their operation.*" (Emphasis added.)

That the rights of any person lawfully using the highway who may be injured by the negligent operation of an automobile by another should be of paramount importance, in an action brought by such injured third person to collect damages resulting from his injuries, is borne out by the fact (commented upon in the case just cited) that in several jurisdictions the legislatures of the respective states have enacted compulsory automobile insurance laws. Such laws have been held to be valid legislative enactments, under the police power of the state. See Huddy, Cyclopedia of Automobile Law, Ninth Edition, vols. 13–14, p. 302, and cases there cited.

Thus in the work of Couch, Cyclopedia of Insurance Law, vol. 5, p. 4199, in discussing the compulsory automobile insurance law of New Hampshire, the author says: "* * * the New Hampshire court, in passing upon the questions submitted to it, declared that the legislature, under its authority over public highways and its power *to provide for the public safety,* could lawfully pass a general requirement that motor vehicles may be operated on the public highways only when adequate provision has been made for compensation to persons injured by negligent operation; * * *." (Emphasis added.)

And in the case entitled Wheeler v. O'Connell, Mass., 9 N.E.2d 544, 546, the court said: "The purpose of the compulsory motor vehicle insurance law * * * is to provide compensation *to persons injured through the operation of the automobile insured by the owner.* In speaking of the grounds for justification of the statute in question, it was said in Opinion of the Justices, 251 Mass. 569, 596, 147 N.E. 681, 694: 'The most important is the great uncompensated damage now caused by motor vehicles to innocent travelers upon the public ways.' And it has been pointed out by this court in many cases that the protection of the traveller on the public ways is the fundamental basis of the statute. [Citing cases.]" (Emphasis added.)

Also in the case entitled In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681, at pages 693, 694, the court discussed at length the reasons underlying legislation providing for compulsory automobile insurance, and commented as follows:

"The power of the General Court to regulate travel over the public ways of the commonwealth for the general welfare is extensive. It may be exercised in any reasonable manner to conserve the safety of travelers. No one has a right to use streets and other public places as he chooses without regard to the presence of others. It is an underlying conception of streets and highways that they shall at all times be reasonably safe and convenient for public travel and that travelers thereon in the exercise of due care may be secure from preventable danger. Numerous statutes to that end have been enacted from early times to the present. All highways now are laid out and established by public authority. * * * The requirement that every owner before being allowed to register his motor vehicle shall provide security for the discharge of his liability for personal injuries or death resulting from the presence of such motor vehicle on the public ways cannot be pronounced unreasonable. It furnishes a degree of assurance of compensation to those rightly and carefully using the ways and injured by the carelessness of operators of motor vehicles. It may be thought that an in-

direct result of such regulation will be to cause the exercise of greater care on the part of such operators and of higher caution on the part of owners of motor vehicles in refusing to intrust them to careless operators. The requirement for security for the payment of the legal claims arising from personal injuries caused on highways by motor vehicles is an extension of the police power into a new field, so far as we are aware, but in our opinion it falls within the limits of the constitutional power of the General Court. It may be justified on several grounds. The most important is the great uncompensated damage now caused by motor vehicles to innocent travelers upon the public ways. It is a part of the declaration of Rights of our Constitution that:

" 'Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character.' Article 11.

"Another ground upon which the validity of the proposed statute may rest is that the motor vehicle is of itself a dangerous instrumentality. Unless kept in good repair and equipped with adequate brakes and then driven on public ways with a high degree of care and skill, it is bound to become a source of imminent danger to other travelers. Chief Justice Shaw said in Commonwealth v. Alger, 7 Cush. 53, 84, 85:

" 'It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.'

" * * * It has commonly been thought that there is no more certain way of securing attention to the safety of human beings than by holding those responsible for dangers to heavy and certain liability for injuries arising therefrom. [Arizona Employers' Liability Cases], 250 U.S. [400] at page 432 [39 S.Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537]. Legal liability without financial responsibility is a barren right to one who sustains injury by the wrongful act of another. A peremptory requirement that, before one brings a dangerous instrumentality into public places, the owner must first provide adequate security that those who suffer personal injury through the negligent use thereof shall be assured of recompense would be no greater interference with fundamental rights than the instances just cited. The operation of such an instrumentality in public places is not a natural right. It is subject to reasonable regulation for the benefit of the general public. * * *"

To the same effect is In re Opinion of the Justices, 81 N.H. 566, 129 A. 117, 39 A.L.R. 1023.

In the face of the provisions of the several statutes to which reference has been had in the foregoing quotations, the reasoning employed by the different appellate tribunals in the cited cases, and the judicial pronouncements in connection therewith, it would seem most improbable that, by reason of a contract provision like the one here in question which might be contained within a policy of insurance,—on the happening of an accident which had occurred through and by reason of the negligent act of the assured—an insurance company would be allowed to evade liability therefor on the ground that, after the accident had occurred, the assured had either refused or failed to "cooperate".

Furthermore, as tending toward a recognition and consequent application of a doctrine such as that which hereinbefore has been suggested and which to my mind should prevail herein, see the case of Malmgren v. Southwestern A. Ins. Co., 201 Cal. 29, 255 P. 512.

32 Cal.App.2d 309

Petition of READER et ux.

READER et ux. v. DRAPEAU, Building and Loan Com'r.

Civ. 11031.

District Court of Appeal, First District, Division 2, California.

April 20, 1939.

1. Estoppel ⇐68(2)

In special proceeding for extension of order postponing foreclosure, wherein beneficiary under deed of trust filed answer making admissions on which petitioners relied, such beneficiary was estopped from contending that his answer had no standing as a pleading because not expressly authorized by statute, and issues appearing on the face of the pleadings were before the trial court. St.1937, p. 465, § 16; Code Civ.Proc. § 462; § 1962, subd. 3; § 1963, subds. 3, 27.

2. Mortgages ⇐357

The statute governing postponement of foreclosure sale absolutely vests jurisdiction in trial court to hear and determine petition for extension of postponement, but does not purport to specify procedure minutely, and trial court may adopt any suitable process or mode of proceeding conformable to the spirit of the Code of Civil Procedure. St. 1937, p. 465, § 16; Code Civ.Proc. § 187.

3. Mortgages ⇐357

In proceeding for extension of postponement of foreclosure, issues on allegations in the original petition for postponement, concerning operating costs and income and possibility of refinancing, were improperly raised. St.1937, p. 465, § 16.

4. Mortgages ⇐357

Petitioners who were granted order extending time for foreclosure, and seeking additional extension of time, were bound to plead that they had filed the original petition for extension, but were not bound to prove again the facts therein recited. St. 1937, p. 465, § 16.

5. Evidence ⇐43(2)

In proceeding for continuance of postponement of foreclosure, court takes judicial notice of the filing of the original petition and making of original order of postponement. St.1937, p. 465, § 16.

6. Courts ⇐99(1)

An order made on original petition for postponement of foreclosure was res judicata in proceeding for continuance of such postponement. St.1937, p. 465, § 16.

7. Mortgages ⇐357

An original order for postponement of foreclosure, based on allegations in the original petition concerning operating costs, monthly income, improved rental conditions, and likelihood of refinancing, constituted some evidence authorizing continuance of the postponement in subsequent proceeding. St.1937, p. 465, § 16.

8. Evidence ⇐18

In proceeding for continuance of postponement of foreclosure, chancellor could take judicial notice that according to general opinion rentals were increasing. St.1937, p. 465, § 16.

9. Building and loan associations ⇐39(14)

In proceeding for continuance of postponement of foreclosure, petitioners were not required to prove immaterial allegations that beneficiary of the deed of trust had refused to accept its own savings certificates in payment of the indebtedness. St.1937, p. 465, § 16.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding in the matter of the petition of Henry J. Reader and wife for an order postponing foreclosure sale of realty under a deed of trust, against Louis C. Drapeau, as Building and Loan Commissioner of the State of California in liquidation of the California Mutual Building and Loan Association. From an order postponing the sale, defendant appeals.

Affirmed.

Walter Carrington, of Oakland, for appellant.

John C. Stirrat and Heber James Brown, both of Oakland, for respondents.

STURTEVANT, Justice.

This is an appeal from an order postponing foreclosure sale of real property under a trust deed by Louis C. Drapeau, building and loan commissioner and as such receiver of California Mutual Building and Loan Association, the beneficiary under a deed of trust executed by Henry J. Reader and Eva L. Reader, his wife. The appellant contends that the evidence did not support the order. The question

at once arises as to what the issues were. The trustors filed a petition as follows:

"The petition of Henry J. Reader and Eva L. Reader, his wife, respectfully shows:

"I. That your petitioners are interested parties in the above entitled matter, and file this petition pursuant to the provisions of the Mortgage and Trust Deed Moratorium of 1937.

"II. That on or about May 15, 1936, your petitioners filed herein their petition for an order postponing the foreclosure sale of real property, which petition is hereby referred to and made a part hereof, as if the same were herein fully set forth.

"III. That pursuant to the petition herein above referred to, the above entitled Court duly made its order herein on the 5th day of September, 1936, postponing the foreclosure sale of the real property described in the petition originally on file herein, until February 1st, 1937. That thereafter, after proceedings duly had herein, the above entitled Court duly made its order on the 5th day of February, 1937, continuing its order of September 5, 1936, which order was presented and signed on the 17th day of September, 1936, in full force and effect in all respects up to and including the 1st day of July, 1937. That said orders, and each of them, are hereby referred to and incorporated as a part hereof, as if the same were herein fully set forth.

"IV. That your petitioners have duly complied with all of the terms provided in the said orders and each of them by your petitioners to be met, and are not in default in any of the terms of the said orders postponing the foreclosure sale of your petitioners' real property.

"V. That the apartment house industry is improving, and that your petitioners are informed and believe and therefore allege that as business in general improves, the rents for apartments will increase and enable your petitioners to either refinance the property or to meet payments satisfactory to the respondent, if the foreclosure sale of the real property is postponed until July 1, 1939.

"VI. That your petitioners have offered to the respondent herein, its own savings certificates in an amount sufficient to pay the entire amount of its incumbrance against the said real property of your petitioners, but that the said respondent has refused to accept its own savings certificates in payment of the said indebtedness."

It was duly served on the petitioner and he promptly appeared and filed an answer as follows:

"Comes now Louis C. Drapeau, as Building and Loan Commissioner of the State of California, in the liquidation of California Mutual Building and Loan Association, respondent in the above-entitled matter, and in answer to the petition herein, admits, denies and alleges:

"I. In answer to paragraph II of said petition, respondent denies the allegations made and contained in paragraphs VI and VII of the petition referred to and incorporated in said paragraph II.

"II. In answer to paragraph V of said petition, respondent does not have sufficient information or belief sufficient to enable him to answer the allegations therein contained, and by reason thereof, denies each and every allegation therein contained.

"III. In answer to paragraph VI of said petition, respondent denies each and every allegation therein contained."

The paragraphs of the original petition referred to in that answer as VI and VII and lettered by us respectively (A) and (B) were as follows:

"VI. (A) That the gross monthly income from the said property averages $206.12. That the monthly operating costs average as follows: water $9.00; garbage $1.30; door telephone system $6.00; telephone $3.00; hall lights $3.40; taxes $33.67; repairs $15.00; replacements $5.00; furniture $10.00; insurance $3.42; interest $101.97 on the first deed of trust; interest on the second deed of trust $2.84; making a total operating expense of $212.60 per month."

"VII (B) That rental conditions are now improving and your petitioners believe and therefore allege that if the proposed foreclosure sale is postponed that they will be able to either refinance the said property or meet the payments as required under the terms of the above-described deed of trust and save their equity in the said property."

[1, 2] On a casual glance at the pleadings it appears that the issues were few. But the appellant stresses the fact that this is a special proceeding, that the statute, Stats.1937, ch. 167, p. 465, sec. 16,

does not expressly authorize the filing of an answer, and therefore his answer had no standing as a pleading. The respondents reply that as appellant filed his answer under the provisions of the Code of Civil Procedure thereby causing respondents to rely upon admissions made under section 462 thereof, the appellant is clearly estopped from invoking against the respondents the rule contended for. Subdivision 3, sec. 1962, Code Civ.Proc.; subs. 3 and 27, sec. 1963, Code Civ.Proc.; Abbott v. Cavalli, 114 Cal.App. 379, 300 P. 67. That reply is clearly sound. However, it is also clear that the appellant was entitled to file an answer. The statute just quoted absolutely vested in the trial court jurisdiction to hear and determine respondents' petition. It did not purport to specify minutely the procedure. Under such circumstances the trial court had the right to adopt any suitable process or mode of proceeding which might appear most conformable to the spirit of the Code of Civil Procedure. Code Civ.Proc., § 187; Barnes v. District Court of Appeal, 178 Cal. 500, 504, 173 P. 1100; Bass v. Leavitt, 11 Cal. App. 582, 585, 105 P. 771; Doty v. Jenkins, 142 Cal. 497, 498, 499, 77 P. 1104; Fleming v. Ingalls, 1 Cal.Unrep. 344. Under the foregoing authorities we think it is clear the issues before the trial court were those that appeared on the face of the pleadings.

[3-6] The issues made regarding paragraph VI (A) of the original petition constituted a false quantity. The respondents having filed a petition and having been granted an order extending the time, and being desirous of an additional extension of time, were bound to plead that they had filed the original petition. They were not bound again to prove the facts therein recited. That such facts existed was interentially found by the trial court when it made its first order extending the time. Of the filing of that petition and the making of that order the trial court, on the hearing of the last petition, was bound to take judicial notice. Craiglow v. Williams, 45 Cal.App. 514, 516, 188 P. 76. The order made on the original petition had become res judicata. (34 C.J. 517, 857, 1175 and 1291.) Moreover, on the hearing of the last petition the respondents introduced oral evidence proving every single allegation in the above mentioned paragraph.

As to the issues made regarding paragraph VII (B) of the original petition they stand on the same basis as the issues of the paragraph disclosed immediately above.

[7, 8] As to the issues made by paragraph V of the last petition it will be observed by comparison that said allegations are in substance merely to the effect that the conditions alleged in paragraph VII (B) were continuing. That is, rental conditions were improving but were still not out of the great depression that commenced in 1929. The original order based on the allegations contained in paragraphs VI (A) and VII (B) constituted some evidence. A comparison of the figures contained in said paragraphs with the figures stated by the witness called on the hearing of the last petition constituted additional evidence. In other words, on May 14, 1936, the date of the filing of the original petition, the rentals of the property involved amounted to $212.60 per month, whereas the rentals at the time of the last hearing for full capacity amounted to $284.50. Furthermore, in hearing the petition the chancellor remarked that according to general opinions rentals were increasing and he could and would take judicial notice of that fact. The appellant vigorously contends the chancellor should not have done so. In that contention we think the appellant is clearly in error. Atchison, T. & S. F. R. Co. v. United States, 284 U.S. 248, 260, 52 S.Ct. 146, 76 L.Ed. 273; Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Wood v. Kennedy, 117 Cal.App. 53, 61-63, 3 P.2d 366.

[9] The last contention made by the appellant is that the respondents did not introduce any evidence proving or tending to prove paragraph VI of their petition. An examination of that paragraph discloses it contained matter that was wholly immaterial. No duty rested on respondents to prove immaterial allegations.

We find no error in the record. The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

32 Cal.App.2d 315

PEOPLE v. BUSICK et al.

Cr. 3074.

District Court of Appeal, Second District, Division 1, California.

April 20, 1939.

1. Indictment and Information ⇐110(3)

An indictment charging offense in language of statute is sufficient.

2. Indictment and Information ⇐71

An indictment charging that defendants conspired to use force and violence in a manner not authorized by law in entering upon and detaining lands and buildings of one who was in peaceable possession thereof, was sufficient to give defendants notice of offense of which they were accused. Pen. Code, §§ 418, 952.

3. Conspiracy ⇐43(6)

An indictment attempting to charge conspiracy to violate statute prohibiting use of force in entering upon or detaining lands of another was not fatally defective as being so general in scope as to include violation of other statutes and as setting forth facts not constituting a crime, where no evidence was received of other violations and defendants were not prejudiced by alleged facts not constituting a crime. Pen.Code, § 418.

4. Constitutional law ⇐42

Defendants charged with conspiracy to violate statute prohibiting use of force in entering upon or detaining lands of another could not complain that statute was unconstitutional as being so broad as to include innocent acts commonly done in everyday life, where defendants' acts did not fall within such category. Pen.Code, § 418.

5. Constitutional law ⇐45

Where validity of statute has not been disputed since its adoption more than 60 years ago, courts will not disturb validity of statute in absence of strong showing.

6. Indictment and Information ⇐159(2)

An indictment entitled "second amended indictment" was not invalid because of alleged invalidity of original indictment, where second indictment did not depend on original indictment.

7. Indictment and Information ⇐159(1)

The failure to rule on demurrer to former indictment did not deprive trial court of jurisdiction to proceed under amended indictment.

8. Criminal law ⇐93

Under statute authorizing prosecution in superior court for conspiracy to commit any crime, superior court had jurisdiction to try indictment charging conspiracy to violate statute prohibiting use of force in entering upon or detaining lands of another, notwithstanding that statute designated offense as a misdemeanor. Pen.Code, §§ 182, 418, 594.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

William Busick and others were convicted for conspiracy to violate sections 418 and 594 of the Penal Code making forcible entry and detainer and malicious mischief misdemeanors, and they appeal.

Affirmed.

John C. Packard and James M. Carter, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

DORAN, Justice.

In an indictment returned by the grand jury of Los Angeles county on March 15, 1937, 358 defendants, including the 22 appellants herein, were charged with the offense of conspiracy to violate sections 418 and 594 of the Penal Code of the state of California. The defendants demurred, both general and special, and at the same time a motion was made to set aside the indictment. The demurrer was overruled and the motion denied. At the trial when the first witness was called and sworn, defendants objected to the introduction of any evidence, basing the objection substantially on the same grounds that were urged in connection with the demurrer and the motion to set aside, which objection was overruled. At the conclusion of the People's case defendants moved to quash the indictment upon all of the grounds previously stated in the demurrer and motion to set aside the indictment, which motion was also overruled. The defendants were adjudged guilty and motions in arrest of judgment and for a new trial were denied.

Defendants appeal from the judgment and from the order denying the motion for a new trial.

Inasmuch as one of appellants' principal contentions is based on the alleged insufficiency of the indictment, the charging part thereof is herewith set forth in full:

"The Grand Jury of the County of Los Angeles hereby accuses (then follow the names of the 358 defendants) of a felony, to wit, the crime of conspiracy to violate Section 418, Penal Code of California, and Section 594, Penal Code of California, in that, on or about the 1st day of November, 1936, and continuously thereafter, in the County of Los Angeles, State of California, the above named defendants did willfully, unlawfully and feloniously conspire, combine, confederate and agree together and with divers other persons, whose true names are to the Grand Jury unknown, to use and procure, and to procure, encourage and assist another to use force and violence in entering upon and detaining the lands, buildings and other possessions of the Douglas Aircraft Company, a corporation, in a manner and case not authorized by law, which said lands, buildings and other possessions were then and there in the lawful, actual and peaceable possession of the said Douglas Aircraft Company, a corporation, and were located at number 3000 Ocean Park Boulevard, in the City of Santa Monica, in the County of Los Angeles; and also to maliciously injure and destroy real and personal property, not the property of the aforesaid defendants, but on the contrary the property of the said Douglas Aircraft Company, a corporation, which said property was located at number 3000 Ocean Park Boulevard, as aforesaid, by ways and means and in a manner otherwise than such as to constitute a violation of any other section of the Penal Code than the aforesaid section 594.

"Overt Act No 1.

"That pursuant to said combination, confederation, agreement and conspiracy, and to carry out the objects and purposes of the same, the aforesaid defendants entered upon the premises located at number 3000 Ocean Park Boulevard, in the City of Santa Monica, County of Los Angeles.

"Overt Act No. 2.

"That pursuant to said combination, confederation, agreement and conspiracy, and to carry out the objects and purposes of the same, the aforesaid defendants did break a certain partition located between two rooms in a building situated at number 3000 Ocean Park Boulevard, in the City of Santa Monica, County of Los Angeles.

"Overt Act No. 3.

"That pursuant to said combination, confederation, agreement and conspiracy, and to carry out the objects and purposes of the same, the aforesaid defendants did lock, barricade and bar the doors of the buildings located at number 3000 Ocean Park Boulevard, in the City of Santa Monica, County of Los Angeles.

"Overt Act No. 4.

"That pursuant to said combination, confederation, agreement and conspiracy, and to carry out the objects and purposes of the same, the aforesaid defendants did make, manufacture and possess instruments and weapons of the kind commonly known as blackjacks, sling-shots and billies.

"Overt Act No. 5.

"That pursuant to said combination, confederation, agreement and conspiracy, and to carry out the objects and purposes of the same, the aforesaid defendants did remain in and about the premises located at number 3000 Ocean Park Boulevard, in the City of Santa Monica, County of Los Angeles, between the 22nd day of February, 1937, and the 26th day of February, 1937."

It is contended that "the indictment does not set forth the facts constituting the alleged crime with sufficient certainty to apprise the defendants of the charge but instead in generic language sets forth facts which might constitute many and various crimes * * * (and) in attempting to charge a conspiracy to violate section 418, Penal Code, alleges acts which may or may not constitute a crime"; also, that "Section 418 of the Penal Code is so indefinite and uncertain that it fails to define the crime denounced in plain and specific language and is therefore unconstitutional".

Sections 418 and 594 of the Penal Code are as follows:

"§ 418. *Forcible entry and detainer.* Every person using or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of

another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor."

"§ 594. *Malicious mischief in general, defined.* Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor."

[1, 2] That an indictment, based upon a code provision of the character herein considered, is sufficient if it charges the offense in the language of the statute is too well settled to require citation of authority. The indictment sets forth that the defendants conspired to use force and violence in entering upon and detaining the lands and possessions of the Douglas Aircraft Company, which lands and buildings were then and there in the lawful and peaceable possession of said aircraft company, and that defendants conspired to use such force and violence in a manner and case not authorized by law. Although brief, the indictment clearly gives "the accused notice of the offense of which he is accused", which condition meets the requirement of section 952 of the Penal Code.

[3] With regard to the argument by appellants, as above noted, that the indictment is faulty because, in effect, it is too general in scope and therefore could be understood to include the violation of many other provisions of the Penal Code and, also, that it sets forth acts which may or may not constitute a crime, it is not urged that any evidence was received at the trial which included proof of such other violations, nor is it pointed out in what manner appellants were in fact prejudiced by such alleged defects in the indictment. In that connection for the purpose of determining the question here considered it should be noted that from the standpoint of logic it is unnecessary to take into account what might have occurred, but only what in fact did occur. Possibilities almost without limit can be suggested to lend support to a specious argument, but logical reasoning will inevitably reveal the defect. The argument therefore that the acts alleged, in some instances may not constitute a crime, is beside the issue.

[4] In support of appellants' contention that section 418 of the Penal Code is so indefinite and uncertain that it fails to define the crime denounced in plain and specific language and is therefore unconstitutional, it is argued that "such a broad prohibition includes within it many instances of innocent acts commonly done in everyday life" and that "an honest mistake in judgment might result in a criminal prosecution". Again appellants rely on possibilities that need not necessarily be taken into account. It is not contended that the acts of appellants fall within the above mentioned category, and that by reason thereof they are the victims of an indefinite statute. Even assuming, but for the sake of argument only, that the statute is indefinite, nevertheless appellants appear to have suffered no prejudice thereby.

[5] In support of the contention that section 418 of the Penal Code is unconstitutional, appellants cite only one case, namely, United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563. The decision does not appear to be in point. It merely holds that the act therein considered was ineffective as the basis of a criminal prosecution because Congress had "not as yet provided by 'appropriate legislation' for the punishment of the offence charged in the indictment". Section 418 of the Penal Code of California was adopted by the legislature in 1872. Although the right of appellants herein to challenge the constitutionality of the section is not questioned, nevertheless it is significant that the validity of the statute has not been disputed since its adoption. Under such circumstances courts proceed with added caution and will not disturb the validity of a statute in the absence of a showing infinitely stronger than appellants have presented.

For convenience, in giving consideration to appellants' further contention that certain facts and events operated to invalidate the indictment upon which the judgment was based, such facts and events are set forth in detail. The pertinent portion of appellants' brief, relative thereto, is as follows:

"On February 25, 1937, the grand jury of the County of Los Angeles returned an indictment against the defendants and appellants herein and others. The indictment so returned named sixty-eight defendants by name and three hundred and thirty-two fictitiously named defendants, two hundred of which were named John Doe 1 to 200, inclusive, and 132 were named Richard Roe 1 to Richard Roe 132.

"Thirteen of the defendants who are appellants herein were included by substantially their true names. The remaining ap-

pellants were purportedly filed against by said indictment under fictitious names.

"The indictment purported to charge that the defendants had committed the crime of conspiracy to violate Sections 418 and 594 of the Penal Code, charging specifically that:

"'On or about the 22nd day of February, 1937, the said defendants did wilfully, unlawfully and feloniously conspire, combine and agree together that they would use and procure and encourage and assist another to use force and violence in entering upon and detaining lands and other possessions of the Douglas Aircraft Company———; and that they would maliciously injure and destroy real and personal property, not their own, and the property of said Douglas Aircraft Company, a corporation.'

"The indictment thereafter purported to allege certain overt acts. * * *

"Thereupon, the warrants issued on the indictments were handed to the sheriff of the County of Los Angeles. Sixty-eight of these warrants named particular persons. The balance named only John Does and Richard Roes. Instructions were given to the arresting officers, deputy sheriffs, to arrest those persons that they found inside the Douglas Plant, regardless of whether they entered the plant before or after the indictment was returned. No description of the fictitious defendants was given to the arresting officers.

"Thereafter, some 350 persons were arrested by deputy sheriffs and lodged in the county jail.

"Thereafter, from time to time, various of the defendants who were named in the indictment but were not inside the Douglas Plant at the time of the arrest, appeared in court and voluntarily surrendered, including two of the appellants herein.

"Thereafter, on March 2, 1937, an amended indictment in the above entitled proceeding was filed with the Superior Court; by which said amended indictment, the various persons who had been arrested, pursuant to the John Doe indictment and warrants issued thereon, were named by their true names. Said amended indictment named 358 individuals and no fictitiously named defendants whatsoever.

"On March 9, 1937, the defendants who are appellants herein and various other codefendants filed a demurrer to the amended indictment; said demurrer was both general and special.

"On March 9, 1937, the demurrer was argued in Dept. 1 of the Superior Court before Hon. Emmet H. Wilson, Judge Presiding, and was ordered submitted by the court. Decision on the demurrer and also the plea of each defendant was continued until March 16, 1937.

"On March 15, 1937, without any decision having been made upon the demurrer under submission, and without any order from the Superior Court or any judge thereof, the grand jury of the County of Los Angeles returned, in the above entitled proceeding, a second amended indictment and the same was filed with the clerk of the court. The bail and orders for release of defendants on their own recognizance theretofore made were ordered to remain in full force and effect.

"The second amended indictment named 358 defendants, including the 22 appellants herein and did not name any fictitious defendants."

Defendants pleaded not guilty on March 16, 1937, as revealed by the official clerk's transcript of the proceedings, as follows: "Each defendant present in Court is arraigned on the second amended indictment and regularly enters his plea of 'Not Guilty as charged in the second amended indictment'." As heretofore noted in the first paragraph of the within opinion, a demurrer to said so-called second amended indictment had been theretofore overruled and a motion to set aside denied.

[6] Appellants attack the validity of what is referred to as the "original indictment", and in particular contend that because of a failure to comply with the statutory requirements with regard to the use of fictitious names, the original indictment was void; that the original indictment being void, the second amended indictment of necessity must be void.

Manifestly it must be assumed, in order to give probative value to appellants' argument, that the so-called second amended indictment was in fact and in law what it purported in its title to be, namely, an amended indictment, and necessarily as a matter of law depended in part upon the validity of the above recited proceedings to which, as contended in substance and effect by appellants, it was inseparably connected. But, from the record, it does not

appear that such an assumption is warranted, much less imperative. A period of 18 days elapsed between February 25th, the return date of the first indictment, and March 15th, the return date of the last indictment. Although the indictments appear to be the outgrowth of the same condition, it does not necessarily follow as a matter of law that they are inseparable and that the later indictments must be regarded as amendments to the first indictment. The first indictment alleged the offense to have been committed on or about February 22, 1937. The amended indictment alleged the offense to have been committed on the same date. The overt acts set forth in both indictments were alleged to have occurred on the same date. The so-called second amended indictment alleged the offense to have been committed November 1, 1936, and continuously thereafter. Thus it will be seen that there is a difference of 112 days between the date of the offense alleged in the so-called second amended indictment and the first indictment referred to above. The mere fact that the pleader entitled the indictment "second amended indictment" is of no significance. The fact is, and the record supports the conclusion, that the indictment upon which the defendants were tried did not depend for its validity upon any of the conditions as claimed by appellants. The Supreme Court recently had occasion to observe that "* * * the common-law forms of procedure have been either abandoned or, at least, have suffered a considerable modification in their strictness, with the consequence that their importance even in matters of pleading has been greatly decreased; and, with reference to statutory procedure, by constitutional provision, ordinarily no error 'as to any matter of pleading, or * * * procedure' constitutes a sufficient ground even for the granting of a new trial. Section 4½, article 6, Constitution". Rodman v. Superior Court, Cal.Sup., 89 P.2d 109. Especially is this true when no prejudice can be shown as the consequence of any asserted departure from a strict compliance with statutory requirements.

[7] It is also urged by appellants that the court was without jurisdiction to proceed under the second amended indictment because no ruling was made upon the demurrer to the former indictment. The contention is without merit. Assuming, but merely for the sake of argument, that the indictment here considered was an amended indictment, appellants' argument would still be unavailing. The court had occasion to pass on a somewhat similar question in People v. Gilbert, 26 Cal.App. 2d 1, 78 P.2d 770, 773; there the court observed: "The first point made by appellants for a reversal of the judgment herein is based upon the refusal of the court to grant their said motion to set aside the amended indictment. The principal ground urged by appellants in support of said motion was that the amended indictment was not legally found by the grand jury, for the reason that it was not an indictment amended by the district attorney after leave granted, but an attempt by the grand jury to return an amended indictment after the defendants had pleaded by way of demurrer to the original indictment. Appellants' claim in this regard is without merit. It is the law that where, as in the instant case, no ruling had been made upon the demurrer, it is the unquestioned right of the grand jury to return a second indictment while the original indictment is in full force and after the defendants have entered their pleas thereto; and, further, such second indictment may be found by the same grand jury which returned the original one, without their hearing any additional evidence. People v. Follette, 74 Cal.App. 178, 185, 186, 189, 190, 240 P. 502, and cases therein cited. It is only where the demurrer is sustained that the judgment becomes a bar unless the court directs a resubmission to the grand jury. Appellants have not suggested how under any possible conception of the record they were in any way prejudiced by the return of the second indictment. People v. Clawson, 82 Cal.App. 422, 255 P. 552. The case of People v. Seitz, 100 Cal.App. 113, 279 P. 1070, has no application to the case at bar because in the Seitz Case the demurrer had been sustained without leave to amend." The same reasoning can be said to apply in the present case.

[8] Finally it is contended by appellants that the court was without jurisdiction because section 418 of the Penal Code contains all of the elements of a conspiracy and the legislature has denominated such a crime a misdemeanor, and that "there cannot co-exist two crimes which are identical and yet which provide each a different type of punishment". This contention is also without merit. It is sufficient to note that section 182 of the Penal

Code provides as follows: "If two or more persons conspire * * * to commit any crime * * * they are punishable as follows: * * * and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done." By the punishment provided, the superior court is vested with jurisdiction. Moreover, it should be noted that the appellants herein were charged with conspiracy and not the simple violation of either section 418 or section 594 of the Penal Code.

The foregoing disposes of other related and subordinate contentions, to which it is unnecessary to give consideration.

For the reasons stated the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.



32 Cal.App.2d 298

SCOTT v. BREUSING.

Civ. 2282.

District Court of Appeal, Fourth District, California.

April 18, 1939.

Appeal and error ⇐787

Where notice of appeal and request for transcript were filed December 21, 1938, and no arrangement was made with reporter covering cost, and no undertaking or draft of bill of exceptions was filed, and no proceedings were pending for settlement of bill of exceptions or transcript, appeal would be dismissed. Code Civ.Proc. §§ 650, 953b.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Louise Elizabeth Scott against Mary Breusing. From the judgment, the plaintiff appealed, and the defendant filed a motion to dismiss the appeal on the ground that no record had been prepared or filed within the time provided by law.

Motion granted and appeal dismissed.

No appearance for appellant.

Hoge, Pelton & Gunther, of San Francisco, and Chester O. Hansen, of Fresno, for respondent.

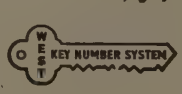
BARNARD, Presiding Justice.

This is a motion to dismiss the appeal on the ground that no record has been prepared or filed within the time provided by law.

From the certificate of the county clerk and an affidavit of the court reporter it appears that the judgment appealed from was entered on October 21, 1938; that a motion for a new trial was denied on December 12, 1938; that a notice of the denial of said motion was served and filed on the same day; that notice of appeal and request for a transcript on appeal was filed on December 21, 1938; that no arrangement was made with the court reporter covering the cost of a transcript and no undertaking was filed in accordance with the provisions of section 953b of the Code of Civil Procedure; that no draft of a bill of exceptions was filed within the time allowed by section 650 of the Code of Civil Procedure; and that no proceedings are now pending in the superior court for the settlement of a bill of exceptions or for the settlement of a transcript.

The motion is granted and the appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 329

PLATT v. UNION PACKING CO.

Civ. 11735.

District Court of Appeal, Second District, Division 1, California.

April 20, 1939.

Rehearing Denied May 17, 1939.

Hearing Denied June 19, 1939.

1. Appeal and error ⇐931(1)

The appellate court must take the facts most favorably to appellee.

2. Frauds, statute of ⇐90(4), 95(1)

The intention of the contracting parties must be determined by their words, acts, conduct, and the circumstances existing at the time an oral contract for purchase and sale of cattle was entered into, as regards whether there was a mutual understanding

that the delivery of and payment for part of the cattle should constitute part performance of the entire contract. Rev.Code Ariz. 1928, § 2808; Civ.Code Cal. § 1724; Code Civ.Proc.Cal. § 1973a.

3. Frauds, statute of ⇐90(4)

A part delivery of personal property subsequent to the sale thereof satisfies the statute of frauds. Rev.Code Ariz.1928, § 2808; Civ.Code Cal. § 1724; Code Civ.Proc. Cal. § 1973a.

4. Frauds, statute of ⇐89(3)

Any act of the buyer manifesting an intention on his part to accept the chattels or some part thereof places the transaction without the pale of the statute of frauds, and a selection of portions of the chattels may be evidence of an acceptance. Rev. Code Ariz.1928, § 2808; Civ.Code Cal. § 1724; Code Civ.Proc.Cal. § 1973a.

5. Frauds, statute of ⇐158(4)

Finding that acceptance by buyer of part of the cattle purchased took oral agreement for purchase of cattle out of the statute of frauds *held* sustained by the evidence. Rev.Code Ariz.1928, § 2808; Civ.Code Cal. § 1724; Code Civ.Proc.Cal. § 1973a.

6. Frauds, statute of ⇐90(4)

It is not required in order to take an oral contract out of the statute of frauds that a partial delivery must be made at the time of the making of the oral agreement. Rev.Code Ariz.1928, § 2808; Civ.Code Cal. § 1724; Code Civ.Proc.Cal. § 1973a.

7. Sales ⇐140

Statute providing that upon the sale or transfer of any neat animals, the delivery of such animals shall be accompanied by written bill of sale from the vendor to the party purchasing, and that upon the trial of any person charged with theft, unlawful possession, etc., of any such animal, the possession under claim of ownership without such bill of sale shall be prima facie evidence against the accused that such possession was illegal, had no application to action by seller against buyer for breach of contract to take and pay for certain steers, since buyer's failure to obtain a bill of sale did not affect buyer's absolute title to cattle as against claim of seller. Rev.Code Ariz. 1928, § 2116.

8. Appeal and error ⇐1011(1)

All conflicts in the evidence are for the trial court's consideration, and finding by trial court must be sustained if there is sufficient evidence to support it.

9. Principal and agent ⇐23(5)

In seller's action against buyer for breach of contract for purchase and sale of cattle, evidence sustained finding that persons purchasing cattle were authorized agents of buyer.

10. Principal and agent ⇐170(3)

Buyer's silence for more than a month concerning authority of persons purchasing cattle for buyer was evidence of actual authority of such persons to consummate the agreement.

11. Appeal and error ⇐931(1)

In examining the sufficiency of the evidence to support a questioned finding, all intendments and inferences are in favor of the finding of the trial court and all conflicts and discrepancies must be resolved on appeal in support of the trial court's finding.

12. Sales ⇐1(1)

The mutuality of assent requisite to the formation of a contract of sale must be gathered from the language and conduct of the parties, and the law imputes to a person the intention corresponding to the reasonable meaning of his words and acts.

13. Sales ⇐87(3)

In action by seller for buyer's breach of contract for purchase and sale of cattle, evidence sustained finding that the contract provided that buyer should take delivery of the cattle within 30 days.

14. Sales ⇐89

In seller's action against buyer for breach of contract for purchase and sale of cattle, evidence sustained finding of trial court that parties had agreed upon an extension of time for performance.

15. Sales ⇐62

Contract for the purchase and sale of 351 head of cattle for delivery within 30 days was an "entire contract" although deliveries were to be made at different times.

[Ed. Note.—For other definitions of "Entire Contract," see Words & Phrases.]

16. Sales ⇐384(2)

Where contract for purchase and sale of cattle was extended beyond original 30-day period and buyer repudiated the contract, the date of repudiation fixed rights of the parties in respect of damages, although

such date was subsequent to expiration of time originally agreed upon.

17. Sales ⇐384(2)

The measure of damages for buyer's breach of contract for purchase and sale of cattle was the difference between the contract price and the market price of the cattle remaining undelivered on date of breach.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by H. J. Platt against Union Packing Company for an alleged breach of a contract to purchase cattle. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Benjamin W. Shipman, of Los Angeles, for appellant.

Mathes & Sheppard and George R. Richter, Jr., all of Los Angeles, for respondent.

WHITE, Justice.

This action was brought to recover damages for an alleged breach by defendant, a corporation, of a contract to purchase cattle. Judgment passed for plaintiff and defendant appeals.

Plaintiff based his right of action upon an oral agreement claimed to have been made with defendant through its agents, under the terms of which the defendant agreed to purchase approximately 350 head of steers at an agreed price of $8.50 per hundredweight, which would aggregate about thirty thousand dollars. The agreement allegedly was entered into on May 13, 1935, at a time when the cattle were being fed for market by plaintiff at the Anderson ranch near Chandler, Arizona, and were in charge of plaintiff's son for the purpose of sale. On May 15, 1935, fifty-six head of steers were shipped to defendant and paid for at the price of $8.50 per hundredweight, while on June 17 two additional carloads were likewise shipped to defendant and paid for as in the first instance. On June 20 defendant corporation advised plaintiff that it would not take the remainder of the steers at the price of $8.50 per hundredweight. Plaintiff recovered judgment for damages for breach of the contract to take the 237 additional head of cattle. The court awarded damages upon the theory that the breach of the contract occurred on June 20, 1935.

[1] Stating the facts most favorably to plaintiff, as we must do when the findings are in his favor, the circumstances attendant upon the making of the agreement in question were substantially as follows: For some years plaintiff had been a cattle raiser and feeder in Arizona, while defendant corporation was engaged in the business of dressing and packing meat, in connection with which it purchased cattle. Adolph Miller was president and general manager of defendant corporation, and Nate Miller, his son, was employed as a cattle buyer. Tom King was a commission buyer operating out of Phoenix, Arizona, and on previous occasions had purchased cattle for defendant, the latter of whom had provided King with printed forms of draft upon which he was denominated "purchasing agent" and which he used as a medium of payment for cattle purchased by him in behalf of defendant. The relationship of Tom King and Nate Miller with defendant was known to plaintiff and his son and agent, Harvey Platt. In the month of May, 1935, defendant, through its general manager, advised Tom King of the need for some fed steers, and in connection therewith Nate Miller went to Arizona, where he joined King, and the two of them, on May 13, inspected the plaintiff's steers at the Anderson ranch. Upon that occasion inquiry was made by King and Miller as to the price wanted for the steers, how they would be shipped, and the length of time that would be given defendant to take the cattle. Plaintiff's son and agent informed King and Miller that the price would be $8.50 per hundredweight, f.o.b. shipping point, with a four per cent deduction of weight for shrinkage, and that plaintiff would give defendant thirty days within which to take the cattle. Upon objection of King and Miller to the condition of some of the steers, it was agreed that one steer would be excluded, thus leaving 351 head of be shipped. On the evening of that day Nate Miller communicated by telephone with his father, defendant's president and general manager, advising the latter that he had bought for defendant corporation the 351 head of plaintiff's steers upon the terms hereinbefore set forth; and on the following day King discussed the purchase with the defendant's general manager. On May 15 fifty-six head of the steers were weighed and billed to defendant, and paid for as aforesaid. Following the making of the agreement, the market price of steers commenced to decline stead-

ily, until during the week of June 7 to June 14 the price had declined approximately twenty-five cents per hundredweight. During this period of time King advised plaintiff that defendant wanted and would take the steers, but that deliveries were to be delayed for various ascribed reasons. On June 10 plaintiff wrote directly to defendant, asking when the latter expected to take the balance of the cattle, but received no reply. On June 12 and 13, plaintiff had conversations with defendant's general manager in Los Angeles, upon which occasion, for the first time, the authority of King and Nate Miller to make the contract in question was questioned by defendant. Upon this occasion defendant's general manager stated that he was going to Arizona on June 14, and he did arrive at the Anderson ranch on June 16 for an inspection of the cattle, following which two more carloads were shipped and paid for. At this time defendant's general manager informed plaintiff's son and agent that upon his return to Los Angeles he would discuss with plaintiff a date for taking the remainder of the steers. However, on June 20, defendant's general manager advised plaintiff that the former would not take the remainder of the steers at the price of $8.50 per hundredweight, which resulted in the commencement of this action.

[2-6] Appellant's first point is that the alleged oral contract for the purchase of the 351 head of cattle at a price approximating $30,000 was illegal and in contravention of the statute of frauds, for the reason that no sufficient showing was made at the trial of a mutual understanding that the delivery of and payment for the stock shipped by plaintiff to defendant should constitute a part performance of the verbal contract in its entirety. The intention of contracting parties must be determined by their words, acts, conduct and the circumstances existing at the time the agreement was brought into being. It is well settled in principle and by a long line of authorities that a part delivery of personal property subsequent to the sale thereof satisfies the statute of frauds. The Arizona statute of frauds (section 2808, Rev.Code of Arizona) is similar to our own (section 1724, Civ.Code; section 1973a, Code Civ. Proc.), and thereunder any act of the vendee manifesting an intention on his part to accept the chattels or some part thereof places the transaction without the pale of the statute of frauds, and a selection of portions of the vended property may be evidence of an acceptance. In the case before us, appellant's agents selected the cattle constituting each of the two shipments and payments were made therefor at the price and in accordance with the terms of the original agreement. And as the original oral agreement was the only agreement between the parties under which the cattle so delivered could have been accepted by appellant, it follows that the finding of the trial court that such acceptance by appellant of the delivered property took the original oral agreement out of the statute of frauds finds ample support in the evidence. King v. Globe Grain etc. Co., 58 Cal.App. 105, 208 P. 166; Merrill v. Kohlberg, 29 Cal.App. 382, 155 P. 824; Carstens Packing Co. v. Miller, 10 Cal.App. 2d 48, 51 P.2d 161. It is not required, in order to take an oral contract out of the statute of frauds, that a partial delivery must be made at the time of the making of the oral agreement. Meyers v. Kaufman, 110 Misc. 321, 180 N.Y.S. 403.

[7] Section 2116 of the Revised Code of Arizona, providing that upon the sale or transfer of any neat animals, the delivery of such animals shall be accompanied by a written bill of sale from the vendor to the party purchasing, and that upon the trial of any person charged with the theft, unlawful possession, etc., of any such animal, the possession under claim of ownership without such bill of sale shall be prima facie evidence against the accused that such possession was illegal, has no application to the case at bar, because appellant's failure to obtain a bill of sale from the respondent for the cattle shipped to and paid for by appellant does not in any wise affect the appellant's absolute title thereto as against any claims of respondent.

[8-10] The next point made by appellant is that the record is barren of any evidence sufficient to support the trial court's finding that Tom King and Nate Miller were the authorized agents of appellant corporation and vested with authority on behalf of appellant to enter into the contract on its behalf. Appellant earnestly urges that the authority of King and Miller was limited to the right to purchase only two carloads of "fat" cattle. It would serve no useful purpose to discuss in this opinion at great length the evidence given at the trial in regard to the existence of an agency. Bearing in mind the well-settled rule that all conflicts in the evidence

are for the trial court's consideration, and that therefore, notwithstanding such conflict, the finding that an authorized agency did exist must be sustained by the appellate court if there is sufficient evidence to support it, a brief statement of such evidence will be helpful. For four or five years antedating the negotiations here in question, Tom King had been buying cattle for appellant. On these occasions, when in need of cattle, appellant's general manager would advise King of the kind of cattle desired. King would inspect available stock and would purchase such cattle as in his judgment met appellant's requirements. King would pay for such cattle with drafts drawn upon appellant, forms of which were furnished King by appellant and which bore appellant's corporate name, beneath which King, after filling out the draft, would sign his name on a line designating him as purchasing agent. The other alleged agent, Nate Miller, was a son of appellant's general manager, admittedly employed by appellant, and he notified appellant by telephone on May 13 of the purchase of the cattle and the price to be paid therefor. Further, the authority of King and Nate Miller remained unquestioned from May 13 to June 13, 1935, and appellant's silence is evidence of actual authority in King and Nate Miller to consummate the agreement. Jan Wai v. Smith-Riddell Co., 55 Cal.App. 59, 66, 202 P. 952.

[11] Appellant's next two contentions (1) that the finding of the trial court that the purchase was not made upon the promise and representation of respondent that the steers would be fed, fattened and conditioned by the respondent until such time as they would be "fat steers," and (2) that the finding that all of the steers were to be taken within thirty days, find no support in the evidence, must fall before the elementary rule that in examining the sufficiency of the evidence to support a questioned finding all intendments and inferences are in favor of the finding of the trial court and that all conflicts and discrepancies must be resolved on appeal in support of the trial court's finding.

[12, 13] Appellant's next claim, that there was no meeting of the minds of the contracting parties as to the time within which respondent was to make the cattle "fat", and that appellant's understanding and intent was that it was to accept the cattle only as they became "fat" and not necessarily within any thirty-day limitation of time, cannot be sustained. The mutuality of assent requisite to the formation of a contract must be gathered from the language and conduct of the parties, and the law imputes to a person the intention corresponding to the reasonable meaning of his words and acts. There is in the record before us evidence which, if believed, warranted the trial court in finding that by word and act all parties to the contract were in agreement that delivery should be made in thirty days. What may have been the real but unexpressed state of the minds of appellant's agents on the subject is immaterial. In the face of conflicting evidence upon this issue, we are not authorized, as heretofore stated, on appeal to invade the field of the trier of facts.

[14] What we have just said applies with equal force to the next ground of appeal, which is that the finding of the trial court that there was an agreed extension of time for the performance of the agreement is without evidentiary support. The testimony as to the delay in deliveries at appellant's suggestion because the latter was "full up" with cattle, and again until appellant's general manager could go to Arizona is typical of the character of testimony in the record which supports this particular finding of the court.

[15-17] There is nothing in the final point made by appellant, that the court erred in holding and concluding that the breach, if any, on the part of appellant occurred on June 20. In support of this claim, it is asserted that this date was thirty-eight days after the making of the oral agreement and eight days after the thirty-day period which the court found was the term of the contract; and further, that appellant was under no obligation to take the cattle, except in installments as they became "fat", and that the "time or times when the goods ought to have been accepted" must be looked to for the purpose of determining the measure of damages for the buyer's breach. Without question, the contract was entire. Norrington v. Wright, 115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366. The provisions as to shipping the cattle in different weeks and at different times and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries. It was only when the repudiation by appellant took the form it did on June 20, that the breach

occurred. Respondent was, therefore, clearly entitled to recover the difference between the contract price and the market price of the cattle remaining undelivered on June 20, the date of the breach.

The judgment is therefore affirmed.

We concur: YORK, P. J., DORAN, J.



32 Cal.App.2d 240

In re DUNN'S ESTATE.
Appeal of BOYSEN et al.
Civ. 10991.

District Court of Appeal, First District, Division 1, California.
April 18, 1939.

Hearing Denied June 16, 1939.

1. Wills ⇐184(2)

The terms of a will may not be disturbed by language in a codicil unless such language evinces a limitation or change in words as definite in expression as the terms of the will.

2. Wills ⇐184(4)

Bequests of money to sisters and nephew were not revoked by a codicil providing that in case of accident or death all stock owned by testator was given to wife.

3. Wills ⇐184(1)

Words in codicil which merely raise a doubt must be resolved in favor of the first instrument.

4. Courts ⇐201
Wills ⇐423

An order admitting will and codicil to probate was final and conclusive as respects status of codicil, but its construction, interpretation, and effect in changing or limiting the terms of the original will were appropriate matters for determination upon the petition for distribution.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Frank Dunn, also known as Frank M. Dunn, F. M. Dunn and Francis M. Dunn, deceased, on petition for distribution by Frank R. Boysen, administrator, and Violet L. Arthur, formerly Violet L. Dunn, administratrix, which was opposed by Stella V. Dunn, Sara E. Carter, and Robert Carter. From decree and order rendered, the petitioners appeal.

Decree and order affirmed.

A. G. Bailey, of Woodland, for appellants.

Howard H. Desky and Norris J. Burke, both of San Francisco, for respondents.

WARD, Justice.

The question upon which this appeal may be determined is whether an instrument admitted to probate as a codicil to a holographic will does in fact revoke certain legacies mentioned in the original will.

Frank Dunn, sometimes referred to as Frank M. Dunn, deceased, left a will directing that payment of certain sums of money in designated banks should be "apportioned" to two sisters and a nephew in the amounts of $2,000, $500 and $100 respectively, with a further direction that "all cash remaining after these bequests have been distributed and expenses paid, I leave to my wife Violet L. Dunn". A specified sum of money and clothing was bequeathed to his brother, but these items were scratched out. The intention of the testator when he signed the holographic will was to apportion specific items of his estate to the individuals named. The codicil, dated approximately three years later, is in part as follows: "In case of accident or death all stock owned by me is hereby given to my wife Violet L. Dunn." Thereafter shares of stock in certain named corporations are listed, and under the caption "Money on Deposit", the names of three banks appear. In two instances, opposite, and in connection with the number of shares, is written the word "sold", and in one instance the words "in box". One of the items of stock and the names of two of the banks appear with lines drawn therethrough. The instrument is signed twice "Frank M. Dunn". The appellants filed a petition for distribution praying that the money in the banks named in the will and codicil, be distributed to the petitioner Violet L. Arthur, formerly Violet L. Dunn, under the provisions of the codicil. Opposition was filed by the sisters and the guardian of the nephew, praying that the legacies designated in the will should be paid to them. The petition of Violet L. Arthur was denied. The amounts of money on de-

posit in the banks did not equal the sums set forth in the will and respective proportions were decreed to the three named legatee sisters and nephew. From this decree and order, Frank R. Boysen and Violet L. Arthur, administrator and administratrix, respectively, appeal.

[1-3] The terms of a will may not be disturbed by language in a codicil unless such language evinces a limitation or change in words as definite in expression as the terms of the will. Probate Code, § 104; In re Estate of Farelly, 214 Cal. 199, 4 P.2d 948. Part of this codicil is a mere itemization of the testator's property, which he evidently changed by obliteration of provisions which were no longer, or only partly, operative because of the loss or sale of stock or the decrease of the amounts on deposit in the banks. That part of the second document was intended as an inventory is made certain by notations written on the same page, under the signature, indicating sales of stock two and three years subsequent to the date of the codicil. Obliterations appear in the will and the codicil evidencing a change in legatees or in amounts of cash or stock, but none appear in connection with the names or the amounts designated to the two sisters or nephew. The 1930 instrument is not a revocation of the bequests to the sisters and nephew unless the words "in case of accident" etc., can be interpreted to indicate a clear and unequivocal intent to revoke such legacies. The words in dispute between appellants and respondents refer to stock and do not mention money. Words which merely raise a doubt must be resolved in favor of the first instrument. In re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071.

[4] The order admitting the will and the codicil to probate was final and is conclusive as to the status of the latter as a codicil to the will (In re Estate of Parsons, 196 Cal. 294, 237 P. 744), but its construction, interpretation and effect in changing or limiting the terms of the original will were appropriate matters for consideration and determination upon the petition for distribution. Probate Code, §§ 1020, 1021. In re Estate of Pforr, 144 Cal. 121, 125, 77 P. 825, 826, the court said: "An instrument testamentary in character, and issued in the form required for a will, cannot be denied probate upon the ground that some of its provisions are invalid or contrary to the provisions of law. The probate of the instrument merely determines the validity of its execution. The sufficiency or invalidity of its provisions will be determined when effect is sought to be given to them. The statute makes no provision by which a portion of such an instrument can be admitted to probate and probate denied to the remainder. Estate of Cobb, 49 Cal. 599; Estate of Murphy, 104 Cal. 554, 38 P. 543; Toland v. Toland, 123 Cal. 140, 55 P. 681." The two documents read together show that the intention of the testator was that respondents should take the legacies enumerated in the 1927 instrument.

In view of the conclusion herein, it is not necessary to discuss other questions presented in the respondents' brief.

The decree and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



32 Cal.App.2d 282

WHITTELL et al. v. RENZ.
Civ. 12127.

District Court of Appeal, Second District, Division 1, California.

April 18, 1939.

Criminal law ⇐1084

A petition for writ of supersedeas alleging that judgment, from which no appeal is pending, has become final, will be denied. Code Civ.Proc. § 949.

Proceeding by Alfred Whittell and others, petitioners, against Walter J. Renz, wherein petitioners filed petition for writ of supersedeas.

Writ denied.

W. W. Kaye, of Los Angeles, for petitioners.

J. G. Moser, of San Francisco, and Richard Coblentz, of Los Angeles, for respondent.

PER CURIAM.

The petition for writ of supersedeas was denied on January 23, 1939. The order denying said petition was made for the

reason that there is no appeal pending from the judgment herein, and the petition itself alleges that the judgment has become final.

In their attempted appeals from certain orders made in the within action, the petitioners claim that the court has authority to issue this supersedeas, but as the petition for supersedeas is a petition to supersede the judgment from which no appeal is pending, this court is without power to issue such writ, or to stay proceedings in any matter other than one from which an appeal is pending. Section 949 of the Code of Civil Procedure provides in part as follows: "* * * the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from * * *." See, also, Bateman v. Superior Court, 139 Cal. 140, 72 P. 922; Southern Pacific Company v. Smith, 171 Cal. 8, 151 P. 426; Hulse v. Davis, 200 Cal. 316, 253 P. 136; McCann v. Union Bank & Trust Company of Los Angeles, 4 Cal.2d 24, 47 P.2d 283.



32 Cal.App.2d 303

FONTES v. MENKE et al.

Civ. 11020.

District Court of Appeal, First District, Division 2, California.

April 20, 1939.

Rehearing Denied May 20, 1939.

Hearing Denied June 19, 1939.

1. Trusts ⇐89(1)

Evidence was insufficient to show that any kind of a trust arose in favor of plaintiff with respect to realty which his deceased wife had purchased with her separate funds and had conveyed to her sister after construction of house and garage on realty with funds advanced by wife's mother and evidenced by note subsequently reduced to judgment and paid by plaintiff out of his separate funds.

2. Appeal and error ⇐1011(1)

Whether separate property of plaintiff's deceased wife was transmuted into community property so that plaintiff was entitled thereto as surviving husband as the result of transactions whereby property was improved with funds furnished by wife's mother and evidenced by note subsequently reduced to judgment and paid by plaintiff was for trial court under conflicting evidence.

3. Appeal and error ⇐1011(1)

A finding of trial court based on conflicting evidence, that separate property of plaintiff's deceased wife was not transmuted into community property so that plaintiff was not entitled thereto as surviving husband, was controlling in the reviewing court.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action to quiet title by M. R. Fontes against Lita C. Menke and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frank J. Fontes, of San Francisco, for appellant.

Rosendale, Scott & Thomas, of Salinas, for respondents.

STURTEVANT, Justice.

In an action to quiet title the trial court denied the plaintiff any relief and from the judgment he has appealed. From the first count contained in plaintiff's amended complaint, which he says states the facts, we gather the following:

Emma M. Fontes died testate on October 14, 1933. She left her surviving this plaintiff, her husband. They were married May 6, 1919. In June 1932 they separated. At all times down to the date last mentioned a confidential relationship existed between them. On November 2, 1920, Mrs. Fontes purchased the land in suit which consists of a lot in the city of Salinas, Monterey county. She paid $1,000 for it out of her separate funds. In February, 1922, she informed the plaintiff that her mother, Emma C. Menke, would advance the moneys to pay the cost of labor and materials to build a dwelling house and also a garage for the plaintiff and his wife. About the 6th day of March, 1922, plaintiff, in reliance upon the promises and representations of his wife, entered into an oral agreement with his wife to accept the offer of Mrs. Menke to erect a dwelling house and garage on said vacant lot with funds to be supplied by her, that the record title to said vacant lot should remain in the name of plaintiff's wife, subject, how-

ever, to the agreement between plaintiff and his wife that if Mrs. Menke demanded payment of the moneys advanced to construct said dwelling house and garage, and if plaintiff and his wife were not possessed of sufficient moneys to pay the same, that said parties would offer to convey said premises to Mrs. Menke and, in that event plaintiff's wife agreed to execute a conveyance of said real property, together with the improvements thereon, to Mrs. Menke in payment of the moneys so advanced that, in the event Mrs. Menke refused to accept a conveyance of said premises in payment of said moneys advanced as aforesaid, plaintiff and his wife would offer said premises for sale and in the event of sale the said plaintiff's wife would execute a conveyance to the purchaser and the proceeds would be used in reimbursing Mrs. Menke and it is further agreed that said lot and improvements should become from the time of acquisition, the community property of the said parties, subject, however, to the contingencies aforesaid and to the further contingency that if plaintiff was not compelled to reimburse Mrs. Menke or to pay for the cost of constructing said dwelling house and garage out of his separate funds, and was discharged from all obligations in connection therewith, then in such event plaintiff would have no interest in said premises; but if, on the other hand, plaintiff was compelled to discharge said obligation, said contingencies and trust conditions would terminate and plaintiff's right and interest in said premises would become absolute. Said agreement was induced solely in reliance upon the said promises and representations of plaintiff's wife and plaintiff believed and relied upon said promises and representations, and accepted the said offer of Mrs. Menke and entered into an agreement for the erection of said dwelling house and caused said dwelling house and garage to be erected upon the said vacant lot and, but for the representations, plaintiff would not have entered into said agreement or incurred any obligation in connection with the cost of erecting said dwelling house and garage; that plaintiff believed and relied upon said promises and representations of his wife because of the confidential relationship of husband and wife existing between said parties. The moneys loaned by Mrs. Menke amounted to $4,300. The loan was evidenced by a note dated July 1, 1922, which was renewed from time to time and the last note was dated January 1, 1931, was payble one year after date, and was also written for the sum of $4,300. Mr. and Mrs. Fontes never offered to transfer the property to Mrs. Menke, nor did they attempt to sell the property, because Mrs. Menke consented to extend the time to pay their note. On or about the 16th day of September, 1933, plaintiff's wife, in disregard of her promises and representations to plaintiff, and acting in concert with Mrs. Menke, and the defendant Lita C. Menke (sister of decedent) entered into a fraudulent scheme to compel plaintiff to pay out of his separate funds all of said moneys so borrowed and to deprive him of any interest in said real property. In furtherance of said scheme plaintiff's wife fraudulently and in disregard of her promises and representations to plaintiff, and in violation of her agreement with plaintiff, and with the knowledge, consent and approval of her mother, executed a deed purporting to convey all of said premises to Miss Menke for a valuable consideration. In fact, Miss Menke paid no consideration for said premises and during all of the time herein mentioned had full knowledge of all of the facts, it being the intention of Mrs. Fontes, Mrs. Menke and Miss Menke to thereby attempt to place the title to said premises beyond the reach of this plaintiff. As a part of the same scheme, Mrs. Menke demanded from plaintiff the payment of the full amount of the moneys so advanced by her and thereafter commenced an action against this plaintiff to recover the full amount of principal and interest on said promissory note. Thereafter said action so brought by Mrs. Menke against this plaintiff came on regularly for trial and judgment was given against this plaintiff and in favor of Mrs. Menke for the sum of $4,300 principal, $551.82 interest, and costs of suit, and plaintiff paid the full amount of said judgment, together with interest, and costs of suit, out of his own separate funds.

When the evidence was introduced it appeared that after the deceased purchased the lot she and her husband built the house above mentioned and that the costs for labor and material amounting to $4,300 were paid by Mrs. Menke and a note for that sum was executed and delivered to Mrs. Menke; that decedent built and paid for another house on the same lot; and that plaintiff paid for some sidewalks being installed, paid the interest on the above mentioned note, and paid the insurance and

taxes prior to the time the couple separated in June, 1932. The evidence also disclosed that immediately after their marriage the plaintiff and his wife rented for $30 a month a house on Church street. When the plan was suggested that Mrs. Menke would make the advancement above mentioned it was stated the rate of interest would be 5 per cent and that when the house was built Mr. and Mrs. Fontes would be more comfortable and the amount of interest, insurance and taxes would be less than the rental they were then paying. No evidence was introduced as to when the principal, $4,300, would be demanded, if at all, or whether in the event of the death of Mrs. Menke the deceased might inherit the above mentioned note. There was evidence Miss Menke had no notice of the conversation above mentioned between Mr. and Mrs. Fontes.

[1] In presenting his case on appeal plaintiff does not take any definite position. However, he does claim (1) that an express trust of and concerning the real estate was declared in his favor, or (2) that a constructive trust in that behalf was created, or (3) that the separate property of the deceased was transmuted into community property and as the surviving husband that he is entitled thereto. These different claims will be discussed in the order stated. However, at this point it should be stated the plaintiff offered no writing whatever in support of any one of his claims. His entire case rested on oral evidence and he was the sole witness who testified on the subject of the conversations had between himself and his wife. There was evidence introduced which tended to contradict him on certain material issues, and later the trial court made findings against the plaintiff.

The rights of Mrs. Menke fully accrued against this plaintiff and his wife on the date of the execution and delivery of the deed to Miss Menke. The rights and obligations of the plaintiff and his deceased wife between themselves and between them and Mrs. Menke fully accrued as of the same date. The record does not disclose that the deceased was insolvent after making the deed to her sister. It is patent that as of that date, September 16, 1933, it must be determined whether an express trust or a constructive trust arose in favor of the plaintiff. We think there is not a particle of evidence that any kind of a trust arose. Tully v. Tully, 137 Cal. 60, 69 P. 700. On September 16, 1933, Mrs. Menke had made no demand for the repayment of her loan. Under the above facts no claim to title of any kind had arisen in favor of the plaintiff. The decedent was therefore entitled to convey the property as a part of her separate estate. Having done so new questions arose as to liability on the promissory note executed by the plaintiff and his wife to Mrs. Menke; but, the mere fact that Mrs. Menke later sued and recovered on the note, did not feed the trust theory.

[2, 3] The claim that the separate property of the deceased was transmuted into community property is likewise without support. That claim was an issue made by the pleadings. The evidence thereon was distinctly conflicting. The trial court made a finding in favor of the defendants. That finding is controlling in this court. From what has been said above we think it is clear the arrangement made with Mrs. Menke was one to the effect that she would make the advancement of $4,300, carry it at 5 per cent, and instead of rentals the plaintiff and his wife would have to meet that obligation together with taxes and insurance. It may be inferred that when Mrs. Menke entered into that arrangement it was her intention to bequeath the said promissory note to her daughter. Had that event occurred it is quite clear this plaintiff would have had little or no reason to assert that the above mentioned lot, together with all of the improvements thereon, were or had become community property. He frankly testified that he based his claim that the property was community property on the fact that, by paying the note, he paid for the improvements.

That by reason of what occurred after the death of Mrs. Fontes the plaintiff had a valid claim for at least a part of the moneys he has paid out may be conceded, but that concession does not tend to show that any kind of a trust arose in his favor or that the separate property of the deceased was in whole or in part transmuted into community property.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

32 Cal.App.2d 378

WELLMAN v. DENNING.

Civ. 11042.

District Court of Appeal, First District, Division 2, California.

April 21, 1939.

Gifts ⇐55

A transfer of certificate of stock to donor's niece, made because niece, who had been attentive to donor over period of years, requested the transfer, and made at a time when donor was ill in a hospital, but was not in contemplation of impending death, was not a "gift causa mortis" and could not be revoked by donor.

[Ed. Note.—For other definitions of "Gift Causa Mortis," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by Eleanor Wellman against Eunice Denning to revoke an indorsement and assignment of a certificate of stock upon theory that the transaction was a gift causa mortis. From a judgment for defendant, the plaintiff appeals.

Affirmed.

M. Mitchell Bourquin and Clinton L. Markley, both of San Francisco, for appellant.

Ralph H. Lachmund, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to revoke an endorsement and assignment of a certificate of stock upon the theory that the transaction was a gift causa mortis. Judgment went for the defendant.

The complaint alleges that plaintiff was ill in a hospital at the time of the endorsement and executed the same "in contemplation, fear and peril of death, and not otherwise". The plaintiff testified at length in her own behalf that she had had no fear of death, had no contemplation of impending death, but had made the transfer simply because the defendant, who was a niece who had cared for her and been attentive to her over a long period of years, requested her to do so.

The appeal presents no debatable question, and the judgment requires no citation of authorities to support it. As indicated by the learned trial judge during the course of the hearing, some of the plaintiff's testimony cast a suspicion upon the transaction which might conceivably support a claim that some undue advantage was taken of plaintiff's illness, but, upon her own testimony, she completely negatived her claim that the transaction was a gift causa mortis.

The evidence fully supports the trial court's finding that the gift was without reservation, voluntary, intentionally irrevocable, and not without consideration.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



32 Cal.App.2d 295

KUEHN v. CARLOS et al.

Civ. 1859.

District Court of Appeal, Fourth District, California.

April 18, 1939.

1. Appeal and error ⇐1099(3)

Previous decision that chattel mortgagee seeking possession of airplane had released his mortgage lien by agreement with mortgagor's judgment creditor so that airplane was sold on execution free from lien was controlling as the "law of the case" in subsequent suit based on the same evidence.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error ⇐1099(3)

Where chattel mortgagee seeking possession of airplane was held in previous case to have released his lien by agreement with mortgagor's judgment creditor, and at time of execution sale mortgagee's receipt showing payment of his claim was on record and the creditor's judgment upon which execution sale was based included the mortgage debt as a third party claim, testimony in subsequent suit that agreement between mortgagee and judgment creditor was re-

scinded before execution sale was insufficient to change the "law of the case" rule of previous case protecting third party in possession under the execution sale.

3. Appeal and error ⇐1051(6)
Evidence ⇐581

Admission of uncertified transcript of previous trial without laying proper foundation or showing witnesses were no longer available was erroneous, but where all material facts in the transcript were also independently established by competent evidence, error was not prejudicial.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Ed Kuehn, chattel mortgagee, against F. Don Carlos and J. E. Beck for possession or value of mortgaged airplane. From judgment awarding possession of the airplane or its value to J. E. Beck, plaintiff appeals.

Affirmed.

Siemon & Claflin, of Bakersfield, for appellant.

Barcroft & Barcroft, of Madera, and Martin C. Thuesen, of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment in which J. E. Beck was awarded possession of an airplane, or its value, if possession could not be had.

This case has been before this court for decision once before. Kuehn v. Don Carlos, 5 Cal.App.2d 25, 41 P.2d 585. Under facts there recited we held that the mortgagee (appellant here) had in effect released the lien of his mortgage for the purposes of the execution sale. This so-called release has more the nature of an estoppel than an actual release of a mortgage. A judgment in the mortgagee's favor was reversed. Defendants urge that our first decision established the law of the case and that, therefore, the judgment in their favor here must be affirmed.

We will repeat only those facts set forth in the first opinion which are necessary to an understanding of the conclusions here reached.

[1] A reading of our former opinion discloses that the holding, that the lien of the chattel mortgage had been in effect released for the purposes of the execution sale, was based largely on documentary evidence. Those same documents were before the court at the second trial. The other facts upon which the conclusion of the release for the purposes of the sale was predicated were also proved at the second trial. In this respect there is no difference between the evidence at the first trial and that at the second. It follows that as the conclusion of a release for such purposes was drawn in the first decision it must be drawn here. Whitney v. West Coast Life Ins. Co., 49 Cal.App. 229, 193 P. 149. As the lien of the chattel mortgage had been in effect released for the purposes of the execution sale, the mortgaged property was sold free of that lien at such sale. That sale was legally conducted, a purchase price was paid and title to the airplane passed to the purchaser. Defendant Beck purchased the airplane from that purchaser for value and title now rests in him.

Plaintiff seeks to escape this conclusion by urging that the facts proved at the second trial were materially different from those proved at the first. He points to the testimony, at the second trial, of Herbert P. Sears, the judgment creditor in the action in which the airplane was sold under execution, to the effect that the agreement between himself and plaintiff, upon which was based the conclusion of the release for the purposes of the execution sale, had been rescinded before that sale. This evidence does not appear in the record of the first trial.

While Sears did state baldly that the agreement had been rescinded, the undisputed facts before us indicate that the attempted rescission was never consummated.

There was an unpaid balance of $336 on the debt secured by the chattel mortgage. That document was delivered to Sears who signed a written agreement to either pay plaintiff $336 or to deliver the airplane to him after the execution sale. Plaintiff gave Sears the following written instrument:

"Bakersfield, Calif., Nov. 10, 1932.

"Received from Herbert P. Sears the sum of Three Hundred Thirty Six ($336.-00) dollars in payment of third party claims filed in the Herbert P. Sears vs. Frank Don Carlos matter same being amount due me on the mortgage which I hold on the Nicholas-Beazley Airplane as described in the mortgage.

"Signed Ed Kuehn."

[2] This receipt was filed with the justice of the peace. Therefore, it appeared from the record in that court that at the time the execution was issued, and also at the time of the execution sale, Sears, the judgment creditor, had paid Kuehn, the mortgagee, the full unpaid balance of the debt secured by the mortgage.

The $336 was taxed as accruing costs in the Sears action against Don Carlos. Sears now has judgment against Don Carlos for that amount, plus the amount of his original bill and costs, less the net amount received for the airplane at the execution sale. Neither Sears nor plaintiff made any effort to correct that judgment, if it be erroneous. Under these circumstances the most that can be said of Sears' testimony concerning rescission is that it conflicted with the documentary evidence which the trial judge accepted as true. As the contract for rescission was never executed it amounted to nothing more than an agreement for future rescission. This is not sufficient to remove the instant case from the operation of the rule of the law of the case.

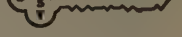
Plaintiff points to an error of law occurring during the second trial which he urges was sufficiently prejudicial to require a reversal of the judgment.

[3] Defendants offered in evidence the reporter's transcript of the previous trial. The objections of plaintiff to this evidence were overruled and the transcript was received. It is clear that this ruling was error. Several of the witnesses whose testimony at the first trial was contained in this transcript were present in court and had testified in the instant case. There was no showing that the other witnesses who testified at the first trial were either dead or were not subject to subpoena. This transcript was not identified and no foundation was laid for its admission in evidence. The court reporter was not called to prove its correctness, even if it be assumed that as a whole it was competent for any purpose. As far as the record here shows it was merely an uncertified transcription of what purported to be all of the proceedings at the first trial. The objections of plaintiff to its admission should have been sustained.

The question of the prejudicial character of this erroneous ruling is still to be decided. We have examined the entire record and can find nothing material in the reporter's transcript that was not established at the second trial by competent evidence there introduced. This being the case the error of admitting the reporter's transcript of the first trial in evidence at the second trial was not prejudicial and can furnish no ground for a reversal of the judgment.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 244

ATLAS IMPERIAL DIESEL ENGINE CO. v. CRISCUOLO et al., and three other cases.

Civ. 11036.

District Court of Appeal, First District, Division 2, California.

April 18, 1939.

Rehearing Denied May 18, 1939.

Hearing Denied June 16, 1939.

1. Shipping ⇐33

The enrollment of a vessel pursuant to federal statute has the effect of nullifying all purported incumbrances executed prior to such enrollment except as provided in the statute. 46 U.S.C.A. § 1012.

2. Shipping ⇐33

California statutes containing provision for executing mortgages on personal property without a change of possession were designed to give rules stated in federal statute, under which the enrollment of a vessel has the effect of nullifying all purported incumbrances executed prior to such enrollment except as otherwise provided, full and complete operation and effect. 46 U.S.C.A. § 1012; Civ.Code, § 2955 et seq.

3. Shipping ⇐33

Under federal statute providing for the enrollment of a vessel in office of collector of customs at home port of such vessel, records of collector are inclusive and exclusive. 46 U.S.C.A. § 1012.

4. Shipping ⇐33

Where chattel mortgage covering motorboat being constructed was recorded under state laws, but was not recorded in office of collector of customs of home port of vessel,

and where, after motorboat had been enrolled and duly licensed, another, who had no actual knowledge of existence of prior mortgage, took a chattel mortgage which was recorded in office of collector of customs of home port of motorboat in accordance with federal statute, the rights of the subsequent mortgagee and its vendee were superior to rights of prior mortgagee, since the enrollment and licensing of the motorboat terminated as to the subsequent mortgagee the mortgage lien of the prior mortgagee. 46 U.S.C.A. § 1012; Civ.Code, § 2955 et seq.

5. Shipping ⇐33

Evidence sustained finding that plaintiff at time it took mortgage covering motorboat enrolled and duly licensed by United States Department of Commerce did not have actual notice of prior mortgage which was only recorded under state law. 46 U.S.C.A. § 1012; Civ.Code, § 2955 et seq.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Atlas Imperial Diesel Engine Company against Tony Criscuolo and others, wherein Tony Criscuolo and others filed a cross-complaint against the Atlas Imperial Diesel Engine Company and an action by Antonio Criscuolo and others against Matts Werner Sweins and others, wherein Matts Werner Sweins filed a cross-complaint against Antonio Criscuolo and others, and wherein the Atlas Imperial Diesel Engine Company and another intervened. The actions involved claims to a motorboat. From the judgment, Antonio Criscuolo and others appeal.

Affirmed.

H. W. Hutton, of San Francisco, for appellants.

Thacher, Jones & Casey, of San Francisco, for respondents.

STURTEVANT, Justice.

In an action involving various claims to a small motorboat the trial court denied the defendants any relief under a mortgage they claimed to hold on the boat. From that judgment the defendants have appealed.

When the boat was being constructed the owners executed a mortgage to the defendants. That mortgage was never recorded in the office of the United States collector of customs of San Francisco, the home port of the vessel. For that reason the plaintiff claims that as to it the mortgage was invalid. For various reasons the defendants claim it was valid and an enforceable obligation against the plaintiff and its vendees. An understanding of the controversy involves the following facts:

In 1929 Antonio Di Maggio resided in the county of Monterey and was engaged in fishing in that neighborhood. He commenced the construction of the boat in Monterey Bay. He contacted Antonio Criscuolo, one of the defendants, who agreed to make him a loan for the purpose of building the boat. As a result of that agreement Di Maggio and his wife executed to Criscuolo and his wife a chattel mortgage on the boat which was then being constructed. That chattel mortgage was recorded in 1929 in the office of the recorder of Monterey county, but at no time was it ever recorded in the office of the collector of customs at San Francisco. On the 27th day of November, 1929, Di Maggio entered into a conditional sales agreement with Atlas Imperial Diesel Engine Company under the terms of which the latter agreed to install a ninety horsepower engine in the vessel. At that time the vessel was described as "to be called the General Pershing". The contract price mentioned in said instrument was $6,900. The contract further provided that as soon as the vessel was completed and documented in the office of the United States collector of customs as a vessel of the United States the owner would execute a promissory note and a mortgage to secure its payment. On January 23, 1930, the hull was taken to the plaintiff's plant at Oakland and the conditional sales contract was performed. On February 14, 1930, the vessel was licensed by the United States Department of Commerce as "a licensed vessel of the United States under twenty tons". On February 12, 1930, the owners executed the note and mortgage hereinabove mentioned and on the 18th day of February, 1930, the mortgage was duly recorded in the office of the collector of customs of the port of San Francisco. Except as will hereinafter be mentioned, neither the plaintiff nor its vendees knew of the existence of a mortgage in favor of the defendants nor of the recordation of said mortgage in Monterey county. On March 8, 1932, Di Maggio was in default of his payments and, in the presence of

Criscuolo, he executed a bill of sale to M. A. Dent, assistant secretary of the defendant company, who took title to the vessel as trustee. It was recorded in the office of the collector of customs on April 18, 1932. After the vessel had been completed it was taken to Monterey and operated by Di Maggio. It was so operated until March 28, 1932, when it was taken to San Francisco by M. A. Dent, the said trustee. While in San Francisco, on the 15th day of July, 1932, the vessel was sold to Matts Werner Sweins, who paid the plaintiff $5,000 therefor. The trial court made a finding that Sweins "was a bona fide purchaser for value without notice of said Criscuolo's said mortgage". Later Sweins took the vessel to Eureka, where he is now operating it and claims to be the owner. Such other facts will hereinafter be stated as it becomes necessary.

The defendants contend that they held and now hold a valid, subsisting chattel mortgage on the vessel. Foster v. Perkins, 42 Me. 168; Stinson v. Minor, 34 Ind. 89. The plaintiff replies it concedes the claim of the defendants was sound down to February 14, 1930, when the vessel was enrolled and duly licensed as hereinabove set forth. However, continuing, the plaintiff asserts that the effect of the enrollment and licensing was to terminate as to the plaintiff the mortgage lien of the defendants. 46 U.S.C.A., § 1012; Civ.Code, sec. 2958; Perkins v. Emerson, 59 Me. 319. While all of the authorities are not in accord, we think the contention of the plaintiff should be sustained. The facts in Foster v. Perkins, supra, show that that case is not in point. Foster held a mortgage from Balkam dated July 26, 1854, one dated December 9, 1854, and both recorded under state laws at Robbinston. He also held a mortgage dated December 27, 1854, which was recorded the same day in the collector's office for the port of Passamaquoddy. On December 22, 1854, the sheriff attached the vessel. The supreme court of Maine held that the plaintiff, Foster, was entitled to replevy the vessel. But, on page 175, the court said: "As to what would be the effect of the federal statute, before cited, upon the rights of attaching creditors, in the case of a mortgage not recorded as it requires, the mortgage or attachment being made after the registry or enrollment of the vessel, we intend to give no opinion." The decision in Stinson v. Minor, supra, is stated in the head-note: "Where before a vessel has been registered or enrolled as a vessel of the United States, a mortgage is executed thereon and duly recorded according to the law of this State, it will be valid against a person purchasing such vessel, for value and without actual notice of the mortgage, after the vessel has been enrolled in the office of the surveyor of a port of delivery, although the mortgage be not recorded in said office." In so far as we are advised, that decision has not been followed. 2 Jones, Chattel Mortgages and Conditional Sales, 6th ed., sec. 527, and notes. However, the writer is not inclined to disagree with the conclusion reached in the Stinson case when considered in the light of the facts involved. The steamer Curlew, before she was enrolled, was mortgaged; the mortgage was recorded as provided in the state statutes; later she was attached and sold at public auction, to M, who had full knowledge of the existence of the note and mortgage; later there were other transfers. Finally in 1867, the boat was sunk and wrecked and her machinery and boilers were all that were involved in the controversy. True it is that while at Evansville she was enrolled and licensed, but it is equally true that by being sunk and wrecked she had lost her identity as a vessel of the United States. In principle that case is the same as Davidson v. Gorham, 6 Cal. 343. The head-note states: "A sale of a vessel of the United States, at sea, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival in a port of the United States."

Perkins v. Emerson, supra, is, we think, directly in point and supports the contention of the plaintiff in this case. Perkins built the sloop Emma. While she was still on the stocks and incomplete, July 6, 1869, Perkins executed the note and mortgage. The mortgage was recorded in the office of the city clerk on August 11, 1869. The sloop was launched in August, 1869. She was licensed on August 6, 1869. The mortgage was never recorded with the collector of customs. On August 15, 1870, she was sold to the defendant, who had no notice whatever of the mortgage except the record in the city clerk's office. The court held that such recordation was no notice to the defendant and that he was entitled to replevy the vessel. In that case, as in this case, it was contended that a recordation

pursuant to the state statute would be valid even after the vessel was enrolled and licensed. Replying to that contention, on page 320, the court said: "We think it will not. Before registry or enrollment a vessel, like any other article of personal property, is subject to the laws of the State. After registry or enrollment it comes under the operation of the laws of the United States. Before the vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the State. After it is registered or enrolled, a mortgage of it will not be valid unless recorded as required by the laws of the United States. To hold otherwise would go far to defeat the very object which the registry laws of the United States were intended to secure."

In effect the rule stated in the case last cited has been followed in California from an early date. In "An Act Concerning Fraudulent Conveyances and Contracts", St. 1850, pp. 266, 267, passed April 19, 1850, section 17, it was provided: "No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." In section 1 of chapter 27, 9 United States Stat., p. 440, (1850), it was provided: "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." In Mitchell v. Steelman, 8 Cal. 363, the following facts were before the court: On June 12, 1854, Steelman executed his note for $1,250 and to secure its payment executed to Swain a mortgage upon the schooner Falmouth. The mortgage was duly recorded in the custom house. On April 30, 1855, Swain assigned the mortgage to Mitchell. The schooner was permitted to remain in possession of Steelman, who sold his interest in the vessel to Lawrence. Mitchell brought his action to foreclose the mortgage. Lawrence claimed that the mortgage was invalid because there was not a change of possession as required by section 17 of the Act of 1850, supra. Commencing on page 370, Mr. Justice Burnett writing the opinion for the court, said: "The provisions of both acts, relate to the validity of the same instruments as against the same parties. To make the instrument valid, the act of congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property, depends, in the contemplation of each act, solely and exclusively upon that which it alone prescribes. If, then, Congress intended to give a party certain perfect rights, upon the performance of certain specified conditions, can the act of the Legislature require the party to do more without abridging his already perfected rights. And if these perfected rights are abridged by the statute, is it not substantially in conflict with the act of Congress? The act of Congress intended to accomplish a given end, by the use of specified means, and that end is defeated by the statute, when it requires other means to be used to attain the same end. The act of Congress expressly makes the record of the instrument full notice as to third parties; while the statute says it is not such notice." Continuing, the court held that the act of Congress was controlling and that the statute of California was inoperative. The rule in the Mitchell case continued down to the enactment of the codes in 1872. In article III, chapter 2, title 14, section 2955 et seq., provisions were made for executing mortgages on personal property without a change of possession. Section 2958, as then enacted, provided: "A mortgage of any vessel or part of any vessel under the flag of the United States is void as against any person (other than the mortgagor, his heirs, and devisees, and persons having actual notice thereof) unless the mortgage is recorded in the office of the collector of customs where such vessel is registered or enrolled." In section 2971 it was provided that sections 2957, 2959–2966 do not apply to any mortgage of a ship or part of a ship under the flag of the United States. In explanation of sections 2958 and 2971 the code commissioners cited and quoted from the act of Congress of July 29, 1850. The act of Congress has been codified. 46 U.S.C.A. § 1012. That section reads: "§ 1012. *Record at home port.* No bill of sale, conveyance, mortgage, assignment of mortgage, or hypothecation (except bottomry), which includes a vessel of the United States or any portion thereof shall

be valid in respect to such vessel against any person other than the grantor or mortgagor, his heirs or devisees, and any person having actual notice thereof, until such bill of sale, conveyance, mortgage, assignment of mortgage, or hypothecation is recorded in the office of the collector of customs at the home port of such vessel. Any bill of sale or conveyance of the whole or any part of a vessel shall be recorded at the home port of such vessel as shown in her new document." A comparison shows that in every material respect the section is the same as section 1 of the Act of 1850, supra.

[1-4] The weight of the above-mentioned authorities is to the effect that the enrollment of a vessel pursuant to section 1012, 46 U.S.C.A., has the effect of nullifying all purported encumbrances executed prior to such enrollment except as provided in said section. Turning to sections 2955–2978 of the Civil Code we think it is clear that they were designed to give the rule stated in section 1012, 46 U.S.C.A., full and complete operation and effect. This is so because the federal statutes clearly contemplate that when a vessel is enrolled, each party may protect his rights by obtaining a new conveyance and filing it in the office of the collector of customs as provided in the federal statutes. In re Empire Shipbuilding Co., 2 Cir., 221 F. 223. But it is equally clear that said statutes provided that the records of the collector shall be inclusive and exclusive as shown above.

White's Bank v. Smith, 74 U.S. 646, 7 Wall. 646, 19 L.Ed. 211, and Aldrich v. Aetna Ins. Company, 75 U.S. 491, 8 Wall. 491, 19 L.Ed. 473, although not directly in point, nevertheless support the reasoning above stated.

In re Empire Shipbuilding Co., supra, states a rule that is also controlling in this case. In 1911 United Shores was being constructed by Shipbuilding Company for Buffalo and Fort Erie Ferry & Railway Company. On May 31, 1911, the Shipbuilding Company executed a bill of sale of the vessel then in process of being constructed. The vendee executed a mortgage thereon to Commonwealth Trust Company. The vendee then executed a bill of sale back to Shipbuilding Company. On August 9, 1911, the vessel was enrolled and licensed. On the same day the bill of sale and the mortgage were recorded in the office of the collector of customs. The court stated [221 F. 226]: "In our opinion the mortgage was not one recordable in the customhouse, and the collector should have refused the request to record it. Since it is not recordable, its improper recording does not operate as constructive notice under section 4192." (Section 4192 of Revised Statutes being the same statute codified as section 1012, 46 U.S.C.A.)

Heretofore Criscuolo commenced an action in equity to obtain the enforcement of his rights. That action was commenced in the District Court of the United States for the Northern District of California and was later appealed to the Circuit Court of Appeals, Ninth Circuit. The result of that litigation was a dismissal of his bill. Criscuolo v. Atlas Imperial Diesel Engine Co., 9 Cir., 84 F.2d 273. At this time Criscuolo claims said decision was res judicata in his favor. We think it is sufficient to state that we have carefully read the decision and we find nothing in it that was res judicata of any issue involved in this action.

[5] The defendants also contend the plaintiff had actual notice of their mortgage at the time the above-mentioned mortgage was executed by Di Maggio to the engine company. That question was made an issue and was fully tried out in the trial court. The trial court made a finding in favor of the plaintiff to the effect that the latter did not have actual notice of the mortgage recorded in Monterey county. The defendants assert said finding is contrary to the evidence. They base that assertion on the fact that about thirty days before the mortgage was executed in favor of the engine company an agent of an insurance company mailed to said engine company a copy of an insurance policy. They call to our attention that said policy contained the following: "Nino Di Maggio, on account of whom it may concern, in case of loss, to be paid in funds current in the United States to assured, Atlas Imperial Diesel Engine Company, Antonio Criscuolo and Angelo Siino, or order, as their respective interests may appear, does make insurance * * *" But that passage was only a part of the evidence introduced on the subject. The officers of the plaintiff testified they had no notice. The evidence was not clear and certain that the copy of the policy was ever mailed. Furthermore, there was evidence that the fact the names were inserted did not imply said persons were owners or mortgagees. Un-

der these circumstances the finding of the trial court may not be disturbed.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



32 Cal.App.2d 287

In re TRETHEWAY'S ESTATE.
Appeal of BERGER et al.

Civ. 6164.

District Court of Appeal, Third District, California.

April 18, 1939.

1. Wills ⇐684(6)

Where will gave income from testamentary trust to wife for life and right to withdraw not to exceed $2,000 of corpus annually if income was insufficient for her support, and income during eight years of existence of trust was only $3,600, wife's withdrawal of $15,315 from corpus was authorized.

2. Wills ⇐683

Where will provided that all testator's estate should go in trust to his wife, and property left by testator was community property of himself and his wife, distribution of one-half of estate to wife and one-half to trust was proper, as against contention that all the property should have been set aside in trust.

3. Trusts ⇐329

On appeal from order settling report and account of testamentary trustee, appellate court would not consider whether division of testator's property between trust and wife was proper, where decree of distribution making such division had become final.

4. Trusts ⇐322

Where will creating trust for wife provided that if income was insufficient in her opinion for her support she should be paid at her request such sums not in excess of $2,000 annually as in her discretion she might require, account of wife as trustee showing payment of sums within $2,000 limit needed by wife for her necessary expenses, without issuing of formal requests to herself as trustee and giving of receipts to herself as trustee, would be approved.

5. Wills ⇐683

Where one-half of stock was property of widow and one-half was property of testamentary trust of which widow was beneficiary, one-half of dwelling house purchased by widow with proceeds of sale of stock was property of trust.

6. Wills ⇐684(6)

A beneficiary who was entitled to withdraw corpus of trust for her support could not, as a part of her withdrawal, make a gift to debtors of trust of the amount of their indebtedness.

7. Trusts ⇐324

In settling account of testamentary trustee, contestant does not join issues of fact, but merely raises objections to certain items in the account, which ground does not require him to set forth any allegations of fact.

8. Trusts ⇐324

The statute providing that issues of fact joined in probate proceedings must be tried in conformity with requirements of rules of practice in civil actions, and that court must sign and file its decision in writing as provided in civil actions, is not applicable to the settlement of an account. Probate Code, § 1230.

9. Trusts ⇐326

In contested proceeding for settlement of account of testamentary trustee, findings of fact are not required. Probate Code, § 1230.

10. Trusts ⇐329

On appeal from order settling report and account of testamentary trustee, appellate court would dispose of matter without returning it for further proceedings in the trial court, where all evidence before trial court was before the appellate court.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding in the matter of the estate of George P. Tretheway, also known as Geo. P. Tretheway, also known as G. P. Tretheway, deceased, and of the trusts created by the will of the deceased. After the death of Mary A. Tretheway, Harry

B. Tretheway, as an executor of her estate, filed an account on behalf of Mary A. Tretheway as trustee of the trust. To the report of the trusteeship, Dean Berger and others filed objections, which were decided contrary to their contentions. From an order settling the report and account of the trustee, Dean Berger and others appeal.

Order in accordance with opinion.

Chauncey H. Dunn, of Sacramento, for appellants.

O. C. Parkinson and Louttit, Marceau & Louttit, all of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

George P. Tretheway died testate on May 9, 1925, leaving surviving his wife, Mary A. Tretheway, his children, George W. Tretheway, Emma Tretheway Winning, Fred H. Tretheway and Harry B. Tretheway, and five grandchildren, Dean Berger, Arthur Berger, June Berger King, Ernest Berger and Frances Berger, the children of a predeceased daughter, Anna T. Berger, all of whom are over the age of twenty-one years.

The will of George P. Tretheway provided that all of his estate should go in trust to his wife Mary A. Tretheway, and that during her lifetime she should have the entire income from the property. The will provided: "I further order and direct that in the event that the income from my estate should not be sufficient in the opinion of my wife, Mary A. Tretheway, to properly support and maintain her in the way and manner in which she has been accustomed to live, there shall be paid to her out of the principal of my estate for her support and maintenance such sums as in her discretion may be necessary, the same not to exceed the sum of Two Thousand ($2000.00) Dollars per annum, and I direct that the same be paid to my said wife upon her request and her receipt to be accepted as a full and complete voucher therefor."

It is upon the construction of this paragraph that the principal objections urged by appellants are based.

By the decree of distribution, one-half of the income and one-half of the principal of the estate being community property, was distributed to Mary A. Tretheway, the widow, absolutely. The other one-half of the property and the income was distributed in trust for her support and maintenance during her lifetime as provided in the paragraph quoted above, with the remainder over to her children and grandchildren after her death. The trustees named in the will were George W. Tretheway, a son; Mary A. Tretheway, the widow, and N. Nelson French, an attorney. Mr. French declined the appointment, and distribution was made to the two remaining trustees. George W. Tretheway cooperated for about two years, but thereafter became practically inactive, leaving Mary A. Tretheway as the only active trustee, and she carried on thereafter largely through her son, Harry B. Tretheway, who conducted most of the business of the trust for her.

Mary A. Tretheway died April 6, 1936, and Fred H. Tretheway and Harry B. Tretheway were appointed executors of her will. In her will she omitted the grandchildren and divided her estate among her children. The result of this distribution was that the trust property passed to the children and the grandchildren, and the separate property of Mary A. Tretheway by the provisions of her will went to her children only.

After the death of Mary A. Tretheway, Harry B. Tretheway, as executor of her estate, filed an account on behalf of Mary A. Tretheway as trustee of the trust. George W. Tretheway, the cotrustee, did not join in that account, nor did Fred H. Tretheway, the coexecutor with Harry B. Tretheway of the estate of Mary A. Tretheway.

The trust estate consisted of an undivided one-half interest in certain real and personal property. The accounting of the trust estate as filed by Harry B. Tretheway as executor upon behalf of Mary A. Tretheway, the deceased trustee, showed as having been paid out of the trust fund to Mary A. Tretheway from the principal, the sum of $15,315, which is alleged to have been paid to Mary A. Tretheway under the provisions of the will granting her the income from the trust and an annual amount not to exceed $2,000 from the principal of the trust. The income of the trust property for the years from 1929 to 1935, inclusive, averaged approximately $520 a year, gross.

[1] In these withdrawals Mary A. Tretheway appears to be within her rights. The will provided that if the income from the estate was not sufficient, in the opinion of the widow, to properly support and maintain her, she was to be paid out of the

principal of the trust a sum not to exceed $2,000 a year. The income from the trust during its existence amounted to $3,600, and as over eight years elapsed between the decree of distribution and the death of Mary A. Tretheway, a sum in excess of that actually withdrawn from the principal of the trust was permissible.

To this report of the trusteeship the granchildren filed objections, which were decided contrary to their contentions, and from the order settling the report and account of the trustee, they appeal.

[2, 3] Appellants claim that the court erred in the first instance in distributing to Mary A. Tretheway one-half of the estate to her, and one-half to the trust, claiming that by the will all of the property should have been set aside in trust. The property of which George P. Tretheway died testate having been community property of himself and wife, clearly there was no error in the court distributing the property as it did. This, however, is a matter not before us, as the decree of distribution making this division has long since become final and is not at this time in issue.

[4] Appellants also object to various payments by the trustee, claiming that such payments were not supported by vouchers, and that there was no evidence of such payments to the beneficiary. It is true that the records are very meager, and the rendering of such accounts are not to be encouraged, but there is sufficient in the record to warrant approval of the account.

Mary A. Tretheway was, by the will of her husband, created sole beneficiary as to the income, and practically so as to the principal up to $2,000 a year. The trust clause provided that if the income was not sufficient, *in the opinion of the wife,* to properly support her, she should have out of the principal, such sums *as in her discretion* she might require, to be paid to her *at her request.* When she withdrew these sums no accounting was required from her as to the use of these moneys; they belonged to her absolutely. The actual withdrawal of these funds by her seems to have been quite clearly established. As to the need, she frequently told her children she required additional amounts from the principal, and the amounts as withdrawn from the principal average less than the annual limitation fixed in the will. It does not appear that she was compelled to withdraw in any one year the entire amount of $2,000, but could accumulate the fund if necessary to her support, provided that she did not withdraw from the principal more than $2,000 for each year. The amounts withdrawn balance the cash received, which was less than the total amount she would have withdrawn if she had taken therefrom the full amount allotted to her each year over the eight years the trust was in existence. In other words the actual cash income was something over $15,000 and the will would have justified a withdrawal of $16,000. It must also be remembered that a portion of the trust estate consisted of farming property which required the expenditure of moneys for taxes, upkeep, etc.

The testimony of a son as to the necessary expenses of Mary A. Tretheway showed that she required approximately $2,700 a year for her personal maintenance, which also approximates the amount actually withdrawn.

In view of the foregoing tangible facts, the strict compliance of the beneficiary as to issuing of formal requests to the trustees for amounts to be withdrawn from the trust, and the giving of receipts to herself as trustee therefor, is not essential in order to approve the account.

[5] An exception is taken to the account by the appellants in that it does not set over to the trust the one-half interest in the Harding way home. This was a piece of property purchased by Mary A. Tretheway in 1928 or 1929 for her home, where she lived until her death. It appeared from the account that she sold certain stock of the Western States Gas & Electric Company, and realized therefor $6,220, and that one-half thereof was the property of the widow and one-half the property of the trust. Harry B. Tretheway testified he thought the proceeds of that sale, of which one-half belonged to the trust and amounted to $3,110, went into the purchase of the Harding way property. Nothing to the contrary appears in the record, and we must conclude in the absence of anything to the contrary that the trust has an interest in that property to the extent of $3,110.

Certain notes given by Harry B. Tretheway amounting to $2,783 were distributed in the decree of distribution, one-half to the trust and one-half to the widow. These notes were outlawed prior to the death of Mary A. Tretheway, and appellants now seek to charge the trustees with one-half of these notes. It does not ap-

pear, however, the notes were ever collectible during the existence of the trust, or if collectible, that Harry B. Tretheway has yet refused to pay the same. The obligation still exists, and the defense of limitations may not be interposed by the maker even if an action is brought to enforce collection.

[6] Another item in the account is the showing that $750 had been collected from E. B. and Emma Winning, and paid into the trust and paid to the widow as a part of her annual withdrawal. With reference to this item, Harry B. Tretheway testified: "It was not paid in cash but was thereafter paid in the form of a gift from Mary A. Tretheway to the Winnings." The trustee could not give away the trust property, and if it was not collected in cash, it could not be used by her for her support. This item in the account must be disallowed and should be returned as an asset to the trust.

Appellants also claim that the court should have made findings of fact as to the issues presented by the contest filed to the account, and cite in support thereof In re Pendell's Estate, 216 Cal. 384, 14 P.2d 506. That was a case where a petition had been filed to remove an executor and the executor filed an answer, issues were joined and a trial held. In such a case the Supreme Court held that findings were necessary. We do not believe, however, that under the record as here presented findings of fact are required. Section 1230 of the Probate Code now provides in part as follows: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. * * * If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions." This is subsequently the same as was formerly found in section 1717 of the Code of Civil Procedure. It was under that section that In re Pendell's Estate, supra, was decided. In re Ingram's Estate, 99 Cal.App. 660, 279 P. 208, was reversed for the reason that the court failed to make findings upon issues framed upon a contest as to the appointment of an administrator. In the Estate of Levinson, 108 Cal. 450, 41 P. 483, 484, 42 P. 479, decided in 1895, findings were held to be unnecessary upon the settlement of an account, and undoubtedly that is still the rule, and has not been changed by any subsequent code amendment.

Appellant claims that an amendment in 1907, St.1907, p. 727, to section 1717 changed the rule, and the Estate of Levinson, supra, is not applicable, but a comparison of the section as it stood originally, and after it was amended, clearly shows that no material change was made as to the requirements of findings. As was said in the Estate of Levinson, supra: "The manner in which the account of an executor or administrator is usually made up, and the manner in which objections thereto are usually presented (and this case shows no exception), do not at all conduce to the development of issues such as arise upon the pleadings in a civil action, and to which findings are required to be responsive. Code of Civ.Proc. §§ 590, 633. And it has been said here obiter, but we think, correctly, that 'in such a proceeding it is not incumbent upon the court to make and file express findings.' "

In Estate of Franklin, 133 Cal. 584, 65 P. 1081, the court, considering this question, said: "Exceptions to an account do not create 'issues of fact joined,' such as must be submitted through a jury."

[7-9] In settling an account, the contestant does not join issues of fact but merely raised objections to certain items in the account, which ground does not require him to set forth any allegations of fact. More recent rulings to the same general fact are found in the Estate of McPhee, 156 Cal. 335, 104 P. 455, Ann.Cas. 1913E, 899, and Estate of Machado, 186 Cal. 246, 199 P. 505. The code sections upon which appellants rely, clearly have no application to the settlement of an account, and there is nothing to require the court to file written findings.

[10] Apparently all the evidence before the lower court is here before us, and we can dispose of the matter without returning it for further proceedings in the trial court.

It is therefore the order of this court that the final account be approved with the following exceptions: That $3,110 applied to the purchase of the Harding Way home be credited to the trust, and distributed in accordance with the terms of the trust. In regard to the E. B. and Emma Winning note, that a one-half interest therein be distributed to the trust. Otherwise the ac-

count is to be approved as filed, and the judgment entered approving the same is hereby affirmed, except as is modified in the foregoing manner. Each party to bear his own costs. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.



32 Cal.App.2d 326

STEPHEN v. SPAULDING et al.

Civ. 11742.

District Court of Appeal, Second District, Division 1, California.

April 20, 1939.

1. Automobiles ⇐181(1), 193(1)

Under automobile guest statute, automobile owner riding with a guest in an automobile driven by owner's chauffeur is only liable for such acts of driver as the principal would be primarily liable for if his personal conduct in connection with the operation of the automobile were the issue. St.1935, p. 154, § 403.

2. Master and servant ⇐300

The existence of liability on part of principal for negligent acts of agent is determined by status of injured party with reference to principal and nature of latter's duty to former.

3. Automobiles ⇐181(2)

The sharing of the cost of gasoline consumed on a trip taken for pleasure or social purposes does not transform into a "passenger" one who without such exchange would be a "guest," so as to entitle such person to recover for injuries sustained as result of mere negligence of driver. St. 1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

4. Automobiles ⇐181(1)

Where sole purpose of contemplated journey was joint pleasure of guest, who was to share cost of gasoline, and automobile owner, and it was conceded that driver was not guilty of willful misconduct or intoxication, guest was not entitled to recover from owner and driver for injuries sustained in automobile collision. St.1935, p. 154, § 403.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action by Minnie Stephen against William Spaulding and others for injuries sustained while riding as guest in defendants' automobile. From a judgment for the plaintiff, defendants appeal.

Reversed and remanded, with directions.

George L. Greer, of Los Angeles, for appellants.

James E. Pawson, of Long Beach, for respondent.

WHITE, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff that involves primarily the question of the liability of a driver of an automobile for injuries to another riding with such driver, under the so-called "guest" law. Section 403, Vehicle Code (St. 1935, p. 154).

Epitomized, the facts are that plaintiff and two other women, accompanied by defendant Mrs. Spaulding, were riding in an automobile belonging to the defendants Mr. and Mrs. Spaulding and driven by their daughter, defendant Barbara Spaulding. The party was journeying to Laguna Beach to attend a bridge party, and as between plaintiff and defendant Mrs. Spaulding there was a tacit and mutual understanding that the cost of gasoline used on the trip was to be shared between them. While en route between Long Beach and Laguna Beach the accident in question occurred, when the auto driven by Barbara Spaulding collided with another automobile that had stopped in front of it.

[1, 2] It is conceded that the driver of the automobile was not guilty of wilful misconduct or intoxication. Therefore recovery by plaintiff is dependent upon whether at the time of the accident she was riding in the capacity of a passenger or a guest. If plaintiff's status was that of a guest she cannot recover in the absence of the elements of wilful misconduct or intoxication on the part of the driver. Assuming the correctness of respondent's claim that the driver, Barbara Spaulding, was the agent of her mother, defendant Mrs. Spaulding, it requires no citation of authority for the statement that plain-

tiff's right to recover was nevertheless based upon the measure of care owed her on the part of the principal, Mrs. Spaulding. If plaintiff was a guest of Mrs. Spaulding while riding in the latter's automobile, then plaintiff's right of recovery is gauged by the provisions of the "guest" statute, regardless of whether Mrs. Spaulding was actually driving or exercising the control or the right to control her daughter, who was operating the car. The existence of liability on the part of the principal for the negligent acts of an agent is determined by the status of the injured party with reference to the principal and the nature of the latter's duty or obligation to the former. An automobile owner riding with a guest in an automobile driven by such owner's chauffeur or agent is only liable for such acts of the agent as the principal would be primarily liable for if his personal conduct in connection with the operation of the car were the issue. It follows, therefore, that if plaintiff was a guest, then unless the driver was guilty of wilful misconduct or intoxication, the principal, Mrs. Spaulding, whose liability was secondary, cannot be held. Respondent's contention that Mrs. Spaulding's action in "turning over of the dangerous instrumentality to a minor lacking in experience" constituted wilful misconduct on the part of the mother, is without merit under the facts of this case.

[3] It is now the settled and established law of this state that the sharing of the cost of gasoline consumed on a trip, when the trip, like the one here in question, is taken for pleasure or social purposes, is nothing more than the exchange of social amenities, and as said in McCann v. Hoffman, 9 Cal.2d 279, 285, 70 P.2d 909, 912, "does not transform into a passenger one who without such exchange would be a guest, and consequently is not payment for the transportation or compensation within the meaning of the statute. It is obvious that if a different result obtained under any construction of the statute its purposes would be defeated and its effect annulled. The relationships which will give rise to the status of a passenger must confer a benefit of a tangible nature and are limited."

[4] Respondent's contentions, in the light of the facts of this case, find a complete and decisive answer in McCann v. Hoffman, supra, and Rogers v. Vreeland, 16 Cal.App.2d 364, 60 P.2d 585. The only conclusion supported by the record in the present case is that the sole purpose of the contemplated trip was the joint pleasure of the parties. The judgment of the trial court in favor of plaintiff was therefore erroneous.

For the foregoing reasons the judgment is reversed and the cause remanded with directions to the court below to enter judgment in favor of appellants.

We concur: YORK, P. J.; DORAN, J.



32 Cal.App.2d 300

MAXON v. AVERY.

Civ. 2266.

District Court of Appeal, Fourth District, California.

April 18, 1939.

1. Judgment ⇐12

A judgment entered after the death of the real plaintiff in the action was void for want of jurisdiction, where no substitution of parties had been made at that time and there was then no real plaintiff before the court.

2. Appeal and error ⇐330(1)
Guardian and ward ⇐135

A purported appeal taken by guardian after ward's death before any substitution of parties had been made was ineffectual, since the authority of the guardian ended with the death of his ward.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action to set aside a joint tenancy with the right of survivorship and to quiet plaintiff's title to certain money and a note and trust deed by Donald A. Maxon, as administrator of the estate of Norton H. Tharp, deceased, substituted for Donald A. Maxon, as guardian of the person and estate of Norton H. Tharp, an incompetent

person, against Rose V. Avery. From a judgment for defendant, plaintiff appeals.

Appeal dismissed.

W. R. Bailey, of Visalia, for appellant.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an action to set aside a joint tenancy with the right of survivorship, and quiet the plaintiff's title in and to certain money and a certain note and trust deed.

On June 2, 1936, Norton H. Tharp, who was then 76 years of age, sold a ranch, which was his separate property, for $13,500, receiving $3,500 in cash and a note for $10,000 secured by a trust deed upon the property. The note and trust deed were made out in favor of Tharp, his wife, and Rose V. Avery, who was a niece of his wife, as joint tenants with the right of survivorship, and the cash received was deposited in a bank under a similar arrangement. Tharp's wife died on November 15, 1936. On January 11, 1937, Tharp was adjudged incompetent and Donald A. Maxon was appointed as guardian of his person and estate.

The guardian brought this action, alleging that on June 2, 1936, Tharp was weak in body and mind, and unable to care for his property; that the defendant occupied a confidential relationship with him and he relied on her to attend to the details of his business transactions; that without his knowledge or understanding and in violation of the confidential relationship between them, she caused and procured the placing of the proceeds of this ranch in joint tenancy as above mentioned; and that the execution and delivery of the note and trust deed and money in this manner was procured by fraud and undue influence. After answer, the cause was tried on June 2, 1937, and was taken under submission. Tharp died on September 22, 1937. The court found in all respects in favor of the defendant, findings of fact being filed on December 13, 1937, and a judgment on December 15, 1937. The court ordered both the findings and the judgment filed nunc pro tunc as of September 20, 1937. From that judgment this appeal was taken on March 2, 1938. On April 10, 1939, an order was made in the superior court of Tulare county substituting Donald A. Maxon, as administrator of the estate of Norton H. Tharp, deceased, as plaintiff in this action. On April 13, 1939, a similar order of substitution was made in this court.

The appellant contends that the findings are not supported by the evidence and that it conclusively appears that Tharp was mentally incompetent on June 2, 1936, and at all times thereafter; that he did not understand the disposition that was made of the money, the note and the deed of trust; that the transaction was procured by the connivance of Mrs. Tharp and the respondent; and further, that the judgment is void, having been entered after the death of Tharp and without the substitution of a party plaintiff.

[1, 2] Conceding, but not holding, that the evidence would have supported contrary findings and a judgment in favor of the appellant, it would have to be held that the findings and judgment as entered are amply supported by the evidence. In fact, they are supported by a preponderance of the evidence. It must be held, however, that the judgment entered after the death of the real plaintiff in the action is void since no substitution of parties had been made at that time and there was then no real plaintiff before the court, and the court was without jurisdiction to enter the judgment. Scoville v. Keglor, 27 Cal.App. 2d 17, 80 P.2d 162. A further consideration is that the purported appeal was taken by the guardian before any substitution of parties had been made. The authority of the guardian ended with the death of Tharp and the notice of appeal filed by the guardian was ineffective for any purpose.

The evidence in the record covering the issues as to Tharp's mental condition, whether he had independent advice, the confidential relationship of the parties, and the use of undue influence is voluminous, and it would seem that there is no occasion for the taking of further evidence. Now that there has been a substitution of parties we suggest that the proper procedure would be for the respondent to take the appropriate steps to have the void judgment set aside, and to have the same findings and judgment entered and filed, nunc pro tunc, as of a date before the death of Tharp.

For the reasons given the purported appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.

32 Cal.App.2d 351

COCA COLA BOTTLING CO. v. FELICIANO.

Civ. 11891.

District Court of Appeal, Second District, Division 2, California.

April 20, 1939.

Rehearing Denied May 18, 1939.

Hearing Denied June 19, 1939.

1. Automobiles ⇐19

No title or interest in a motor vehicle registered pursuant to vehicle code passes until transfer of registration of such vehicle is made by department of motor vehicles and the department has issued a new certificate and registration card with respect to the vehicle. St.1935, p. 118, § 186.

2. Statutes ⇐161(1), 163

The statute last approved, particularly if it is a special act, applicable to a particular subject, is controlling over a statute previously adopted by Legislature.

3. Automobiles ⇐19

Sections of Civil Code dealing with relationship between a buyer and seller are inapplicable in determining ownership of automobiles in view of subsequent adoption of provisions in motor vehicle code governing question of transfer of title of automobiles. Civ.Code, §§ 1738, 1739, 1761, 1762, 1768; St.1935, p. 118, § 186.

4. Automobiles ⇐19

Title to automobiles owned by judgment debtor did not pass to corporation set up by debtor after judgment so as to relieve automobiles from execution where debtor had requested department of registration of motor vehicles to issue new certificates showing title in corporation but such certificates were not issued. St.1935, p. 118, § 186.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Execution proceedings by the Coca Cola Bottling Company against Frank Feliciano, wherein the Frank Feliciano Beverage Company, Incorporated, filed a third party claim. From a judgment based on findings that certain automobiles in controversy were the property of Frank Feliciano, the third party claimant appeals.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

C. Douglas Smith and Marion A. Smith, both of Santa Maria, for respondent.

McCOMB, Justice.

This is an appeal by third party claimant from a judgment of the trial court based on findings that four automobile trucks (Engine No. 18261-4272, Engine No. DMV 20774, Engine No. B.B. 18-2740913, and Engine No. T 61-82405) were the property of Frank Feliciano and not of appellant.

March 24, 1938, a jury returned a verdict in favor of respondent and against Frank Feliciano for the sum of $7,435.20. Judgment was entered the same day and a revised judgment entered March 31, 1938. At the time of the verdict Frank Feliciano was a wholesale and retail beverage merchant in San Luis Obispo, California, and he owned and used in his business the four automobile trucks above mentioned.

March 28, 1938, E. R. Lewis, a W.P.A. worker of San Luis Obispo, California, Francis D. Feliciano, the son of Frank Feliciano, the judgment debtor above mentioned, and B. Hollingshead duly incorporated appellant (Frank Feliciano Beverage Company, Inc.) pursuant to the laws of the state of California. March 29, 1938, Frank Feliciano attempted to transfer to appellant all of his stock in trade, his delivery trucks (including those mentioned above), tools, and other store equipment used by him in the conduct of his wholesale and retail beverage business. The consideration for this transfer was a note of appellant in the sum of $2,000 payable two years after date. March 30, 1938, appellant caused to be mailed to the division of registration of the department of motor vehicles, Sacramento, California, duly executed, the pink slips for the trucks above referred to and requested that new certificates be issued showing the title in appellant. This was never done. April 8, 1938, respondent had issued a writ of execution upon the trucks and appellant filed this third party claim, which resulted in the judgment here appealed from.

This is the sole question necessary for us to determine:

Did title to the automobile trucks here in question pass to appellant from Frank Feliciano prior to the transfer of registration and issuance of a new certificate of ownership and registration card covering said trucks by the department of motor vehicles?

[1] This question must be answered in the negative. The law is clear in California that no title or interest in a motor vehicle registered pursuant to the provisions of the California Vehicle Code passes until transfer of registration of such vehicle is made by the department of motor vehicles and said department has issued a new certificate and registration card with respect to the vehicle.

Section 186 of the Vehicle Code (St. 1935, p. 118), provides as follows: "When Transfer Deemed Complete. No transfer of the title *or any interest* in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effected for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a transfer and except as provided in sections 178 and 180 hereof and in Chapter 3 of this division." (Italics added.)

It is conceded that the present case does not fall within the provisions of section 178 or section 180 of the Motor Vehicle Code (St.1935, pp. 115, 116).

The cases cited by appellant, such as Pendell v. Thomas, 95 Cal.App. 33, 272 P. 306; Maryland Casualty Co. v. Hollman, 100 Cal.App. 669, 280 P. 1034; Sidney v. Wilson, 67 Cal.App. 282, 227 P. 672; Kenny v. Christianson, 200 Cal. 419, 253 P. 715; Eckhardt v. Morely, 220 Cal. 229, 30 P.2d 423, are inapplicable to the facts of the present case, for the reason that they were decided pursuant to section 45(e) of the Motor Vehicle Act (St.1929, p. 514), which read thus: "Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

This section has been superseded by section 186 of the Motor Vehicle Code. It is to be noted that section 45(e) of the Motor Vehicle Act provided that "title" to the vehicle in question should not pass until the provisions of the act were complied with. No reference was made to any other interest in the vehicle than that of title, while section 186 of the Motor Vehicle Code expressly provides that "no transfer of the title or *any interest*" shall pass until the requirements of the act have been complied with.

[2-4] The law is established that the statute last approved, particularly if it be a special act applicable to a particular subject, is controlling over a statute previously adopted by the Legislature. Pierce v. Riley, 21 Cal.App.2d 513, 519, 70 P.2d 206. Therefore, since section 186 of the Motor Vehicle Code was adopted in 1935, it supersedes any conflicting provision in the previously adopted sections of the Civil Code, to-wit, sections 1738, 1739, 1761, 1762, and 1768, which deal generally with the subject of the relationship between a buyer and a seller; and there is no merit in appellant's contention that the sections of the Civil Code just mentioned are applicable to this case.

Because of our conclusions, it is unnecessary to discuss other points raised by counsel.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



32 Cal.App.2d 354

GASKILL et al. v. WALLACE.

Civ. 2242.

District Court of Appeal, Fourth District, California.

April 20, 1939.

1. Account ⇐22

In action for accounting, trial court can strike balance of accounts between parties and give judgment for any balance found due from one party to the other.

2. Judgment ⇐713(2)

A judgment rendered in court of competent jurisdiction is res judicata on all questions actually litigated and decided and on all others that might have been litigated.

3. Judgment ⇐592, 713(2)

A party is not permitted to split his demands or defenses.

4. Judgment ⇐713(2)

A judgment quieting title on cross-complaint of vendors who terminated contract for sale of land on purchaser's default in payment of installment of purchase price was res judicata in vendors' subsequent action to recover unpaid installment, where issue of unpaid installment was litigated and was particularly found and determined, but judgment was silent thereon.

5. Judgment ⇐713(2)

The denial of amended cross-complaint did not mean that judgment was not res judicata of issues involved in cross-complaint, where such denial did not deprive cross-complainants of right to try such issues.

6. Pleading ⇐35

The record should not be incumbered with repetitious pleadings.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Percy D. Gaskill and others against Walter J. Wallace to recover an unpaid portion of the purchase price of property. Judgment was rendered for the defendant. From an order granting plaintiffs' motion for new trial, the defendant appeals.

Order reversed.

Victor Ford Collins, of Los Angeles, and Frederick W. Welsh, of Bakersfield, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

MARKS, Justice.

This is an action to recover an unpaid portion of the purchase price of property. Under an executory sales contract plaintiffs agreed to sell to defendant land in Kern county. Judgment was rendered for defendant. Plaintiffs' motion for new trial was granted "for the reason that the decision is against the law". Defendant has appealed from this order.

The sole defense interposed is that of res judicata. The trial judge found in favor of this defense and rendered judgment for defendant. The motion for new trial was heard and granted by another judge. The sole question argued by counsel is whether the defense of res judicata was established and the judgment based upon it properly rendered. We will confine ourselves to that question.

Some time prior to July 1, 1931, plaintiffs entered into a parol contract with defendant for the sale of the Kern county land to him. This contract was reduced to writing on July 1, 1931. Among other things it provided that Wallace might employ Percy D. Gaskill to superintend the construction of a duck club and preserve on the property. A payment of $5,000 on the purchase price fell due on July 1, 1932.

Under date of July 25, 1932, plaintiffs notified defendant that he was in default under his contract and that unless he remedied such default within three days they would terminate the contract. Under date of July 29, 1932, they served notice of termination. Gaskill was then residing on the property and thereafter excluded Wallace therefrom.

In August, 1932, Wallace started suit against plaintiffs for an accounting and for possession of the land. He pleaded the contract of sale in detail. He alleged that he had employed Gaskill to superintend the construction of the duck club and preserve; that Gaskill went into possession of the property for him and as his agent proceeded to improve it; that he had paid Gaskill $16,050 on account of the purchase price and on account of the cost of the improvements; that he had expended an additional $5,725.49 on improvements and furnishings on the property; that Gaskill had failed to account for the $16,050 paid him by Wallace and that Wallace had no knowledge of how much of that sum had been applied on the purchase price.

The Gaskills filed an answer and cross-complaint in which they sought to quiet their title to the property. The trial court found that Wallace had paid Gaskill $17,387.75, out of which there was paid certain sums on the indebtedness created by the contract, and $807.92 on the instalment of principal falling due on July 1, 1932; that on that date there was $4,192.08, principal, and $698.72, accrued interest, due and unpaid from Wallace to the Gaskills.

On November 16, 1933, judgment was entered quieting the Gaskills' title to the property. The judgment is silent on the question of the indebtedness from Wallace to the Gaskills although the findings went into detail on this question and would

have supported a judgment in favor of the Gaskills for $4,192.08, principal, and $698.72, interest, under the peculiar terms of the contract of sale. No appeal was taken and that judgment has long since become final.

On September 11, 1934, plaintiffs instituted the present action to recover the $4,192.08, principal, and $698.72, accrued interest, found due them in the first action but for which they failed to recover judgment. Defendant pleaded the former judgment and relied on the defense of res judicata.

[1] It is well settled in California that in an action for an accounting the trial court can strike a balance of the accounts between parties and give judgment for any balance found due from one party to the other. Smith v. Blodget, 187 Cal. 235, 201 P. 584; Murdock v. Clarke, 88 Cal. 384, 26 P. 601; Joshua Hendy Machine Works v. Pacific Cable Co., 99 Cal. 421, 33 P. 1084; Rodehaver v. Mankel, 16 Cal.App. 2d 597, 61 P.2d 61.

[2, 3] It is equally well settled that a judgment rendered in a court of competent jurisdiction is res judicata not only on all questions actually litigated and decided, but on all others that might have been litigated in the action. A party is not permitted to split his demands or defenses. In Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.2d 1003, this rule was thus announced:

"To this situation is clearly applicable the well-established rule that '* * * a judgment between the same parties is conclusive not only as to the subject-matter in controversy in the actions upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided. * * *' Bingham v. Kearney, 136 Cal. 175, 177, 68 P. 597. See, also, Price v. Sixth District Ass'n, 201 Cal. 502, 511, 258 P. 387, 391, where the court, citing 15 Ruling Case Law, § 446, pp. 969, 970, says: 'The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. * * *'" See, also, In re Estate of Bell, 153 Cal. 331, 95 P. 372; Henderson v. Miglietta, 206 Cal. 125, 273 P. 581.

[4, 5] Plaintiffs seek to escape the effect of those rules by pointing out that some time before the trial of the first case they sought leave to file an amendment to their cross-complaint in which they proposed to incorporate a separate cause of action for the recovery of the $4,192.08, principal, and $698.72, interest, then due them. Counsel for Wallace resisted their motion to amend and the trial court denied it. They point to the rule that where one party is prevented by the other from having issues tried in an action the judgment in that action will not be a bar to another action involving those issues. Stockwell v. McAlvay, 10 Cal.2d 368, 74 P.2d 504; United Bank & Trust Co. v. Hunt, 1 Cal.2d 340, 34 P.2d 1001.

Plaintiffs can draw no comfort or support from that salutary rule. The order denying leave to file the amended cross-complaint did not deprive the Gaskills of the right to try, in the first case, the issue of the amount due and unpaid them by Wallace. The findings in that case are particular on that question and show that the amount of that unpaid balance was not only litigated but was particularly found and determined. It was probably error not to give the Gaskills judgment for what was due them. As the first judgment was silent on that question it was the duty of the Gaskills to attack it on appeal if they were dissatisfied with it and desired at any time to reduce the debt to judgment. As they have had their day in court, and as they could have protected their rights in the former action, they are precluded from litigating the same issues in a second action.

[6] Further, on the fragmentary record of the first case that is before us, we can see no error in the order denying the Gaskills the right to amend their cross-complaint. That pleading presented no issue not already before the trial court under the pleadings there on file. A trial judge should not encumber the record with repetitious pleadings.

The order granting the motion for new trial is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

32 Cal.App.2d 275

McMANUS v. ALLAN et al.

Civ. 11718.

District Court of Appeal, Second District, Division 1, California.

April 18, 1939.

1. Appeal and error ⇐989

Court of Appeal would not speculate as to what theory or what instruction jury relied upon in returning verdict.

2. Attorney and client ⇐167(2)

In action for reasonable value of attorneys' services, whether attorneys were to be paid for the reasonable value of services or upon a contingent basis was for the jury.

3. Limitation of actions ⇐46(7), 49(2), 50(2)

Generally, where a contract for legal services, either express or implied, is for an indefinite period and no time of payment is specified, or where services are rendered under general retainer, statute of limitation does not begin to run against cause of action for payment until services end.

4. Appeal and error ⇐930(4)

In action for services rendered by attorneys, wherein defendants alleged that litigation was undertaken upon a contingent fee basis and that claim was barred by limitations and there was nothing to show that verdict for defendant was based on issue of limitations, it would be assumed that jury found that attorneys were to be paid for their services on a contingent basis or that they were fully compensated for services rendered. Code Civ.Proc. § 339, subd. 1.

5. Appeal and error ⇐1064(4)

In action for services rendered by attorneys, who voluntarily terminated relation before litigation was completed, wherein defense was that cause was barred by limitations, instruction that suit on contract not in writing for payment of wages for "services rendered" must be commenced within two years next after cause of action accrued, was not reversible error because of failure to use words "services completed." Code Civ.Proc. § 339, subd. 1.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by B. W. McManus against Robert M. Allan and another for legal services rendered to respondents by plaintiff's assignors. From a judgment for the defendants and an order denying motion for new trial, plaintiff appeals.

Affirmed and appeal from order denying motion for new trial dismissed.

Irvin C. Louis and H. B. Pool, both of Los Angeles, for appellant.

Hanna & Morton and Robert M. Allan, Jr., all of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal presented upon a bill of exceptions is from a judgment in favor of respondents following a verdict of the jury, in an action to recover for legal services rendered to respondents by appellant's assignors, Irvin C. Louis and H. B. Pool, hereinafter referred to as "attorneys".

The first amended complaint contained two counts, one for the reasonable value of the services rendered as itemized in a statement attached thereto and marked exhibit "A"; the other upon an open book account, as to which latter count the court granted a motion of nonsuit.

The answer denied either a promise or an agreement to pay, or that any amount had been paid as the reasonable value for any services rendered, and alleged that the litigation was undertaken upon a contingent fee basis; and that, except for the last three items appearing in the itemized statement of account, appellant's first cause of action was barred by subdivision 1, section 339, Code of Civil Procedure.

The contract of employment was entered into in December, 1931, and actual work commenced thereunder during the month of January, 1932. The relationship of attorney and client was terminated on July 15, 1935 and this action was commenced November 17, 1936. The account sued upon was made up of several items, and during the trial it was stipulated as to four of said items "that the Statute of Limitations barred plaintiff from recovering judgment on account of further fees for services rendered in the arbitration matter, the hearings on the third party claims on behalf of Louis M. Allan and Helen M. Allan, and the action on the third party claim bond which action was entitled 'Allan v. Fidelity & Deposit Co. of Maryland'."

From the bill of exceptions it appears that during the early part of November, 1931, Robert M. Allan, one of the respondents herein, employed attorney Louis to act

as an arbitrator in an effort to settle a dispute between said respondent and one Francis Stearns. When that matter was concluded, respondent Allan asked Mr. Louis to act as his attorney in the collection of some promissory notes which were owned and held by his wife, respondent Helen M. Allan. At the same time Mr. Allan asked attorney Louis to handle a salary claim for him and to handle such other matters as might arise out of these cases. Mr. Allan claims that at the time he asked Mr. Louis to act as his attorney, he stated that the work would have to be undertaken upon a contingency basis and that Mr. Louis agreed to that arrangement. However, Mr. Louis denies that such arrangement was made, and testified at the trial that he told Mr. Allan that when the services were completed, he would make a charge for same that would be satisfactory. Before commencing the work to collect the promissory notes hereinbefore referred to, Mr. Louis introduced to Mr. Allan his associate, attorney Pool, one of appellant's assignors herein, who handled all details with reference to the services which were thereafter rendered. During the early part of December, 1931, Mr. Allan handed to Mr. Louis a written memorandum, offered in evidence as plaintiff's exhibit "A", which set forth under Mr. Allan's signature his instructions regarding certain matters which were later handled by said attorneys. Mr. Allan testified that he wrote this memorandum at the request of Mr. Louis, explaining his wishes with regard to possible causes of action which might arise. On the 16th day of January, 1932, the complaint in the first cause of action was filed. Thereafter and until July 15, 1935, said attorneys continued to act for respondents, and during that period handled all legal work in connection with seven actions, as well as proceedings resulting from the filing of two third-party claims. The relationship of attorney and client, as hereinbefore stated, was terminated on July 15, 1935, when a substitution of attorneys was filed in the actions then pending. During the trial of the instant action, in support of their claim that a contingent fee was agreed upon, respondents introduced in evidence copies of letters dated February 27, 1934, and November 5, 1936, from respondent Robert M. Allan to attorney Louis, in which the contingency fee arrangement was discussed.

Respondents offered no evidence as to the reasonable value of the services rendered by the attorneys; therefore, appellant's evidence in that regard as well as that respecting the nature of such services stands uncontradicted.

Upon this appeal it is contended that the court committed prejudicial error in giving to the jury the following instruction on the question of the statute of limitations: "You are instructed that by the law of this State, suit on a contract not in writing, express or implied, for the payment of wages for services rendered must be commenced within two years next after the cause of action accrued to the plaintiff or plaintiff's assignors, and if you believe from the evidence in this case that the plaintiff rendered services for the defendants more than two years before the beginning of this suit on the 17th day of November, 1936, and that there was no agreement in writing whereby the defendants agreed to pay for such services, the plaintiff cannot recover on his first cause of action for services rendered more than two years before the beginning of the suit."

Appellant in his opening brief urges that this is not a true statement of the law for the reason that in actions for the recovery of attorneys' fees, the statute of limitations does not commence when the services are rendered, but when the services contracted for have been completed, regardless of the length of time it might take to complete the work. In this regard, he argues that practically all of the services here in question were rendered more than two years prior to the commencement of the instant action, but that with the exception of the four minor items, which it was stipulated were barred by the statute of limitations, none of the services contracted for was completed on November 17, 1934, nor even as late as April, 1935, and that the attorneys were still the attorneys of record in the pending cases as late as July 15, 1935.

Respondents urge that any error committed by the trial court in its instructions to the jury with regard to the statute of limitations was cured by the verdict in their favor, and claim that where the verdict of the jury exempts a party from liability, the giving of an erroneous instruction limiting his liability is harmless.

Appellant answering this argument in his reply brief admits the correctness of this rule of law, but argues that it is not applicable in the instant case for the reason that the instruction complained of did not limit respondents' liability, but was a general instruction which, if followed, would completely bar a recovery even though the

jury desired to find for the appellant on every other issue presented. In this connection, appellant further contends that, excluding the last three items of the account as to which the testimony was uncontradicted, the parties hereto thereby agreeing that those items had been paid and settled, every other item in the account came within the purview of the two-year statute of limitations, and, therefore, when the court gave the instruction objected to, it amounted to a directed verdict which the jury was bound to heed regardless of whether or not it believed the services were rendered on a contingency basis, thereby directly affecting every issue presented to the jury.

Eliminating from the account sued upon the four items which it was stipulated were barred by the statute of limitations, and also eliminating therefrom the last three items which it is conceded were not barred by the statute, there remain the following items:

(1) Security-First National Bank v. Bestway Laundry, services rendered from 2/23/32 to 3/23/33	$ 68.75
(2) Allan v. Southwest Finance Co., services rendered from 1/6/33 to 1/25/34.....	500.00
(3) Meeker v. Southwest Finance Co., services rendered from 2/11/32 to 12/26/33.....	2,000.00
(4) Allan v. Allan MacMaster Co., services rendered from 11/25/31 to 6/15/33.....	2,000.00
(5) Southwest Finance Co. v. George, services rendered from 10/26/31 to 1/30/34...	1,000.00
(6) Allan v. Southwest Finance Co., services rendered from 12/27/32 to 1/18/34.....	1,750.00

With respect to items Nos. 2 and 3, attorney Pool testified that he collected the judgments in these two cases on April 11, 1935; as to item No. 4, the judgment had not been collected on July 15, 1935; and as to items Nos. 5 and 6, the actions were still pending and either had not been brought to trial or were ready for trial at the time new attorneys were substituted on July 15, 1935. Respondent Allan testified with reference to item No. 4, that the judgment therein had not been collected at the time new counsel were substituted in July, 1935, and as to item No. 6, that action was still pending at that date. As to item No. 5, Mr. Allan testified that a new trial had been granted therein and the case had not been retried.

[1, 2] It is impossible to ascertain from the record, and this court is not permitted to speculate as to what theory or what instruction the jury relied upon in returning its verdict for respondents. An issue of fact for the determination of the jury was presented both by the pleadings and by the evidence as to how the attorneys should be paid for their services, whether for the reasonable value thereof or upon a contingency basis. The action is one for the reasonable value of services many of which appellant admits were never completed, for the reason, as indicated by a letter written by Mr. Pool to Mr. Allan under date of December 26, 1934, which was introduced in evidence by respondents as their exhibit "I", that said attorneys did not feel justified in continuing to represent the respondents "without the payment of a substantial fee on account, together with a settlement as to the total amount due. The entire summer has gone by and nothing has been done to accomplish anything in the matter of the payment of any amount on account of our fee. Unless some action is taken before the first of the year, we shall be forced to withdraw as attorneys for you in all pending litigation." It is shown by the record that during the month of July, 1935, new counsel were substituted for the attorneys Louis and Pool, and in the correspondence regarding payment which followed, respondent Allan stated in one of his letters to said attorneys: "I, of course, cannot help but feel that we would have had a better chance of success if you had continued, since your office was so familiar with all of the facts."

[3] While it appears to be the general rule of law that where a contract for services, either express or implied, is for an indefinite period and no time of payment is specified, or where the services are rendered under a general retainer, the statute of limitations does not begin to run against a cause of action for payment until the services end (Osborn v. Hopkins, 160 Cal. 501, 507, 117 P. 519, Ann.Cas.1913A, 413, see, also, Cullinan v. McColgan, 87 Cal.App. 684, 263 P. 353), the record indicates that the attorneys in the instant case voluntarily terminated the relationship of attorney and client before the pending litigation was completed, and thereafter brought this action for "services rendered". It should be noted that while the account sued upon totaled the sum of $8,108.55, the attorneys had been paid from time to time during the period from December, 1931 to July 1935, the sum of $3,036.45.

[4] The bill of exceptions contains sufficient evidence to sustain the verdict which was rendered by the jury, and there is nothing in the record which tends to show that such verdict was based on the issue of the statute of limitations. Therefore, it must be assumed that the jury was convinced that the attorneys were to be paid for their services on a contingency basis, or that they were fully compensated for the services rendered.

[5] At any rate, as a matter of law it cannot be maintained that a miscarriage of justice resulted which would warrant a reversal of the judgment, because the court in its instruction to the jury used the words "services rendered" instead of "services completed."

For the foregoing reasons, the judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

We concur: DORAN, J.; WHITE, J.



32 Cal.App.2d 365

KANE v. UNIVERSAL FILM EXCHANGES, Inc., et al.

Civ. 11096.

District Court of Appeal, First District, Division 1, California.

April 21, 1939.

Hearing Denied June 20, 1939.

See 91 P.2d 577.

1. Appeal and error ⇐449

Appeal from judgment or order refusing or granting change of venue does not stay operation of judgment or order from which appeal is taken. Code Civ.Proc. § 949.

2. Appeal and error ⇐460(2)

Operation of judgment or order denying or granting change of venue is stayed, pending appeal from such order or judgment, only by issuance of a writ of supersedeas, and whether such writ shall issue is a matter of discretion. Code Civ.Proc. § 949.

3. Appeal and error ⇐478

An applicant for writ of supersedeas to stay proceedings pending appeal from order denying change of venue must show some special reason why he is entitled to the stay. Code Civ.Proc. § 949.

4. Appeal and error ⇐478

In determining whether application for supersedeas should be granted to stay proceedings in trial court pending appeal, error will not be presumed, rights of respondent as well as those of appellant must be considered, and until contrary is shown presumption is in favor of trial court's decision. Code Civ.Proc. § 949.

5. Corporations ⇐661(3)

Unless a foreign corporation has complied with requirements of statute requiring copy of articles of incorporation to be filed with secretary of state, it has not acquired a statutory "principal place of business" in the state upon which it may base a demand for change of place of trial of an action against it. Civ.Code, § 405.

[Ed. Note.—For other definitions of "Principal Place of Business," see Words & Phrases.]

6. Corporations ⇐666

A foreign corporation which filed certified copy of articles of incorporation with secretary of state and a copy duly certified by secretary in a certain county and also filed with secretary of state a designation of a person residing in the state upon whom process could be served did not thereby acquire or establish a statutory "principal place of business" in any particular county in the state so as to be entitled to have place of trial changed to such county. Civ. Code, §§ 405, 406; St.1917, p. 371.

7. Corporations ⇐661(1)

A foreign corporation which has not complied with statutes by making filings and thereby acquired a statutory principal place of business in the state is not entitled to be sued in county where it has established what it calls its principal office, or to have place of trial changed to such county. Civ.Code, §§ 405, 406; St.1917, p. 371.

8. Corporations ⇐666

Mere allegation, in the affidavit for change of venue, that a foreign corporation has its principal place of business in a certain county, does not establish that its legally authorized principal place of business is in such county. Civ.Code, §§ 405, 406; St. 1917, p. 371.

9. Corporations ⇐666

A corporation may be sued on a contract in county where contract was made

or is to be performed, or where obligation or liability arises or breach occurs. Const. art. 12, § 16.

10. Appeal and error ⇐479(1)

A foreign corporation was not entitled to supersedeas to stay operation of order denying its motion for change of venue from San Francisco to Los Angeles county pending appeal from order, where affidavits in support of motion alleged mere legal conclusions, and record showed contract upon which action was brought was to be performed in part and that liability arising thereunder occurred in part in San Francisco county, especially where statements in answer to petition for supersedeas showed necessity of obtaining depositions throughout United States before trial could proceed. Code Civ.Proc. § 949; Civ.Code, §§ 405, 406; St.1917, p. 371; Const. art. 12, § 16.

Action by M. Kane against Universal Film Exchanges, Incorporated, and another, for damages for breach of contract. From an order denying defendants' motion for a change of venue, defendants appeal and apply for a supersedeas to stay the operation of the order denying the motion.

Petition denied.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, and Peter S. Sommer, all of San Francisco, for petitioners.

Henry C. Clausen, of San Francisco, for respondent.

WARD, Justice.

Appellant applied to the trial court for a writ of supersedeas to stay the operation of an order denying its motion for a change of venue from the city and county of San Francisco to the county of Los Angeles, pending its appeal from said order. The application was denied, and it has now applied to this court for such a writ.

[1-4] As will be noted from reading section 949 of the Code of Civil Procedure, the legislature has enumerated certain cases in which an appeal does not stay the operation of the judgment or order from which the appeal is taken, among them being an appeal from an order granting or refusing to grant a change of venue. In such cases the operation of the judgment or order is stayed only by the issuance of a writ of supersedeas; and it is well settled that whether such writ shall issue is a matter of discretion. Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978. In this connection the court in McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 263 P. 338, went on to say that if the provision of said section authorizing the issuance of the writ were held to be mandatory, it would lead to a most vicious practice, because under such construction every case in which one party sought delay would have to be continued upon application for a change of venue, however frivolous or defective the application might prove to be; and that therefore on such an appeal, in order that the court may have a basis for the exercise of its discretion in favor of the applicant, the applicant must show some special reason why he is entitled to the stay. It is equally well settled that in determining whether an application for the writ shall be granted, error will not be presumed; that the rights of the respondent as well as those of the appellant must be taken into consideration; and that until the contrary is shown the presumption is in favor of the lower court's decision. Nuckolls v. Bank of California Nat. Ass'n, 7 Cal.2d 574, 61 P.2d 927. After having examined the record herein, we are of the opinion that no probable error in the trial court's rulings has been shown.

[5-8] The appellant is a foreign corporation, and is being sued for damages for the alleged breach of a contract. Neither a copy nor the substance of appellant's motion for change of venue is set forth in the record before us, but it appears from appellant's affidavit of merits that the main ground urged for the granting of the motion was that at all times mentioned in the amended complaint appellant had its principal office for the transaction of business in this state in the county of Los Angeles, and therefore it was entitled to have the place of trial changed to that county. It is the law of this state that unless a foreign corporation has complied with the requirements of section 405 of the Civil Code, as revised in 1929 (St.1929, p. 1287), or as subsequently amended, it has not acquired a statutory principal place of business in this state upon which it may base a demand for change of place of trial. Hobson v. Metropolitan Casualty Ins. Co., 114 Cal.App. 349, 300 P. 87; Bohn v. Better Biscuits, Inc., 26 Cal.App.2d 61, 78 P.2d 1177, 80 P.2d 484. In 1918 appellant qualified to transact business in this state by complying with the then existing law (Stats.1917, p. 371), to-wit, by filing a certified copy of its articles of incorporation with the secretary of state,

and a copy duly certified by the secretary of state in the county of Los Angeles; also by filing with the secretary of state a designation of a person residing in this state upon whom process could be served; but, according to the law laid down in the following decisions, appellant did not thereby acquire or establish a statutory principal place of business in any particular county in this state (Waechter v. Atchison, etc., Ry. Co., 10 Cal.App. 70, 101 P. 41; Bohn v. Better Biscuits, Inc., supra; Hobson v. Metropolitan Casualty Ins. Co., supra); and as stated in California Jurisprudence (vol. 6A, p. 1408), a foreign corporation which has not complied with the statutes by making filings and thus acquired a statutory principal place of business in this state, is not entitled to be sued in the county where it has established what it calls its principal office, or to have the place of trial changed to that county (Hobson v. Metropolitan Casualty Ins. Co., supra; Bohn v. Better Biscuits, Inc., supra); and an affidavit that it has its principal place of business in a given county does not establish that its legally authorized principal place of business is there. Waechter v. Atchison, etc., Ry. Co., supra. As claimed by appellant, section 406 of the Civil Code provides among other things that no foreign corporation which has filed with the secretary of state a designation of an agent for the service of process pursuant to the requirements of any law in force at the time of such filing, need file with the secretary of state the statement provided for in section 405, except for the purpose of designating a new agent. But as will be noted from the cases above cited, there was no law in this state prior to the revision of section 405 in 1929, whereunder a foreign corporation could acquire a statutory place of business at any particular location in this state, and that only by complying with the provisions of that section may such a principal place of business be legally established.

[9] Irrespective, however, of the point concerning appellant's principal place of business in this state, it is provided by the Constitution (sec. 16, art. 12), that a corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; and here the record amply supports the conclusion that the contract sued upon was to be performed and in fact was performed in part, and that the obligation and liability arising thereunder occurred in part, in the city and county of San Francisco.

The amended complaint alleges that appellant "maintains offices and did business in the city and county of San Francisco"; that at Los Angeles respondent's assignor and appellant entered into an agreement to commercialize certain screen pictures. Respondent's assignor was to travel continuously for a period of six months in publicizing and exploiting the pictures and the services of actors appearing in person in conjunction with the demonstration of the screen pictures. Respondent's assignor traveled to Oakland and San Francisco and assisted in making tentative arrangements for the production of the pictures in the last named cities. Subsequently, according to the complaint, appellant notified respondent's assignor that it would not perform any of the required conditions of the alleged contract. The complaint alleges, also, that appellant has since continuously presented and commercialized the pictures throughout the United States to the damage of respondent's assignor in the sum of $500,000. In a separate cause of action the complaint alleges that at San Francisco, Oakland and Los Angeles, California, the corporate defendant became indebted to respondent's assignor.

[10] Appellant contends that the last step in the performance of the contract was to be made in Los Angeles county and, upon the authority of Union Oil Company of California v. Basalt Rock Company, Inc., Cal.App., 86 P.2d 139, asserts that the motion for change of venue should have been granted. In that case a written contract provided for the several steps in its performance. From the written contract the place of performance was ascertainable. In the instant case the amended complaint is silent relative to the place of payment, except for the insertion of the allegation that appellant became indebted to respondent's assignor at San Francisco, Oakland and Los Angeles. An affidavit accompanying the motion for change of venue avers that the obligation, if any, and the breach, if any, occurred in the county of Los Angeles. A second affidavit signed by one of the attorneys for the appellant, petitioner herein, avers that in effect no matter where respondent's assignor's services were to be rendered, the payment therefor was to be made at Los Angeles. This averment is a legal conclusion. That respondent's

assignor did not understand payments were to be made exclusively in Los Angeles is demonstrated by his action in sending a bill for services rendered to the main office of appellant in New York city.

We are not convinced that such a substantial legal question has been presented in the briefs as to justify the issuance of an order of suspension of proceedings, particularly in the face of statements in the answer to the petition setting forth the immediate necessity of obtaining depositions throughout the major cities of the United States before the trial may proceed.

The petition is denied.

We concur: TYLER, P. J.; KNIGHT, J.



32 Cal.App.2d 283

In re STANFIELD'S GUARDIANSHIP.

Civ. 6220.

District Court of Appeal, Third District. California.

April 18, 1939.

1. Guardian and ward ⇐18

Where mother was served by registered mail in guardianship proceedings, affidavit, filed by mother in support of motion to set aside default order appointing father guardian of children, which stated that she had been awarded custody of children and father directed to pay $25 a month for support of herself and children by court in another state, that father made no payments, but abducted children and brought them to California was sufficient showing of meritorious defense to justify court in vacating appointment of father as guardian. Code Civ.Proc. § 473a.

2. Judgment ⇐142

In application to vacate default judgment where defendant has not been personally served, defendant need only show that he has not been personally served and that he has a good defense to action on merits which he could have presented had he been informed of its pendency and need not negative laches. Code Civ.Proc. § 473a.

3. Guardian and ward ⇐18

Where mother was not personally served in guardianship proceedings of minor children instituted by father and defaulted, vacating order appointing father as guardian of children at request of mother was discretionary, in absence of showing that father suffered any prejudice other than being compelled to meet defense which mother might make. Code Civ.Proc. § 473a.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceedings in the matter of the guardianship of Orville De Von Stanfield and Duane William Stanfield, minors. From an order revoking letters of guardianship issued, Orville Heber Stanfield appeals.

Order affirmed.

A. W. Hollingsworth, of Santa Rosa, for appellant.

L. G. Hitchcock and Fred H. Steinmetz, both of Santa Rosa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order revoking letters of guardianship issued to appellant herein. The record discloses that in April, 1936, an action entitled Rita Case Stanfield, plaintiff v. Orville Heber Stanfield, defendant, was filed in the Fourth Judicial District of Utah County, State of Utah, and in a judgment therein, the custody and control of the persons and estates of Orville DeVon Stanfield and Duane William Stanfield, the minor sons of the parties, was given to the mother, Rita Case Stanfield. Thereafter without the knowledge or consent of Mrs. Stanfield, the husband abducted the minors while in the city of Boise, Idaho, and brought them to California. Within a few days thereafter Stanfield instituted guardianship proceedings in the County of Sonoma, State of California, and the court ordered that a citation directed to Rita Case Stanfield issue requiring her to appear and show cause why the petition should not be granted, and further directing that this citation, together with a copy of the petition, be sent by registered mail to Mrs. Stanfield at Boise, Idaho. Service was made as ordered and was received by Mrs. Stanfield by registered mail at Boise, Idaho, on August 13, 1937. On August 27, 1937, Mrs. Stanfield not having appeared in the proceedings, the court appointed Stanfield as guardian of said minor children.

Several months thereafter, on May 13, 1938, Mrs. Stanfield, upon notice to Stanfield, moved for leave to answer the petition, and at the same time presented her supporting affidavit and proposed verified answer. On May 16th, this motion came on for hearing, at which time the court made its order vacating its previous order appointing Stanfield guardian and appointed Mrs. Stanfield as the guardian of the persons and estate of said minor children.

It is from the order vacating the previous order appointing appellant guardian that this appeal is taken.

[1] It is the contention of apellant that the court erred in setting aside its previous order and appointing respondent guardian, for the reason there is no showing of merit in the motion to vacate the judgment, and that no showing of due diligence appeared in the record. In this appellant is in error. The affidavit of Rita Case Stanfield accompanying her application for permission to answer the petition of Stanfield shows that she is the mother of two minor sons; that the children were awarded to her custody and control by the District Court of the Fourth Judicial District in and for the County of Utah, State of Utah, and that Orville Stanfield was personally served with process therein, and that he was, by the court, directed to pay $25 a month for the support of his wife and children, but had paid nothing; that Stanfield abducted and kidnapped the minors from the custody of affiant and brought them to California, where he instituted these proceedings.

The verified answer which petitioner filed with her motion and proposed to file if permission was granted so to do, set forth similar facts, and also alleged therein that she was a fit and proper person to be appointed as the guardian of said minors. This we believe constituted a sufficient showing of merit to justify the court's decision under Section 473a of the Code of Civil Procedure. In Savage v. Smith, 170 Cal. 472, 150 P. 353, the objection was there made that no affidavit of merit had been presented, but the court received and considered the verified answer, which was held sufficient to meet all of the requirements of an affidavit of merit. The evidence which the court heard upon the motion was also sufficient, we must assume, to support the court's finding that respondent had a meritorious defense to the guardianship petition.

[2] It is next contended by appellant that in seeking relief under the provisions of Section 473a of the Code of Civil Procedure, the moving party must be free from laches.

Mrs. Stanfield was served by publication, and in Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.2d 277, 278, the court said:

"In applications for relief under this clause of the section there is no presumption of neglect, as in cases where there has been personal service. The party is not required, in the first instance, to do more than show that he has not been personally served and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency. Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990 [supra]. But his opponent may show, in opposition to the application, that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief."

[3] In the case of Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990, the court, in considering this question, held that there was no presumption of lack of diligence against one where service is made by publication as there is where one is personally served. If there was any neglect to the injury of the opposite party, which would make it inequitable to grant relief, proof of such neglect and of the circumstances causing injury must be established by the plaintiff. Here there is no showing of any prejudice or that Stanfield suffered any injury from the vacation of the order, other than being compelled to meet the defense which may be made. The relief here asked for lies within the sound discretion of the trial court, and there is nothing to show any abuse of discretion.

The order appealed from must be affirmed, and it is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

32 Cal.App.2d 371

PHIPPS v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 11067.

District Court of Appeal, First District, Division 1, California.

April 21, 1939.

Hearing Denied June 19, 1939.

1. Judgment ⇐303

If entry of judgment was essentially a part of clerk's duty, and mistake therein was not inherently judicial, interests of justice required a change in the judgment.

2. Judgment ⇐303

The court may not correct a proper judgment, but may change judgment in accordance with actual decision.

3. Trial ⇐340(1)

The court retains control of jury until it is discharged and has authority to return jury to jury room for further deliberations in effort to obtain verdict conforming to statute.

4. Trial ⇐312(1)

When court's attention is called to an improper verdict, court must further instruct jury on subject of legal limitation of verdict under consideration.

5. Certiorari ⇐34

On petition for writ of review from order correcting entry of judgment for injuries sustained when struck by automobile, respondents were not under circumstances estopped in effort to have judgment properly construed. St.1935, p. 153, § 402.

6. Trial ⇐343

The trial court is not required to construe verdict immediately after rendition with view to entry of judgment, in absence of motion by one of litigants or request by the clerk.

7. Trial ⇐321

The rendition of verdict is ineffectual until entered as a judgment. Code Civ.Proc. § 664.

8. Judgment ⇐271

When a clerk enters a verdict as a judgment, he may not enlarge, extend, reduce, or decrease scope of verdict. Code Civ.Proc. § 664.

9. Judgment ⇐271

A clerk simply performs a ministerial act in entry of judgment. Code Civ.Proc. § 664

10. Trial ⇐321

The rendition of a general verdict corresponds to the filing of findings of fact.

11. Judgment ⇐276

Statutory requirement that clerk enter judgment in conformity to verdict within 24 hours is employed in lieu of a direct order by the court to enter judgment, but entry is a "clerical" and not a "judicial act," and does not imply a judicial decision by the trial judge. Code Civ.Proc. § 664.

[Ed. Note.—For other definitions of "Judicial Act," see Words & Phrases.]

12. Judgment ⇐326

Where clerk inadvertently entered a several judgment against each defendant when in fact verdict correctly construed was a joint and several judgment and should have been entered against both defendants, nunc pro tunc order correcting entry of judgment was not an order vacating a previous judgment, but was merely an order for correction of clerical mistake in original entry, so that court had jurisdiction to make order though judgment had become final.

13. Judgment ⇐306

If court had directed entry of judgment wrong in law, judgment could not be corrected summarily, but if entry of judgment was made without judicial direction and was not in conformity with statute, correction could be made.

14. Trial ⇐343

The trial court had right to construe verdict.

15. Trial ⇐343

The trial court's right to construe the verdict continues regardless of lapse of time to any period within which it would be necessary to interpret the verdict.

16. Judgment ⇐326

A nunc pro tunc order to make definite and clear the terms of a verdict was a proper method of procedure.

17. Judgment ⇐239

Generally, the liability of joint tort-feasors cannot be segregated and only one judgment can be entered against both, though amount of recovery may by statute be limited against certain tort-feasors.

18. Automobiles ⇐247

When verdict is returned against driver of an automobile for injuries and amount is also assessed against driver and owner,

verdict may be termed to be individual and joint.

19. Judgment ⇐256(1)

The form and language used in a verdict assist in determination of scope of judgment.

20. Judgment ⇐247, 326

In action against wife and husband as driver and owner respectively of automobile for injuries sustained by pedestrian, where verdicts for plaintiff were returned on separate forms and driver was not named in one verdict and owner was not named in the other, the amount of recovery named in each being $2,500, judgment entered thereon should have been joint and several for $2,500, but where clerk inadvertently entered several judgment, mistake could be corrected by order nunc pro tunc. St.1935, p. 153, § 402(d).

21. Certiorari ⇐67

If nunc pro tunc order, necessitated by error in entry of judgment had lawful and relevant effect, order would not be disturbed.

22. Certiorari ⇐66

On petition for writ of review from order correcting entry of judgment, petitioner had burden of affirmatively showing that trial court's interpretation of the nature of the mistake, as basis for authority to make correction, was erroneous.

Writ of Review from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding by Athalie Phipps, petitioner, against the Superior Court of the State of California, in and for the County of Alameda, and others for a writ of review.

Petition denied.

Philander B. Beadle, of San Francisco, for petitioner.

Bronson, Bronson & McKinnon, of San Francisco, and Owen Gentry, of Oakland, for respondents.

WARD, Justice.

Petitioner sued Helen M. Patterson and her husband F. J. Patterson as driver and owner respectively of an automobile for personal injuries, the result of an accident in which plaintiff was struck while crossing a street near an intersection. The wife was operating the vehicle with the consent of her husband. A jury rendered verdicts in favor of plaintiff and against defendants in form as follows: "We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant F. J. Patterson and assess damages in the sum of $2,500." "We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant Helen M. Patterson and assess damages in the sum of $2,500.00." Judgment was entered as follows: "In the above entitled action, in conformity to the verdict of the jury therein, judgment is hereby entered that the plaintiff, Athalie Phipps, do have of and recover from the defendant, F. J. Patterson, the sum of $2,500.00; and that the plaintiff, Athalie Phipps, do have of and recover from the defendant, Helen M. Patterson, the sum of $2,500.00; together with costs and disbursements herein amounting to the sum of $315.70." Defendants filed notice of intention to move for a new trial but this motion was evidently abandoned and no appeal taken. Subsequently plaintiff presented a motion "for an order correcting clerical mistakes in the two verdicts * * * to-wit change the figure '$2,500' in each of said verdicts to read '$5,000'." In the same motion a request was made for an order "correcting clerical mistakes" in the judgment by changing the figures $2,500 to $5,000. This motion was denied and plaintiff appealed. The order of denial to correct the verdicts and judgment was affirmed. Phipps v. Patterson, 27 Cal. App.2d 545, 81 P.2d 437. Subsequently defendants moved for an order correcting the entry and record of judgment to read as follows: "That plaintiff Athalie Phipps have and recover from defendants F. J. Patterson and Helen M. Patterson, the sum of $2,500.00," and that the order of correction be entered nunc pro tunc as of the date of the original entry. This motion was granted and from the order correcting the entry of judgment plaintiff petitioned for a writ of review.

[1, 2] If the entry of this judgment was essentially a part of the clerk's duty, and the mistake not inherently judicial, the interest of justice required a change in the judgment. Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 P. 328. In Estate of Burnett, 11 Cal.2d 259, 262, 79 P.2d 89, 90, the court said: "Admittedly a trial court upon its own motion or on ex parte application, has jurisdiction to correct mistakes in its orders and records

which are not actually the result of the exercise of judgment. (Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; Estate of Willard, 139 Cal. 501, 73 P. 240, 64 L.R.A. 554; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 47 P.2d 733.)" The court does not have the right to correct a proper judgment (Estate of Potter, 141 Cal. 424, 75 P. 850), but it has the right to change the judgment in accordance with the actual decision. Takekawa v. Hole, 170 Cal. 323, 149 P. 593.

[3–5] Petitioner's position is that the judgment had become final; that the order changing the judgment was in respect to a matter of substance, and not clerical error, and it was therefore in excess of the jurisdiction of the court. The court retains control of the jury until it is discharged and has the authority to return the jury to the jury room for further deliberation in an effort to obtain a verdict conforming to statutory provisions. When the court's attention is called to an improper verdict, it is the court's duty to further instruct the jury upon the subject of the legal limitation of the verdict under consideration (Van Damme v. McGilvray Stone Co., 22 Cal.App. 191, 133 P. 995, cited with approval in Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063), but whatever the substance of the verdict may be, it is the decision of the jury and not the result of the exercise of the judgment of the court. In view of the confusion that has arisen in connection with the rendition of a verdict under section 402 of the Vehicle Code, St.1935, p. 153, no surprise may be expressed at the fact that the litigants and the court remained silent when the verdict was read. If the court's views upon the subject had been suggested, a mistrial or a miscarriage of justice might have resulted. We are not prepared to say from the record before us that any of the parties litigant remained silent at the time of the rendition of the verdict for the purpose of reaping a "technical advantage" that might result by reason of the situation. Brown v. Regan, supra, 10 Cal. 2d page 524, 75 P.2d page 1066. Under all of the circumstances presented, we cannot hold that respondents are estopped in their efforts to have the judgment properly construed. The jury was discharged without objection by either side.

[6–12] In the absence of a motion by one of the litigants, or a request by the clerk, the trial court is not called upon to construe the verdict immediately with a view to the entry of the judgment. The rendition of the verdict is ineffectual until entered as a judgment. It is the duty of the clerk to enter the judgment in conformity to the verdict within twenty-four hours, unless upon motion a stay of proceedings is granted or an order made reserving the entry for argument or consideration. Code Civ.Proc. § 664. When a clerk enters a verdict as a judgment, he may not enlarge, extend, reduce or decrease the scope of the verdict. In the entry of the judgment the clerk simply performs a ministerial act. 14 Cal.Jur. 917, 920, secs. 34, 35. The rendition of a general verdict corresponds to the filing of findings of fact, and the provision of section 664 of the Code of Civil Procedure is employed in lieu of a direct order by the court to enter the judgment (Marshall v. Taylor, 97 Cal. 422, 32 P. 515), but the entry is a clerical and not a judicial act. It does not imply a judicial decision by the trial judge. The nunc pro tunc order now under review is not an order vacating a previous judgment, but is a correction of a clerical mistake in the original entry. Crawford v. Meadows, 55 Cal.App. 4, 203 P. 428. In the present case the clerk inadvertently entered a several judgment against each defendant, when in fact the verdict correctly construed is a joint and several judgment and should have been entered against both defendants. Milburn v. Foster, 8 Cal.App.2d 478, 47 P.2d 1106.

[13–16] If the court had directed the entry of a judgment wrong in law, it could not be corrected summarily (McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214), but if the entry of judgment was made without judicial direction and was not in conformity with statutory provision, the court had an inherent right to cause the records to reflect the limitation of the legislative pronouncement; in other words, to make the judgment conform to the verdict rendered. The trial court had a right to construe the verdict. Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198. This right continued "regardless of lapse of time" to any period within which it would be necessary to interpret the verdict. McKannay v. McKannay, supra. A nunc pro tunc order to make definite and clear the terms of the verdict was a proper method of procedure. Lauchere v. Lambert, 210 Cal. 274, 291 P. 412.

[17] The general rule is that the liability of joint tort-feasors cannot be segregated, and that only one judgment can be entered against both (Curtis v. San Pedro Transportation Co., 10 Cal.App.2d 547, 52 P.2d 528), though the amount of recovery may, by statutory provision, be limited against certain tort-feasors. An illustration is the provision in section 402 of the Vehicle Code wherein the liability of the owner for imputed negligence, not arising through the relation of principal and agent or master and servant, is limited for death or injury in one accident to one person to the sum of $5,000. The amount recoverable from the driver or operator of the car may be in excess of that amount.

[18–20] When a verdict is returned against the driver, and an amount is also assessed against the driver and owner, the verdict may be termed to be individual and joint. Snodgrass v. Hand, supra. Unlike the Snodgrass case, wherein the two verdicts were joined by the use of the conjunction "and", the verdicts under consideration in this case were returned on separate forms. The driver was not named in one verdict, and the owner was not named in the other. The form and language used in the verdict assist in the determination of the scope of the judgment. In Holland Kodimer, 11 Cal.2d 40, 42, 77 P.2d 843, 844, the court said: "It is now well settled that 'In cases which predicate liability of an owner defendant under this section (1714¼, Civ.Code) [the former counterpart of section 402 of the Vehicle Code] when ownership of the automobile and permission to operate the same have been proved, the owner becomes directly liable for damage suffered in an amount limited by the statute, and this liability is direct and several, as well as joint, and is not dependent upon a judgment against the operator.' Milburn v. Foster, 8 Cal.App.2d 478, 480, 47 P.2d 1106, 1107; Guberman v. Weiner, 10 Cal.App.2d 401, 404, 51 P. 2d 1141; Brush v. Kurstin, 11 Cal.App.2d 258, 262, 53 P.2d 777; Sayles v. Peters, 11 Cal.App.2d 401, 404, 54 P. 2d 94; Pascoe v. Payne, 124 Cal.App. 528, 12 P.2d 1091, 1092." The judgment should be joint and several. From the forms and the language used in this particular case, in the absence of the conjunction "and", we cannot say that the jury intended to return a verdict directing the driver to pay $2,500, and then under the subrogation clause of section 402(d) of the Vehicle Code, St. 1935, p. 153, also direct the driver to pay to the owner the $2,500 assessed against the owner.

Petitioner relies upon Garrison v. Williams, 128 Cal.App. 598, 17 P.2d 1072. In that case one verdict for $15,000 was returned against the driver and owner. No special order to enter any particular judgment was given to the clerk. To conform to the verdict, the judgment was entered in favor of the plaintiff for that amount. After the appeal had been taken, the trial court made a nunc pro tunc order amending the judgment. On appeal, 128 Cal.App. at page 603, 17 P.2d at page 1074, the court said: "* * * nor did appellants object to the form or amount of the verdict, nor did they file a motion for a new trial, nor in any manner call the attention of the trial court to the excessive nature of the verdict". Thereupon the verdict was adjusted on appeal to the sum of $5,000 against the owner in conformity with the statute. In its opinion, the court remarked that the entry of the judgment was not a clerical error. In this we are agreed—it was a joint and several judgment. In the present case a several judgment was entered against each defendant. In the Garrison case the verdict and the total judgment were the same. The verdict conformed to the judgment. In the present case the verdict was for $2,500, and the judgments in effect amounted to a total of $5,000.

[21, 22] If this nunc pro tunc order, necessitated as the result of an error in the entry of the judgment (Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 47 P.2d 733), has a lawful and relevant effect, it should not be disturbed. It is incumbent upon the petitioner to show affirmatively "that the trial court's interpretation is erroneous". Snodgrass v. Hand, supra, [220 Cal. 446, 31 P.2d 200]. We agree with that part of the decision in Bradford v. Brock, 140 Cal.App. 47, 50, 51, 34 P.2d 1048, 1049, reading as follows: "The jury returned a verdict as follows: 'We the jury in the above entitled action, find for the plaintiffs and assess the damages at $2,500 against Paul M. Brock, and $2,500 against Schwabacher-Frey Stationery Company.' Judgment thereon was entered for plaintiffs for $2,500 as against Brock and $2,500 as against the stationery company, being a several judgment on which plaintiffs could legally collect a total of $5,000. The court should have construed

the verdict as being for a total sum of $2,500 against both defendants and, if otherwise satisfied with its correctness, should have entered judgment to that effect. * * * The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found by the jury to be $2,500, they should not be permitted to collect that sum from him and then go to the owner or employer, whose liability arises out of his relationship to the car or its operator, and not out of any independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision."

From the record presented, and the decision in Phipps v. Patterson, supra, we cannot say that the trial court erred in the construction given the judgment.

The petition is denied.

We concur: TYLER, P. J.; KNIGHT, J.



32 Cal.App.2d 253

CITY OF LOS ANGELES et al. v. CITY OF HUNTINGTON PARK.

SAME v. CITY OF SOUTH GATE (two cases).

Civ. 10934, 10935.

District Court of Appeal, First District, Division 2, California.

April 18, 1939.

1. Trial ⇐36

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities, where defendants admitted in answers that, for more than three months after request to do so, defendants had failed to agree upon terms, no evidence was required to prove such request and failure and no findings thereon were required. St.1923, p. 147.

2. Appeal and error ⇐1010(1)

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities, where defendants admitted in answers that, for more than three months after requests to do so, defendants had failed to agree upon terms, the sufficiency of the evidence to support findings concerning such matter could not be questioned on appeal. St.1923, p. 147.

3. Electricity ⇐9(1)

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities, finding that defendants had been requested to agree upon terms and that, for more than 3 months thereafter, the defendants had failed to agree, *held* sustained by the evidence. St. 1923, p. 147.

4. Electricity ⇐9(1)

The city of Los Angeles and its water commissioners were entitled to institute actions to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities where defendants were requested to agree upon terms and for more than three months thereafter had failed to do so. St.1923, p. 147.

5. Electricity ⇐9(1)

Under statute granting to a municipality the right to construct, operate, and maintain electric power lines across, along, in, under, over, or upon any road, street, avenue, or highway, provided that, when such right is exercised by one municipality within the boundary lines of another, it must be exercised upon terms and conditions agreed upon by the municipalities or determined by the court, the right acquired by acceptance of the grant by a municipality is to be measured by the purpose for which the grant was made and accepted. St.1923, p. 147.

6. Evidence ⇐20(1), 25(2)

It is common knowledge that the ordinary purpose for which power lines are constructed by a municipality is to bring electricity at high voltages from the source of supply into the municipality, and that such lines are ordinarily suspended from towers which cannot be constructed within the boundary lines of a street.

7. Municipal corporations ⇐272

The statute granting to municipalities the right to construct, operate and main-

tain electric power lines across, along, in, under, over, or upon any street, alley, avenue, road, or highway, provided that, if the right is exercised by one municipality within the boundary lines of another municipality, it must be exercised upon terms agreed upon by the municipalities or determined by the court, contemplated, among other things, the construction and maintenance of such lines upon private rights of way. St.1923, p. 147.

8. Electricity ⇐9(1)

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiff might erect electric power transmission lines through defendant cities, finding that, if ordinances of defendant cities were enforced, plaintiffs would be prevented from exercising the right acquired by acceptance of statute granting power to erect and maintain electric power transmission lines through other cities upon terms agreed upon by the municipalities involved or determined by the court, *held* sustained by the evidence. St.1923, p. 147.

9. Municipal corporations ⇐266

Statute granting to municipalities the right to construct and maintain electric power lines across any street, alley, avenue, or highway, provided that, when right is exercised by one municipality within the boundary lines of another, it must be exercised upon terms agreed upon by the municipalities involved or determined by the court, has not been repealed by subsequent statutes in view of saving clauses and restoration by subsequent statutes. St.1923, p. 147; St.1927, pp. 1210, 1211; 1211, § 2; St. 1933, p. 2576.

10. Pleading ⇐236(1)

Allowance of amendment to complaint was not an abuse of discretion where there was no showing of prejudice.

11. Municipal corporations ⇐266

The statute granting to municipalities the right to construct, operate, and maintain electric power lines across, along, or upon any road, street, alley, avenue, or highway, provided that, when the right is exercised by one municipality within the boundary lines of another, it must be exercised upon terms agreed upon by the municipalities involved or determined by the court, is not unconstitutional. St.1923, p. 147; Const. art. 1, § 14; art. 4, §§ 24, 31; art. 11, §§ 11, 12.

12. Dismissal and nonsuit ⇐60(2)

Actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities were not abandoned, although the actions were commenced in 1926 and were not tried until 1932, where the history of the litigation showed that plaintiffs were not chargeable with any unreasonable delay. St.1923, p. 147.

13. Trial ⇐2

Actions by Los Angeles and its water commissioners against two other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities were properly consolidated for trial. St.1923, p. 147; Code Civ.Proc. § 1048.

14. Trial ⇐396(4)

Judgment was not void because the findings made reference to exhibits introduced in evidence without making exhibits a portion of the findings, where the rights of the parties as determined by the judgment were not dependent in any way upon the exhibits referred to.

15. Appeal and error ⇐837(1)

Propriety of trial court's judgment must be determined without regard to what parties obtaining judgment may or may not have done since the entry thereof.

16. Electricity ⇐9(1)

Under statute empowering the superior court to determine conditions on which one municipality may construct electric power transmission lines through another, the only implied limitation upon such power is that the conditions must be reasonable in the light of the peculiar facts in each case. St. 1923, p. 147.

17. Electricity ⇐9(1)

In actions by Los Angeles and its water commissioners against other cities to determine conditions upon which plaintiffs might erect electric power transmission lines through defendant cities, superior court had jurisdiction under the statute to impose terms and conditions relating to damage to property in the vicinity. St.1923, p. 147.

18. Electricity ⇐9(1)

In action by a municipality against other cities to determine the conditions upon which plaintiff might erect electric power transmission lines through defendant cities,

the issue of damage to property owners need not be raised by defendants' pleadings in order to warrant the inclusion in the judgment of provisions relating to damage for the protection of property owners. St.1923, p. 147.

19. Electricity ⇐9(1)

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which plaintiffs might erect electric power transmission lines through defendant cities, where court imposed terms and conditions relating to damage for protection of property owners it was immaterial that the acceptance of such awards was made optional with property owners who were not named and were not parties to the action. St.1923, p. 147.

20. Electricity ⇐9(1)

In actions by Los Angeles and its water commissioners against other cities to determine the conditions upon which the plaintiffs might erect electric power transmission lines through defendant cities, conditions imposed by the court relating to damage for the protection of property owners were reasonable under circumstances disclosed by record. St.1923, p. 147.

Appeals from Superior Court, Los Angeles County; C. E. Beaumont, Judge.

Separate actions by the City of Los Angeles, a municipal corporation, and the Board of Water and Power Commissioners of the City of Los Angeles, a municipal corporation, against the City of Huntington Park, a municipal corporation, wherein T. R. Householder intervened, and against the City of South Gate, a municipal corporation, which were consolidated for trial. From a judgment for plaintiffs, separate appeals were taken by defendants from the entire judgment, and by plaintiffs from certain portions thereof.

Judgment affirmed.

In No. 10934:

Ray L. Chesebro, City Atty., James M. Stevens, Asst. City Atty., G. Ellsworth Meyer, Deputy City Atty., and T. B. Cosgrove, Sp. Counsel, all of Los Angeles, for appellants.

Clyde Woodworth, City Atty., of South Gate, Delbert A. Hessick, City Atty., of Huntington Park, and Dunlap & Larwill, Sp. Counsel, of Los Angeles, for respondents.

Haight, Trippet & Syvertson, of Los Angeles, for respondent T. R. Householder, intervener.

G. L. Aynesworth, of Fresno, and Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, amici curiae.

In No. 10935:

Delbert A. Hessick, City Atty., of Huntington Park, Clyde M. Woodworth, City Atty., of South Gate, and Chris J. Griffin, City Atty., Cruickshank, Brooke & Dunlap, and Robert H. Dunlap, Sp. Counsel, all of Pasadena, and George R. Larwill, Sp. Counsel, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., G. Ellsworth Meyer, Deputy City Atty., T. B. Cosgrove, Sp. Counsel, and James M. Stevens, Asst. City Atty., all of Los Angeles, for respondents.

SPENCE, Justice.

Two actions were instituted by plaintiffs City of Los Angeles and the Board of Water and Power Commissioners of that city. In one of said actions the City of Huntington Park was the defendant and in the other, the City of South Gate was the defendant. The plaintiffs sought by said actions to have the court determine the terms and conditions under which they might exercise the right claimed by them under Statutes 1923, chapter 76, page 147, to erect and maintain electric power transmission lines through the defendant cities. The two actions were consolidated for trial and resulted in a judgment in favor of the plaintiffs affirming the right claimed by plaintiffs and imposing various terms and conditions upon the exercise of said right. Two separate appeals were taken from said judgment. Defendants appealed from the entire judgment while plaintiffs appealed from certain portions thereof. Both appeals will be considered herein.

During 1923 and 1924, plaintiffs developed a plan to bring electric power from Boulder dam to the metropolitan area of Los Angeles by means of a transmission line supported on steel towers. This plan contemplated the bringing of power at 275,000 volts across the easterly boundary line of the City of Los Angeles to a central receiving station, designated as station B, located at 95th and Central avenues near said easterly boundary line. It further contemplated that the voltage would be stepped

down from 275,000 volts to 132,000 volts at said station B and would then be transmitted to other stations within the City of Los Angeles as follows: station A to the northeast; station C to the south and station D to the west. The map shows that the easterly boundary line of the City of Los Angeles is very irregular in shape and that there are several jogs to the east as said line runs in a northerly direction above said station B. Along said easterly boundary line and either contiguous or practically contiguous thereto are located in order from south to north, beginning at a point near said station B, the cities of South Gate, Huntington Park and Vernon. Plaintiffs' plan was to construct the main line from Boulder dam to Los Angeles in a westerly direction across the City of South Gate and to construct the loop line from station B to station A in an easterly direction along the same route into the City of South Gate and then in a northerly direction through South Gate, Huntington Park and Vernon and along the banks of the Los Angeles river to station A at Main and Power streets in the City of Los Angeles. Pursuant to said plan, the plaintiffs purchased and acquired the title in fee to a strip of land approximately 100 feet in width along the entire course of the proposed route through said cities and expended in excess of $2,000,000 for said purpose. Said strip of land, which plaintiffs term the "right of way", was adjacent to the streets of said cities at practically all points. For the sake of convenience, we will hereinafter refer to said strip as the "right of way". After acquiring said right of way, plaintiffs requested the defendant cities to agree upon the terms and conditions upon which plaintiffs might construct and maintain said transmission lines across and over the various streets which were intersected by said right of way. The parties were unable to agree and these actions were commenced in 1926.

It is apparent from the briefs that the main controversy between the parties concerned the question of whether plaintiffs should be permitted to construct and maintain overhead transmission lines as planned by plaintiffs or should be required to transmit the power by means of underground cables. The testimony regarding the practicability of carrying the power underground and the findings of the trial court with respect thereto will be hereinafter discussed. Suffice it to state at this point that, after plaintiffs had proceeded with the development of their plan by surveying the route and purchasing their right of way, the defendant cities enacted numerous power line ordinances and zoning ordinances, many of which would have had the effect, if held to apply, of preventing plaintiffs from erecting an overhead transmission line as proposed.

The complaints filed in the two cases were quite similar. It was alleged therein that plaintiffs had acquired the right of way for their proposed electric transmission lines, describing in detail the portions of the streets in said defendant cities which they desired to cross; that defendants had been requested to agree upon the terms and conditions of the use of the streets of the defendant cities; that the defendant cities had failed to agree with plaintiffs upon said terms and conditions and that more than three months had elapsed since plaintiffs' request had been made. Plaintiffs therefore prayed for judgment determining the terms and conditions of such use.

In the South Gate case, the defendant interposed a demurrer which was sustained without leave to amend. On appeal, the judgment, entered upon the sustaining of said demurrer, was reversed. City of Los Angeles v. City of South Gate, 108 Cal. App. 398, 291 P. 654. Answers were filed in both cases by the respective defendants. Among the main defenses set up in said answers were the power line and zoning ordinances of the defendant cities and the claim that the construction of said transmission lines would result in a decrease of property values. In addition, T. R. Householder, one of the owners of land adjacent to the right of way, filed a complaint in intervention seeking the determination of the amount of damage caused to his property by the construction of the transmission line. The actions were consolidated on motion of plaintiffs and proceeded to trial. The trial was a lengthy one and a large amount of expert testimony was introduced. During the trial, the trial court, on several occasions, inspected the proposed routes and the prevailing conditions in the vicinity. Thereafter the trial court announced its conclusions as the basis for the preparation of the findings of fact, conclusions of law and the judgment. Defendants then petitioned the Supreme Court for a writ of prohibition. Said petition was denied. A second application of

defendants for a writ of prohibition was also denied. Judgment was entered on June 15, 1936. After the filing of the notices of appeal, defendants petitioned the Supreme Court for a writ in aid of appellate jurisdiction and the petition was denied. City of South Gate v. City of Los Angeles, 6 Cal.2d 593, 58 P.2d 1288. A similar petition was thereafter denied by the District Court of Appeal.

The trial court found that all the material allegations of the complaints were true and made further findings with respect to the proposed plan and route, the nature of the proposed transmission line, the terms and conditions under which it might be constructed and maintained, including certain terms and conditions relating to the damage which would be suffered by the property owners whose property was located in the vicinity of the right of way. The trial court further found that each of the ordinances of the defendant was either inapplicable or invalid as to plaintiffs.

Some of the more important findings for the purposes of this discussion will be summarized. It was found that plaintiffs had developed their plan and had purchased their right of way through the defendant cities in reliance upon and in acceptance of the grant contained in Statutes 1923, chapter 76; that they had expended large sums of money on the project and had irrevocably committed themselves to the expenditure of further large sums of money; that at the time of acquiring said right of way, there were no ordinances in existence in the defendant cities purporting to prohibit such use of the properties acquired by plaintiffs; that prior to the filing of these actions, plaintiffs had constructed portions of their proposed transmission lines outside of but extending to the limits of the defendant cities. The trial court further found that the proposed unified plan for the development of the system, was "the only reasonable, practicable and feasible method for the efficient and reliable service of electrical energy to said city"; that said plan, including the proposed type of overhead construction to be built through the defendant cities, was in complete accord with the best known engineering practice and in compliance with all rules and safety regulations of the railroad commission; that the proposed type of construction affords security for life and property and will interfere as little as possible with traffic conditions and other existing street uses; that the selection of the routes was made "in a manner most compatible with the greatest public good and the least private injury"; that said routes along said rights of way and across the intersecting streets were the "most practicable, feasible and reasonable routes available"; that in order to afford security for life and property and to interfere as little as possible with existing use of the streets, it was "necessary, in the use of streets and highways for transmission lines such as those proposed and involved herein, that such lines be constructed overhead"; that underground construction of said lines would be "impracticable * * * for the reason that the use of underground cables for high voltage transmission lines * * * has not thus far developed to a sufficient extent that they may be said to be beyond the experimental stage"; that there were no underground cables in use in the United States of sufficient carrying capacity to carry the energy required to be transmitted over the Boulder canyon line; that at the time of the trial, the only underground cables in the United States of a capacity sufficient to carry even 132,000 volts were in the cities of New York and Chicago and said cables were constructed subsequent to the filing of these actions; that the test made had been insufficient to justify the use of underground cables for the proposed lines under the operating conditions along the proposed routes; that the underground cables above mentioned were laid in territory with favorable soil conditions whereas the soil conditions within the defendant cities is unfavorable for that purpose; that the proposed type of construction "is the only available, feasible and usable type of construction which will afford security for life and property"; and that the suggested underground construction "cannot be successfully used".

The findings with respect to the various ordinances of the defendant cities are very lengthy. It would serve no useful purpose to set forth at length said findings or the various ordinances. Some of said ordinances were held to be inapplicable to the intended use of plaintiffs by reason of provisions, express or implied, of the ordinances themselves. Other ordinances were held to be inapplicable to plaintiffs for the reason that, if held to be applicable, said ordinances would be unreasonable, discriminatory, prohibitory, confiscatory and in conflict with the act of the legislature

and various constitutional provisions. It was found that said ordinances were adopted in an effort to prevent plaintiffs from exercising their rights under said act and to limit the power of the court in fixing the terms and conditions under which plaintiffs might exercise their rights. As to certain ordinances, it was found that "said ordinances are unreasonable, discriminatory, prohibitory and confiscatory in that they undertake to require underground construction for the proposed lines, which type of construction cannot be successfully used".

The findings with respect to the terms and conditions under which plaintiffs were to be permitted to exercise their rights need not be discussed at this time. We so state as it is apparently conceded by the parties that said terms and conditions other than those relating to the damage sustained by the property owners in the vicinity, were entirely appropriate in the event that plaintiffs were properly accorded the right to run overhead transmission lines through the defendant cities. Plaintiffs' objections to the findings and judgment relating to said damage will be hereinafter discussed.

Plaintiffs filed an "acceptance agreement" and bond, required by the trial court and hereinafter referred to in the discussion of plaintiffs' appeal, and judgment was entered as above indicated. Plaintiffs thereupon completed the project by constructing the Boulder canyon line through the City of South Gate and by constructing the loop line between station B and station A, which last mentioned line traversed in part the City of South Gate and the City of Huntington Park.

Defendants' Appeal.

As above stated, defendants appeal from the entire judgment. Before discussing the points raised by defendants, we will first set forth the terms of the act under which these actions were instituted.

Statutes 1923, chapter 76, provided in part as follows: "There is hereby granted to every municipal corporation of the State of California the right to construct, operate and maintain * * * electric power lines, * * * across, along, in, under, over, or upon any road, street, alley, avenue or highway, * * * in such manner as to afford security for life and property; * * * and provided, further, that before any such municipal corporation shall use any street, alley, avenue, or highway within any other municipal corporation, the municipal corporation proposing to use such street, alley, avenue or highway shall request the municipal corporation in which such street, alley, avenue or highway is situated to agree with said municipal corporation proposing to make such use, upon the terms and conditions to which such use shall be subject and the location thereof, and if said two municipal corporations are unable to agree on such terms and conditions and location within three months thereafter then the municipal corporation proposing to use such street, alley, avenue or highway may bring an action in the superior court of the county in which the same is situated against such other municipal corporation to have such terms and conditions and location determined * * *."

The legislative grant contained in said act is in general terms and the act contains no provision providing for the formal acceptance of the grant. A somewhat similar act was before the court in City of Beverly Hills v. City of Los Angeles, 175 Cal. 311, 165 P. 924, 925. There the city of Los Angeles had projected a plan for bringing water to that city and had expended large sums in the development of said plan. It was there held that the acts of said city constituted an acceptance of the grant and that said grant "became effective as completely as though the pipe had been actually laid". The court said 175 Cal. on page 314, 165 P. on page 925: "The grant resulting from defendant's acceptance of the state's offer constituted a contract, the property right in which is protected by the federal Constitution (Russell v. Sebastian [233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912, Ann.Cas.1914A, 152] supra, and the cases therein cited), and the extent of which right is measured by the purpose for which the grant was made and accepted. * * * Assuming, in the absence of the accepted legislative grant, that defendant had obtained from the city of Beverly Hills the right to use its streets for a pipe line, clearly it could not, after a part of such line had been installed, revoke the grant or add thereto new conditions and restrictions the effect of which might nullify and render the grant made wholly inoperative. Dillon's Municipal Corporations (5th Ed.) § 1242. And yet that is the effect of appellant's contention."

The act under which these actions were instituted differs only in that its provisions are broader and in that resort to a superior

court action is provided in the event that the cities involved are unable to agree upon terms and conditions. Said act was before the court on the former appeal in the action brought against the City of South Gate, on which appeal the last-named city challenged the sufficiency of plaintiffs' complaint. City of Los Angeles v. City of South Gate, 108 Cal.App. 398, 291 P. 654. The burden of the attack was that the act was unconstitutional on the ground that it conferred legislative powers upon the superior court. The act was there held to be constitutional and the complaint was held to be sufficient. The court said 108 Cal. App. on page 401, 291 P. on page 655: "There can be no doubt but that the Legislature in this instance conferred upon appellant municipality (assuming the constitutionality of the statute) the right to erect and maintain the proposed electric transmission line." The court held that the legislature had the power to grant the franchise and that the terms and conditions upon which the grant could be exercised were proper subjects of agreement between the municipalities or of judicial determination. It further held that it was immaterial whether notice of the desire to use the streets constituted an acceptance of the grant or whether the acceptance remained incomplete until the final location was determined upon as "The appellant is clothed with a right and has done everything within its power to evidence its selection of particular streets for the purpose of exercising that right."

[1, 2] Defendants contend that the trial court was without jurisdiction as "no proper opportunity to agree upon the terms and conditions of the proposed use * * * was ever afforded the defendant cities". We find no merit in this contention. Defendants appear to be foreclosed from raising this question because of the state of the pleadings. In each complaint it was alleged that the defendant city was duly requested to agree upon such terms and conditions; that more than three months elapsed thereafter and the defendant city failed and neglected to agree upon said terms and conditions. These allegations were admitted by the answers of the defendant cities and said allegations appear to meet all the requirements of the act. No evidence was therefore required to prove said issues and no findings thereon were required. Welch v. Alcott, 185 Cal. 731, 198 P. 626. Findings were made, however, but owing to the admissions of the pleadings, the sufficiency of the evidence to support said findings cannot now be questioned. Muraco v. Don, 79 Cal.App. 738, 250 P. 1109. Defendants argue that plaintiffs did introduce evidence on said issues during the trial and since no objection was made, the issues were raised during the trial. The rule which defendants have in mind is properly applied where the issues are not raised or are defectively raised in the pleadings but it has no application where the facts are aptly pleaded in the complaint and are admitted by the answers, either expressly or by failure to deny.

[3, 4] But aside from the admissions of the pleadings, we believe that the evidence was sufficient to measure up to the requirements of the act. It appears therefrom that plaintiffs requested that the defendant cities agree upon the terms and conditions of the proposed use and submitted proposed forms of agreements to be entered into; that representatives of plaintiffs appeared before the proper authorities of the defendant cities to discuss the proposed use; that the attitude of the defendant cities was at all times one of refusing to consider an agreement to the proposed use by plaintiffs and of insisting upon a use which plaintiffs considered, and the trial court found, impracticable and unsound. During the trial, it was stipulated that "Huntington Park and South Gate had never been able to agree with Los Angeles as to the terms, conditions and location of a tower line". The act in question merely contemplates that a request to agree upon the terms and conditions of the proposed use should be made and that the municipality in which the proposed use is to occur should thereafter have an opportunity, during the prescribed three months' period which follows, to negotiate upon the terms and conditions of the proposed use. Such request was made and such opportunity was afforded to the defendant cities in the present case. In view of the admitted fact that the parties were unable to agree, within the time prescribed, plaintiffs were entitled to invoke the provisions of the statute permitting the filing of an action to have such terms and conditions determined.

Certain further contentions of defendants involve attacks upon the findings and conclusions of the trial court with respect to the invalidity and inapplicability of the ordinances of the defendant cities. Closely related to these contentions are certain con-

tentions of defendants with respect to the nature of rights acquired by plaintiffs by virtue of their acceptance of the legislative grant.

[5-7] The act grants to a municipality the right to construct, operate and maintain electric power lines "across, along, in, under, over, or upon any road, street, alley, avenue or highway". When that right is exercised by one municipality within the boundary lines of another municipality, it must be exercised upon terms and conditions agreed upon by said municipalities or determined upon by the court as provided in the act. If we understand the contentions of defendants, they take the position that the only right which could be acquired by plaintiffs by virtue of their acceptance of the grant was a right to construct electric power lines along, in, under or upon the streets of the defendant cities and within the boundary lines thereof. We believe that defendants' conception of the right which plaintiffs acquired by virtue of the acceptance of the grant is too limited. Plaintiffs' right is to be measured "by the purpose for which the grant was made and accepted". City of Beverly Hills v. City of Los Angeles, supra, 175 Cal. page 314, 165 P. page 925. If the grant was made for such a purpose as that embraced in plaintiffs' plan, it appears certain that plaintiffs did everything within their power to accept the grant for that purpose. As we view the act, one of its main purposes was to grant to one municipality the right to enter another for the purpose of constructing and maintaining power lines. It is a matter of common knowledge that the ordinary purpose for which such lines are constructed is to bring electricity at high voltages from the source of supply into the municipality constructing said lines and that such lines are ordinarily suspended from towers which cannot be constructed within the boundary lines of a street. The trial court found upon sufficient evidence that plaintiffs' plan embraced the only reasonable, feasible and practicable means of transmitting electricity at the required voltages through the defendant cities. It will be noted that the statute provides for the construction and maintenance of electric power lines not only along, in, under or upon streets but also across and over streets. We are of the opinion that the act contemplated among other things the construction and maintenance of such lines upon private rights of way as planned by plaintiff notwithstanding the fact that said act expressly dealt only with the use of streets. The acquisition of such private rights of way, at all points other than streets, was necessarily left to the ordinary processes of purchase or condemnation. When plaintiffs formulated their plan and accepted the alleged grant for the purposes of developing their plan, we believe that the purpose of their acceptance was within the purpose of the grant and that their right is to be measured accordingly.

Turning to the power line and zoning ordinances adopted by the cities, it is certain that some of said ordinances were intended to prohibit and by their terms did purport to prohibit the construction of transmission lines such as were embraced in plaintiffs' plan. It is defendants' contention that the trial court erred in its findings and conclusions with respect to said ordinances and that said ordinances should have been held valid and applicable to plaintiffs. Much of defendants' brief is devoted to the argument that the construction and maintenance of electric transmission lines are the proper subjects of regulation by a city in the exercise of its police power; that police power has been conferred upon the defendant cities by the Constitution; and that the act in question did not prevent the enactment of regulations on those subjects by the defendant cities in the proper exercise of such police power. As we understand plaintiffs, they do not question the right of the defendant cities to enact reasonable regulations upon the subjects in question, but they contend that said ordinances were unreasonable and confiscatory and therefore void as to plaintiffs.

[8] It may be conceded, as claimed by defendants, that the legislative act did not purport to cover the entire field and that the defendant cities had the right to enact reasonable regulations. This may have been implied in the opinion on the former appeal in the South Gate case (City of Los Angeles v. City of South Gate, supra) where the court said 108 Cal.App. at page 402, 291 P. at page 655, "If it [South Gate] refuses because it claims the right to legislate reasonable terms and conditions to which the use shall be subject, its rights and limitations in this particular are the proper subject of judicial inquiry". We believe, however, that the question is fundamentally that of the reasonableness of the ordinances viewed in the light of the grant found in the legislative act and the acceptance there-

of by plaintiffs. The basic right of plaintiffs rested upon said grant and their acceptance thereof even though the terms and conditions were subject to determination by agreement or by judicial decree. The trial court has found in substance that if these ordinances are applicable, they will have the effect of preventing the exercise of the right acquired by plaintiffs by the acceptance of said grant. Said findings are amply supported by the evidence and we find no error in the trial court's findings with respect to the ordinances of the defendant cities. Defendants cite and rely upon Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 33 P.2d 672, and City of South Pasadena v. City of San Gabriel, 134 Cal. App. 403, 25 P.2d 516. These cases are distinguishable in that no legislative grant was involved in any of said cases. Other cases cited in defendants' briefs are distinguishable upon the ground that the regulations were reasonable and did not have the effect of preventing the exercise of the right acquired.

[9, 10] Defendants further contend that "the statute has been repealed and the action should abate". We find no merit in this contention. The 1923 act has not been repealed. It was amended in 1927 (Stats. 1927, pp. 1210, 1211) and again in 1933 (Stats.1933, p. 2576). By the 1927 amendment, the provisions for a superior court action were deleted but such provisions were restored by the 1933 amendment. In section 2 of the amendment of 1927, it was provided, "This act shall not affect any right or action which has accrued, or any duty imposed, or any proceedings commenced under and by virtue of the act hereby amended". The 1933 amendment contained a similar saving clause. Under this same heading, defendants apparently claim that trial court erred in permitting an amendment in 1932 to plaintiff's complaint in the South Gate case. No showing of prejudice has been made and we find no abuse of discretion in the allowance of said amendment.

[11] Defendants further contend that the act under which these proceedings were instituted is unconstitutional. They argue that said act is unconstitutional as violative of article IV, section 24, article I, section 14, article IV, section 31, article XI, section 12 and article XI, section 11 of the Constitution. The constitutionality of the act was under consideration in the former appeal in the South Gate case. It was there sustained against the attacks then made upon it. We have considered the arguments of defendants with respect to the sections of the Constitution above mentioned and are of the opinion that said act is not violative of any of said sections.

[12] Defendants also contend that plaintiffs "have waived all rights under this pending proceeding". They devote but one page of their brief to this subject. They point out that the actions were commenced in 1926 and were not tried until 1932. They assert that the lapse of time was such that plaintiffs should not be permitted to assert rights which they have "abandoned". There is no evidence justifying the statement that plaintiffs abandoned any rights and the history of this litigation shows that plaintiffs are not chargeable with any unreasonable delay.

[13] Defendant City of Huntington Park contends the trial court erred in consolidating the two actions for trial. This contention appears to be likewise without merit. While these were special proceedings, the act contains no provisions concerning the procedure to be followed by the trial court. We therefore conclude that the trial court had the power, in its discretion, to order a consolidation of the actions (Coghlan v. Alpers, 140 Cal. 648, 74 P. 145) provided such consolidation would be "without prejudice to a substantial right". Code of Civil Procedure, § 1048. Said defendant claims that said consolidation was prejudicial to it but the showing made by said defendant appears insufficient to show an abuse of discretion of the trial court in making its determination to the contrary.

[14] Both defendants contend the judgment is void because the findings make reference to exhibits introduced in evidence without making the exhibits a portion of the findings. The findings in question set forth the fact that electrical energy will be available at Boulder Dam for distribution to the cities of Pasadena, Glendale, Burbank and Los Angeles, "pursuant to the terms of contracts with the Secretary of Interior of the United States which were introduced in evidence in these actions". We find no invalidity in the judgment because of the omission of the exhibits from the findings. The rights of the parties, as determined by the judgment, are not dependent in any way upon said contracts with the secretary of the interior. This distinguishes the present case from Boone v. Doyle Cattle Co., 132 Cal.App. 355, 22 P.2d

542, which is cited and relied upon by defendants.

[15] The final contention of defendants is that plaintiffs have acquired no preferential rights by the construction of the transmission lines. We do not understand that plaintiffs claim any preferential rights by reason of the construction of such lines. The parties state that such lines have been constructed since the entry of judgment but the propriety of the trial court's judgment must be determined without regard to what plaintiffs may or may not have done since the entry thereof. Under this heading, defendants make the assertion that plaintiffs "will actually save money by putting the line underground". They refer to testimony indicating that the cost of overhead installation, including land, is $260,000 per mile while the cost of underground installation is $170,000 per mile. They then conclude that "nothing less than a reversal with a direction that the line be put underground will constitute a just result". These facts and figures tend to indicate the correctness of the testimony offered by plaintiffs and of the trial court's findings regarding the impracticability of putting the lines underground. It would be difficult to believe that plaintiffs would have determined upon overhead construction of approximately nine miles of lines in and about the defendant cities if it had been feasible to put said lines underground at a saving of $90,000 per mile.

Plaintiffs' Appeal.

Plaintiffs appeal only from that portion of the judgment found in subdivisions 2, 3 and 4 of paragraph "Sixth" and in paragraph "Eighth" thereof. These provisions of the judgment were part of the "terms and conditions" imposed upon plaintiffs by the court. They related to the damage to property in the immediate vicinity to the plaintiffs' proposed transmission line.

The main contention of plaintiffs is that the trial court was without jurisdiction to enter said provisions in the judgment. A consideration of this contention requires further discussion of the act in question.

[16] We have heretofore held that said act constituted a grant in general terms and that the precise terms and conditions under which the grant might be exercised were left to determination by agreement or by the superior court. There are no express provisions in the act purporting to define the nature of the terms and conditions which might be imposed by the superior court in an action brought thereunder. The act has been held to be constitutional and we are of the opinion that the only implied limitation upon the superior court in fixing the terms and conditions is that such terms and conditions should be reasonable in the light of the peculiar facts and circumstances before the court in each particular case. We therefore turn to the facts and circumstances before the court in these actions in order to determine the reasonableness of the terms and conditions imposed.

We have hereinabove summarized certain findings of the trial court. It appears therefrom that the trial court had determined that the plan of plaintiffs embraced the only feasible method of constructing said lines; that the routes selected were the most feasible routes; and that it was necessary that the lines be constructed overhead as underground construction was impracticable and could not be successfully used. It further appears, however, that the trial court was impressed with the fact that the construction and maintenance of tower lines through defendant cities would result in damage to the certain property in the immediate vicinity of such lines and that there would be a resulting decrease in the value of such property. Allegations to that effect are found in the answers of the defendant cities and also in the complaint in intervention, by which complaint in intervention, damages were sought on behalf of the intervening property owner. The trial court took evidence on the subject of damage and inspected the property along the routes traversed by said lines.

During the trial, plaintiffs "waived any and all objections which might be urged against intervention in these actions by owners of property within defendant cities of Huntington Park and South Gate". It appears that "the waiver was for the sole purpose of enabling them to set forth, urge and litigate any and all claims for damages which they may claim have accrued or may in the future accrue to said properties". T. R. Householder was the only property owner who did intervene. In their trial brief, plaintiffs fully recognized the problem presented to the trial court and made certain suggestions under the heading "Solution". They therein stated that the facts and circumstances furnished

sufficient foundation for the belief "that the property owners damage is the crux of the situation and supplies the backbone of the resistance to the enforcement of the statute involved here"; that they could "easily understand that there might exist in the mind of the court the quite natural desire to provide in these actions some adequate protection and assurance for the property owners concerning any legal damages which might arise after construction". Plaintiffs therein suggested by way of a solution of the problem that the court could provide "as one of the conditions in the interlocutory decree a provision that plaintiffs execute a bond in favor of the owners of the properties affected, guaranteeing and securing to them the payment of any damages which they may suffer by reason of the construction of the electric lines". While the trial court went further than the suggestion made by plaintiffs in their trial brief, the foregoing excerpts are quoted to show that plaintiffs there conceded the reasonableness of imposing some terms and conditions with respect to the damage to the property owners.

The trial court found and concluded that there would be damage to property in the immediate vicinity and a resulting decrease in the value thereof; that the claimed inductive interference with radios and the like would be slight but that a decrease in property values would result in the vicinity of said lines mainly by reason of the unsightliness of the lines suspended on large towers and by reason of the fear which some persons would entertain with respect to said line. The trial court therefore concluded that notwithstanding the fact that property owners, other than the intervener, had not intervened, it should provide for compensating the property owners in the vicinity for the damage sustained. The trial court then found that, within a certain zone surrounding said lines, the property owners had been damaged and that adequate compensation would be afforded if awards were made to the property owners within that zone based upon varying percentages of the assessed values of the properties as shown on the assessment roll for 1935. The zone was described in the findings and the varying percentages were fixed depending upon whether the property within the zone was abutting or non-abutting property and whether it was improved or unimproved property. It then provided the method for determining the owners of all such property and gave said owners the option of accepting the awards, within a specified time after the judgment might become final, in full satisfaction of all claims for damages against plaintiffs. The trial court further provided that before judgment should be entered pursuant to the findings of fact and conclusions of law, plaintiff, without prejudice to their right on appeal to question the jurisdiction of the court to make provisions relating to such damages, should be required to file an "acceptance agreement" stipulating that the classifications of the property were fair and reasonable, and that if compensation was properly allowable in these actions, that each award was just and reasonable in the amount awarded; and further, that plaintiffs should be required to file a bond in the sum of $225,000 guaranteeing the payment of said awards. It was also provided that unless plaintiffs filed said acceptance agreement and bond within thirty days, that judgment should not be entered on said findings of fact and conclusions of law but that the trial court would reopen the actions for the purpose of permitting the property owners to intervene in order to have their claims for damages adjudicated. The amount of damage suffered by the intervener F. R. Householder, was determined to be the sum of $300.

Pursuant to the foregoing provisions of the findings of fact and conclusions of law, plaintiffs filed the above-mentioned "acceptance agreement" and bond. The judgment carries the foregoing provisions into subdivisions 2, 3 and 4 of paragraph "Sixth" and into paragraph "Eighth" of the judgment, which portions are under attack by plaintiffs on this appeal. The judgment further recited that plaintiffs had filed the "acceptance agreement" and bond in all respects in conformity with the findings of fact and conclusions of law.

In addition to contending that the trial court had no jurisdiction to include such provisions in the judgment, plaintiffs claim that said provisions are void because they are not warranted by the pleadings; they are not in favor of parties to the action; they are in favor of unnamed persons; and they are made optional with the property owners. Many cases are cited by plaintiffs dealing with actions of the ordinary type but none of said cases involved proceedings under an act similar to that before us.

[17] We are of the opinion that the trial court had jurisdiction under the act to impose said terms and conditions relating to damage and that said provisions are not invalid upon any of the grounds urged by plaintiffs. The act is unique in its provisions and when a plaintiff seeks to have the superior court fix the terms and conditions upon which it may exercise its rights acquired under the act, we believe that the trial court has jurisdiction to impose any terms and conditions which the facts and circumstances may show to be reasonable. It will be noted that plaintiffs have not questioned the reasonableness of the awards but, on the contrary, they have stipulated in the "acceptance agreement" that each of said awards is reasonable in amount. It therefore must be taken as an admitted fact that every property owner, included as a beneficiary under said provisions, suffered damage to his property in the amount fixed by reason of the construction of plaintiff's transmission lines. There were hundreds of said owners included in the zone described by the trial court, and under the peculiar facts and circumstances of these cases, we believe that it was entirely reasonable to require that plaintiffs pay the amount of the admitted damage caused by the exercise of said rights.

[18-20] In a proceeding under said act we do not believe that the issue of damage to property owners need necessarily be raised by defendants' pleadings in order to warrant the inclusion in the judgment of provisions similar to those under attack. When plaintiffs sought their remedy under the act, asking that the terms and conditions be fixed by the court, plaintiffs themselves necessarily raised the issue as to what terms and conditions should be imposed as a condition precedent to the exercise of the rights claimed by them and any terms and conditions, shown to be reasonable under the evidence, were warranted by the pleadings. Furthermore, we believe it immaterial in such proceedings that the acceptance of such awards was made optional with the property owners, who were not named and were not parties to the action. Not being parties to the action, they could not be bound by the judgment and therefore the acceptance of the awards was necessarily made optional with said property owners. There is no uncertainty in the judgment regarding the property involved, the amount of the award in each instance, or the manner provided by the court for determining the person entitled to such award. We again stress the fact that this was not an ordinary action but one in which the trial court was requested by plaintiffs, under the terms of the act, to determine the terms and conditions upon which it might exercise its claimed rights. We conclude that all of the terms and conditions were entirely reasonable under the circumstances.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



NEBELUNG et al. v. NORMAN et al.*

Civ. 10878.

District Court of Appeal, First District, Division 2, California.

April 21, 1939.

Hearing Granted June 19, 1939.

1. Negligence ⇐134(4)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated after automobile had been driven about 60 miles with the retreaded tire thereon and while automobile was traveling about 60 miles an hour causing driver to lose control of automobile, evidence sustained finding that manufacturer was negligent in the manufacture of the retreaded tire.

2. Negligence ⇐134(11)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated after automobile had been driven about 60 miles with the retreaded tire thereon and while automobile was traveling about 60 miles an hour causing driver to lose control of automobile, evidence sustained finding that manufacturer's negligence in manufacture of the retreaded tire was proximate cause of the accident.

*For subsequent opinion see 96 P.2d 327.

3. Negligence ⇐135

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, evidence sustained finding that operation of automobile at approximately 60 miles per hour was not contributory negligence.

4. Appeal and error ⇐1008(1)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, whether occupants were guilty of negligence by reason of speed of automobile was for trier of facts, and findings of trial court sitting without jury could not be set aside.

5. Evidence ⇐5(2)
Negligence ⇐24

It is common knowledge that automobiles are operated at times at a speed of approximately 60 miles an hour, and manufacturers of automobile tires must reasonably anticipate that automobiles will be driven at times at such speed.

6. Negligence ⇐142

Contention that finding that each plaintiff was free from negligence which contributed to happening of accident was in irreconcilable conflict with finding that it was not true that plaintiffs, or any of them, were guilty of contributory negligence as alleged was hypertechnical.

7. Negligence ⇐142

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, where trial court found that manufacturer had sold retreaded tire without any express warranty, and further found that manufacturer represented that tire was safe and warranted tire to be free from defects and capable of withstanding use for which it was designed, the findings were not in irreconcilable conflict.

8. Appeal and error ⇐1071(5)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, where judgment rendered against manufacturer was based on negligence and was supported by material findings without resort to findings regarding any warranty, findings regarding warranty were immaterial.

9. Negligence ⇐142

Where finding referred to a paragraph of complaint which used word "defendants" and charged that defendants did certain acts and found allegations to be true and other findings found that individual defendant was not agent of corporate defendant, reference to paragraph of complaint wherein word "defendants" was employed was an inadvertence and findings could be reconciled on theory that court intended to refer only to corporate defendant in finding.

10. Negligence ⇐27

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, the nature of the article sold brought case within recognized exceptions to general rules which ordinarily shield manufacturer from liability to persons as to whom there exists no contractual privity with the manufacturer.

11. New trial ⇐100

Where evidence showed that plaintiff had suffered fracture of second and third lumbar vertebræ resulting in curvature of spine and muscle spasm and that proper treatment would restore plaintiff within a few months to a condition which would permit many normal activities, but not that of strenuous heavy lifting, denial of motion for new trial based on alleged newly discovered evidence relating to extent of injuries suffered by plaintiff accompanied by affidavits and motion pictures showing activities engaged in by plaintiff was not error.

12. New trial ⇐150(2)

When a new trial is asked on ground of newly discovered evidence, the moving party must make a strong case, especially when alleged newly discovered evidence relates to facts occurring after conclusion of trial.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Personal injury action by Edward Nebelung, Jr., and others against A. G. Norman, the Laher Spring & Tire Corporation, and others. From a judgment for

plaintiffs against the last-named defendant, such defendant appeals.

Affirmed.

Frank V. Campbell, Walter E. Rankin, and Robert E. Hayes, all of San Jose, for appellant.

Bohnett, Hill, Cottrell & Boccardo and James F. Boccardo, all of San Jose, for respondents.

SPENCE, Justice.

The three plaintiffs brought this action seeking to recover damages for personal injuries sustained by them in an automobile accident. The cause was tried by the court sitting without a jury and a judgment was entered in favor of plaintiffs and against defendant, Laher Spring & Tire Corporation. By said judgment, plaintiffs Nebelung and Muccia were awarded the sum of $500 each, while plaintiff Virnig was awarded the sum of $7,500. Said defendant's motion for new trial was not ruled upon within the time prescribed and was therefore denied by operation of law. Said defendant appeals from the judgment.

The defendant Laher Spring & Tire Corporation, hereinafter referred to as the defendant, was in the business of buying used automobile tires, removing the old tread and replacing it with new, and selling said tires as "retreads" or "remolds". In 1936, they sold some retreads to a dealer named Gilbert, who, in turn, sold one of said retreads to plaintiff Nebelung. Shortly thereafter said plaintiff placed said retread on the right rear wheel of his automobile and, after traveling about 60 miles thereon, said tire disintegrated while the car was being driven with the three plaintiffs riding therein. The new tread became completely detached from the casing or carcass of the tire, causing the car to swerve out of control and to run off the highway with the resulting injuries to plaintiffs.

It is conceded by defendant that defendant manufactured the tire involved and that there is substantial evidence to show that said tire came out of the mold with a defect known as a "mold-pinch" or "buckle". This caused an indentation on the inner side of the tire for about one-third of its circumference, which identation was filled by defendant with rubber cement. While defendant lays some stress upon the fact that said tire was sold to Gilbert as a "second" rather than as a "first", it appears from the evidence of defendant's own witnesses that the designation "second" merely denotes with the trade some minor irregularity such as an irregularity of the knobs of the tread. One of defendant's witnesses gave the following answers to the questions propounded:

"Q. And the only difference between a first and a second is the looks of the tread? A. Yes.

"Q. The real qualities are the same, the wearing quality? A. Yes, they test along the same as the others.

"Q. Your firsts and seconds as far as the tread sticking to the carcass is concerned, should be the same? A. Yes.

"Q. And you wouldn't expect the tread on a second to come off any sooner than you would at first? A. Absolutely not."

We may therefore treat the fact that the tire was sold as a second as wholly immaterial in this discussion.

The casing and tread were introduced in evidence as well as photographs of both. Experts were called by both parties to give their opinions with respect thereto. Said evidence was ample to show that defendant was chargeable with negligence in several respects in the manufacture of the retread tire in question. We need only point to the evidence showing that defendant had failed to remove the breaker strips from the tire before applying the new tread and had failed to take proper precautions to avoid the mold-pinch in applying the new tread. It appears that the failure of defendant in the foregoing respects prevented proper adhesion between the new tread and the casing and that experiments had shown that such defects invariably cause a new tread to loosen and to separate from the casing when the tire is put in service. We do not understand that defendant's experts seriously questioned the existence of said defects or the fact that it is extremely dangerous to use a retread tire containing such defects. It was conceded by one of defendant's experts that a tire with a mold-pinch could not be as good a tire as one without a mold-pinch and that he would not want one of his customers using a tire with a mold-pinch without knowing it. Another of defendant's experts admitted that he "never saw a tread come off like that"; that there was something unusual about it and that (referring to the casing and retread in evidence) "it is the durndest looking mess I have ever seen in my life for ordinary wear." When asked

if there was not something wrong with the workmanship, he merely said, "Well it wasn't done intentionally, I'm sure of that." Some of defendant's experts gave their opinions that the tire had been used in an underinflated condition, but the evidence on that subject, other than said opinions, was to the contrary.

[1] It was plaintiffs' claim upon the trial that an automobile tire is an article which, if negligently manufactured, becomes imminently dangerous to life and limb in the use for which a tire is intended; that the defendant was guilty of negligence in retreading the tire in question and selling it for such use; and that as a direct and proximate result of such negligence, and without negligence on the part of plaintiffs or any of them, the tire in question disintegrated when put to such use thereby overturning the automobile in which they were riding and causing their injuries. There was ample evidence to sustain plaintiffs' claims and the trial court made findings in accordance therewith.

[2-5] Defendant makes the claim that some of the findings are not sustained by the evidence, but we are of the opinion that all of the material findings are sustained. Defendant claims that the findings on the issue of proximate cause were based on speculation and conjecture and not upon any fair inference. This claim cannot be sustained. While experts were not in accord as to the immediate cause of the disintegration of the defective tire, this would appear to be immaterial. Plaintiffs presented ample evidence to show that defendant was negligent in manufacturing the defective tire and placing it on the market and the only fair inference to be drawn from said evidence is that defendant's negligence was the proximate cause of the accident. In this connection, defendant claims that "the wrong of Gilbert and the high speed at which the car was traveling intervened assumed negligence" on the part of defendant. The "wrong of Gilbert" consisted in buying the tire from defendant as a second and in selling it to plaintiff Nebelung as a first, but under the testimony of defendant's own witnesses, a second was as safe for use as a first. The "high speed" at which the car was traveling was approximately sixty miles per hour. This brings us to the further claim of defendant that driving at such speed constituted negligence on the part of plaintiffs and that the findings negativing contributory negligence were contrary to the evidence. This claim appears equally untenable as it cannot be said that the evidence showed that plaintiffs were guilty of contributory negligence as a matter of law. The automobile was being driven along a surfaced highway which was eighteen feet wide with four foot shoulders. The accident happened in open, desert country at a time when no other traffic was in the vicinity. In fact, it was fifteen minutes or more after the accident happened before any other vehicle arrived upon the scene. The question of whether plaintiffs were guilty of negligence by reason of the speed of the car was one for the trier of the facts and the trial court's findings may not be set aside under the circumstances. With respect to the question of speed, it is a matter of common knowledge that automobiles are operated at times at a speed of approximately sixty miles per hour. Such speed is not unlawful under all circumstances and manufacturers of automobiles and automobile tires must reasonably anticipate that automobiles will be driven at times at such speed. We therefore conclude that defendant may not take shelter behind either the alleged "wrong of Gilbert" or the "high speed" at which the car was being driven.

[6-9] Defendant further contends that certain findings are in irreconcilable conflict. We find no conflict in any of the material findings. The claim that the finding "that each plaintiff was free from negligence which contributed to the happening of the accident" is in irreconcilable conflict with the finding "that it is not true that plaintiffs, or any of them, were guilty of contributory negligence as alleged" is hypertechnical. The remaining alleged conflicts arise out of the situation presented by the pleadings and proof. Plaintiffs pleaded in their complaint that Gilbert was an agent of the defendant and that defendants made certain express warranties to plaintiff Nebelung with respect to the tire. They also pleaded negligence. The evidence developed that Gilbert was not an agent of defendant and that defendant had made no express warranty to either Gilbert or plaintiff Nebelung concerning the tire. The trial court found that defendant had sold the tire "without any express warranty". It further found that defendant "represented that the tire was in all respects safe for use in the manner for which it was manufactured and sold" and "warranted and held out said tire to be

free from defects and capable of withstanding use for which it was designed * * *". We find no irreconcilable conflict in said last-mentioned findings, but furthermore, the issues upon which said findings were based have now become immaterial issues. When plaintiffs ascertained that Gilbert was not an agent of defendant, they predicated their claim solely upon the alleged negligence of defendant and the judgment based upon such negligence finds support in the material findings without resort to the findings relating to any warranty, either express or implied. Defendant further lays stress on a finding which referred to a paragraph of the complaint and found the allegations thereof to be true. Said paragraph of the complaint used the word "defendants" and charged that defendants did certain acts. In other findings, the trial court found that defendant Gilbert was not the agent of the defendant company. We believe, however, that it is entirely clear that the reference to the paragraph of the complaint wherein the word "defendants" was employed was an inadvertence in so far as the adoption of the plural was concerned and that the trial court intended to refer only to the defendant company in said finding. We therefore believe that said findings may be reconciled and obviously should be reconciled as above indicated.

[10] Before proceeding further we should state that we are of the opinion that the nature of the article here sold brings the cause within the recognized exceptions to the general rules which ordinarily shield the manufacturer from liability to persons as to whom there exists no contractual privity with the manufacturer. The general subject is discussed at length in Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481, and such discussion need not be repeated here. It is sufficient to state that trend of judicial decisions is to extend the exceptions beyond articles which are inherently dangerous and to include all articles which are reasonably certain to place life and limb in peril if negligently manufactured. Several examples of such articles, including automobiles, are referred to in the cited case and we believe that an automobile tire is such an article. We may further state that we do not believe the case of Stultz v. Benson Lumber Co., 6 Cal.2d 688, 59 P.2d 100, to be controlling as that case involved the manufacture and sale of lumber in which the defects were apparent.

Defendant also contends that "the judgment should be reversed at least in so far as it affects appellant's liability to plaintiff Virnig because the trial court did not grant the appellant tire company's motion for new trial". Our examination of the record leads us to the conclusion that this contention is likewise without merit. Defendant's motion was based upon alleged newly discovered evidence relating to the extent of the injuries suffered by plaintiff Virnig. It was accompanied by affidavits and motion pictures showing activities engaged in by said plaintiff after the trial.

The testimony on the trial showed that said plaintiff, a man 26 years of age, has suffered a fracture of the second and third lumbar vertebrae resulting in curvature of the spine and muscle spasm; that he stood and walked in an unnatural position; that the condition would be permanent but would be helped by a brace; that with proper bracing, the muscles should strengthen within a few months and the pain would then be negligible "except if he was exerting himself strenuously under heavy lifting". While the doctors testified that the condition would be permanent, the testimony did not indicate that said plaintiff would be permanently prevented from engaging in all work and physical activity. On the contrary, it indicated that proper treatment would restore said plaintiff within a few months to a condition which would permit many normal activities, but not that of strenuous, heavy lifting. In short, the testimony showed a serious and permanent injury to said plaintiff but did not show a total and permanent disability. The award of $7,500 indicates that this was the view taken by the trial court.

The accident occurred in October, 1936, the trial was had in June, 1937, and the judgment was entered in October, 1937. It appears that said plaintiff has been examined prior to the trial by a doctor selected by defendant but that said doctor was not called at the trial. The activities stressed in defendant's affidavits were recreational activities and work attempted by said plaintiff several months after the trial. It is conceded that the counteraffidavits "deny everything" except that said plaintiff engaged in these activities and as a result he "experienced pain and discomfort in his back".

[11, 12] Taking into consideration the testimony given at the trial, the amount of the verdict and the showing made on the

motion for new trial, we cannot say that the trial court erred in failing to grant said motion. When a new trial is asked upon the ground of newly discovered evidence, "the moving party must make a strong case" (Smith v. Schwartz, 14 Cal. App.2d 160, 166, 57 P.2d 1386), and this is particularly true when the alleged newly discovered evidence relates to facts occurring after the conclusion of the trial. The only California case, involving comparable facts, which has been called to our attention is Lawrence v. Pickwick Stages, N. D., 68 Cal.App. 494, 229 P. 885. It was there held that the motion for new trial had been properly denied. Upon the showing made here, we cannot say that the trial court abused its discretion in failing to grant said motion and in permitting the statutory time to expire.

The last contention of defendant is that the trial court committed prejudicial error in denying in part its motion to strike said plaintiff's counteraffidavits submitted in opposition to the motion for new trial. Said motion was granted in part and while said affidavits may have contained other hearsay statements which were not stricken, we cannot say that the ruling of the trial court constituted prejudicial error.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



32 Cal.App.2d 220

DAY et ux. v. GENERAL PETROLEUM CORPORATION et al.

Civ. 2230.

District Court of Appeal, Fourth District, California.

April 17, 1939.

Rehearings Denied May 15, 1939.

Hearing Denied June 15, 1939.

1. Pleading ⇐129(2)

In action for injuries resulting from automobile collision where petition alleging that defendant corporation was the owner of and in control of truck driven by named person who was its officer, servant and employee was not denied, the allegations stood admitted.

2. Evidence ⇐53, 595

An "inference" is a permissive deduction from the evidence, while a "presumption" is a deduction directed to be drawn by law, and the rule governing the dispelling of an inference is materially different from that relating to the dispelling of a presumption.

[Ed. Note.—For other definitions of "Inference" and "Presumption," see Words & Phrases.]

3. Evidence ⇐595

An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt even though such evidence is produced by the opposite side, but if the opposition evidence is conflicting, vague or uncertain or is weakened by contradictions or improbabilities, the inference is not dispelled as a matter of law.

4. Evidence ⇐89

A presumption is generally dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness when such testimony was not the product of mistake or inadvertence, but a presumption is not dispelled by evidence produced by the opposite party, but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive.

5. Automobiles ⇐245(30)

In action for damages resulting from automobile collision, whether defendant's truck driver was acting within the course and scope of his employment at the time of the collision was for jury.

6. Appeal and error ⇐1002

Verdict upon conflicting evidence that defendant's truck driver was acting within the course and scope of his employment at the time of collision cannot be disturbed on appeal.

7. Appeal and error ⇐1001(1)
Automobiles ⇐245(50, 90)

Where the evidence as to the circumstances of an accident is conflicting, or more than one conclusion can be reasonably drawn therefrom, whether the negligence of one driver or of both was the proximate cause of the collision must be determined by the jury, and if there is evidence to support

such determination, it cannot be disturbed on appeal.

8. Automobiles ⇐245(15, 60)

In action by motorist for injuries resulting from collision, where truck struck automobile in front of it and crossed road and collided with automobile driven by plaintiff, whether driver of automobile first struck by truck was guilty of negligence having causal connection with injuries suffered by plaintiff was for jury.

9. Appeal and error ⇐989

The appellate court's duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the conclusion that was reached.

10. Automobiles ⇐242(6), 244(26)

Admission that truck involved in collision was owned by and in the control of defendant corporation at the time of the accident and that truck driver was at that time an employee of the defendant and that he was driving the truck gave rise to an "inference" that truck driver was acting within the course and scope of his employment and not to a "presumption."

11. Appeal and error ⇐1064(4)

In action for damages resulting from collision, instruction that the admitted fact of ownership of truck by defendant and that driver was an employee at the time of accident gave rise to a presumption that he was acting within the general scope of his authority and that the presumption was a species of evidence and should prevail and control the jury's deliberation until it was overcome by satisfactory evidence was not prejudicial because the word "presumption" instead of "inference" was used.

12. Trial ⇐260(1)

The refusal of requested instruction on subject matter substantially covered in other instructions given was not prejudicial error.

13. Appeal and error ⇐1032(3)

For a reversal to be ordered on account of errors committed in the giving or refusing of instructions it must affirmatively appear that there has been a miscarriage of justice.

14. Appeal and error ⇐1069(2)

That jury was permitted to take to the jury room the written instructions subsequently requested by jury and given to jury by bailiff after statement by clerk to court and counsel that instructions would be given to jury if asked for was not prejudicial where all attorneys consented except one, who made no objection.

15. Damages ⇐128

There is no absolute rule established for determining whether a verdict is excessive.

16. Damages ⇐128

One means of measuring a verdict to discover whether it was influenced by passion or prejudice is to compare the amount awarded with the evidence since a declaration that the verdict was influenced by passion or prejudice is but one way of stating that the verdict exceeds any amount justified by the evidence.

17. Damages ⇐132(1)

$35,000 to married woman for compound fracture of left humerus, a compound comminuted fracture of left radius ulna, simple comminuted fracture of right wrist, rupture of both ear drums, a subjunctive hemorrhage of left eye, fracture of left side nasal bone, resulting in impaired hearing and vision and droop of left eyelid, a puncture wound on left arm pit and wounds and cuts on breast, thigh and body generally *held* not excessive although accompanied by special damages to husband amounting to $7,708.73.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by J. R. Day and Alice Day, husband and wife against the General Petroleum Corporation, a corporation, Charles A. Kelly, the Shell Oil Company of California, a corporation, J. E. Flacey and others, defendants, for damages sustained by reason of the injury of Alice Day in an automobile accident. From a judgment for plaintiffs for the sum of $35,000 and for plaintiff J. R. Day for the sum of $7,708.73, the named defendants appeal.

Judgment affirmed.

Hearing denied by Supreme Court; EDMONDS, J., dissenting; HOUSER, J., not participating.

Chas. E. R. Fulcher, of Los Angeles, and Borton, Petrini & Conron, of Bakersfield, for appellant General Petroleum Corporation.

Wayne Veatch, of Los Angeles, for appellant Charles A. Kelly.

Ray W. Hays, of Fresno, and Brittan & Mack, of Bakersfield, for appellants Shell Oil Co. of California and J. E. Flacey.

Claflin, Dorsey & Campbell, of Bakersfield, for respondents.

GRIFFIN, Justice.

This is an action commenced by the respondents Alice Day and her husband, J. R. Day, against the appellants General Petroleum Corporation, Charles A. Kelly, Shell Oil Company of California, and J. E. Flacey, wherein the respondent Alice Day sought damages for personal injuries received by her as a result of an automobile accident, wherein it is alleged that such injuries proximately resulted from the carelessness and negligence of Charles A. Kelly and J. E. Flacey, the drivers of two separate vehicles. It is further alleged that General Petroleum Corporation is liable for said injuries by reason of the fact that Charles A. Kelly was, at such time and place, driving the truck as an employee of General Petroleum Corporation; that said truck at the time was in the control of said corporation; and that Shell Oil Company of California is liable by reason of the fact that J. E. Flacey was driving his automobile as an employee of the Shell Oil Company of California, and acting within the course and scope of his employment.

On October 28, 1937, the jury found a verdict in favor of the plaintiffs and respondents J. R. Day and Alice Day and against the General Petroleum Corporation, Charles A. Kelly, Shell Oil Company of California, and J. E. Flacey for the sum of $35,000, and also a verdict in favor of the respondent J. R. Day against the same defendants and appellants for the further sum of $7,708.73.

The General Petroleum Corporation admits in its brief that the evidence is sufficient to justify the jury in finding that Kelly, the driver of the truck, was guilty of negligence which was a proximate cause of the accident and injuries received by respondent Alice Day and that she was not guilty of contributory negligence.

The points raised by the General Petroleum Corporation are confined to the questions pertaining solely to the liability of this appellant under the rule of respondeat superior and as owner of the truck.

Oildale is a town located north of the city of Bakersfield. Chester street runs north and south through that town. Woodrow avenue runs east and west through Oildale and intersects Chester street. The accident happened at, or slightly north of this intersection. The termination of Woodrow avenue is immediately in front of the Oildale School house, which is on the east side of North Chester street. The 25-mile zone for the village of Oildale starts at the south side of Woodrow avenue. Washington street runs east and west through Oildale and intersects Chester street one block south of Woodrow avenue. The truck driver (appellant Kelly) resided at 526 Washington street, several blocks west of Chester street. North of Oildale are oil fields known as the Poso Creek field and others. The appellant General Petroleum Corporation had leases and wells in this field known as the Young lease, and others. The Young lease was the headquarters of appellant General Petroleum Corporation for this district. Southeast of Bakersfield is the Edison field in which is located the Osborne lease which was the General Petroleum Corporation's headquarters for that district.

On Sunday, May 24, 1936, at about the hour of 4 o'clock p. m., the appellant Kelly, an employee of the General Petroleum Corporation, was driving an empty truck, admittedly owned by that corporation, in a southerly direction on Chester street in Oildale. Ahead of him, and traveling south, was a Ford automobile owned by appellant Shell Oil Company of California, and admittedly driven within the course and scope of his employment by J. E. Flacey, as an employee of that company. As the Shell car approached Woodrow avenue, it suddenly slowed down or stopped, without the driver giving any warning or signal. Kelly, not having been warned of this act, applied his brakes, swerved to the left, struck the left rear of the Shell car, traveled easterly across the street, and struck the front of the car driven by respondent Alice Day, who was traveling north, on the proper side of Chester street, with such force that the truck literally climbed on top of her car, causing the injuries which she suffered.

The injuries sustained may be summarized as follows: A compound fracture of the left humerus; a compound comminuted fracture of the left radius ulna; a simple comminuted fracture of the right wrist which, prior to the trial, had welded with a hump at the side of the fracture, which deformity will be permanent. From an examination of the X-rays the doctors reached a diagnosis of a fractured skull.

Both ear drums were ruptured. There was a subjunctive hemorrhage of the left eye and a fracture of the left side nasal bone. At the time of trial, both ears were reduced in the amount of hearing, with the watch test, probably 10 or 15 per cent. The hearing, with a tuning fork, was reduced about 25 per cent. This will be permanent. The vision of the right eye was normal and the left eye reduced about 20-50 or 40 per cent below normal. The impaired vision in the left eye will be permanent. There was a four-inch cut on the scalp inside the hair-line. A puncture wound on the left arm pit left several scars. There was a four-inch cut from the top of the brow down around the outer aspect of the orbit which, prior to trial, had healed, leaving a scar on the left eye-lid. The left eye-lid now droops. The evidence indicates that prior to the accident Mrs. Day "had two beautiful big brown eyes and her face was perfect, very nice looking woman". The description of her after the accident and at the time of the trial was related as follows: "Her face is very different. One eye looks much smaller than the other and droops, and the eye-brow looks drooped or drawn down and the entire side of the face to me looks smaller".

There were various minor cuts along the left breast which left scars, and a seven-inch scar on the left thigh, together with minor cuts, bruises and lacerations. She suffered some sleeplessness and headaches, together with pains at the sites of the breaks of the arm and occasional periods of unawareness. These occasions of unawareness were described by one witness as follows: "She was seeing things, talking out of her head, didn't know what she was doing for a period of an hour and a half." Three of these spells of unawareness occurred in a five-month period during the year 1936. Mrs. Day was in a hospital for about 14 weeks. Four weeks of this period she was in an unconscious state. After her discharge from the hospital on the first occasion she returned for a further stay to have the left humerus reset.

The truck of the General Petroleum Corporation had been driven from the north part of North Chester avenue probably a distance of about 11 miles to the point of the accident. It was a three and one-half ton White truck, weighing about 14,000 pounds. A steam railroad crosses North Chester avenue at a point two or three blocks north of the scene of the accident. The White truck was driven for the last 3 miles of its trip north of the railroad mentioned at a speed of 35 to 40 miles per hour. The evidence seems to indicate that when it crossed the railroad track it decreased its speed to about 25 to 30 miles per hour. The Shell Oil Company Ford V-8, driven by Flacey, was driven on the open highway to the railroad crossing immediately in front of the truck at 35 to 45 miles per hour. Its driver, Mr. Flacey, testified that when he crossed the railroad tracks he gradually slowed down until he was traveling at 20 miles per hour and that when he slowed down he did not give any signal of intention to stop or of suddenly decreasing the speed of his car, and he further testified that he did not stop. When the Ford V-8 was struck by the White truck the Ford was going about 20 miles an hour. There were skid marks from the rear wheels of the truck, where it came to rest, extending from 50 to 60 feet, and terminating across the median line of the pavement on the west side of that line.

[1] The facts in reference to the question of the scope of the employment of the driver Kelly and as to the permission of the employer to operate the truck at the time of the accident may be summarized as follows: Respondents in their complaint (paragraph V) allege: "That on the 24th day of May, 1936, at the place herein last above mentioned (scene of the accident) the defendant General Petroleum Corporation, a corporation, *was the owner of, and in the control of* a motor vehicle, to wit, a certain truck which was then and there being driven in a southerly direction by said defendant Charles A. Kelly, *its officer, servant and employee.*" There is no denial of these allegations and accordingly they stand admitted. Hutson v. Gerson, 132 Cal.App. 665, at page 669, 23 P.2d 816. The foremen at the various stations testified generally that it was the general instruction to employee drivers to garage or park their equipment at the place where they finished their work for the day, at the lease or wherever they were working, and that if an employee finished his day's work on the Young lease the truck should be left or parked on the Young lease; that appellant did not furnish transportation for its employees to and from work; that they furnished their own transportation and where it was necessary for them

to travel more than 10 miles from Nineteenth and Chester streets, in Bakersfield, in order to get to and from work, the company allowed them 50 cents per day.

On May 24, 1936, Kelly was assigned to the production department, Kern division, under the supervision of the foreman of production and subject to his orders. The Young lease is less than 12 miles from Nineteenth and Chester streets and the Osborne lease is over 10 miles. Kelly's duties took him into the fields north of Bakersfield and south of Bakersfield. The foremen also testified that when a truck driver finished work in the Edison field he would finish at the Osborne lease, and if he should finish his work in the Poso Creek field he would return to the Young lease. This particular truck was to be where duty called it. It might be the Osborne or it might be the Young lease. Quitting time was 4 p. m. These foremen also testified that none of the truck drivers lived on the leases; that if a truck driver went in his automobile to work and started at the Osborne lease and left his car there and carried equipment to Mount Poso in the northern district where he finished his work, he should bring his car back to the Young lease; that "there is usually someone there he can ride home with. It is up to him to get home"; that the hours of employment of Kelly were 7:30 a. m. to 4 p. m. and that they never authorized him to quit earlier.

The driver Kelly testified in relation to this matter that a day or two prior to May 24, 1936 (the date of the accident) he drove his personal car to the Osborne lease and on the evening before, he stopped at his home with the empty truck of the company and remained there that night. On the following day (6:30 a. m.) he drove the truck to the Young lease and hauled drilling equipment most of the day on and about the Young lease; that he quit work and left early (3:30 p. m.) because he had finished the hauling at the Young lease. He testified further that no one authorized him to quit early or to take the truck to his home on this occasion. He stated that he intended to take the truck to his home on this particular evening. His home was located south and west of the scene of the accident, a few blocks off of the main highway leading from the Young lease to the Osborne lease.

Considering the first point raised by appellant General Petroleum Corporation, i. e., that the evidence is not sufficient to establish the fact that Kelly, the driver of the appellant's truck, was acting within the course and scope of his employment at the time of the accident, it is to be noted that it is an admitted fact that the truck involved was owned by and *"in the control of"* the appellant corporation at the time of the accident; that Kelly was an employee of that company at that time and that he was driving the truck. This appellant admits that such facts raise an inference (not a presumption) that he was so driving within the course and scope of his employment at the time of the accident, but contends that such inference was wholly dispelled by the uncontradicted evidence showing that he was not at such time acting within the course and scope of his employment and that where such evidence is so uncontradicted, the inference so arising as aforesaid, is wholly dispelled and there remains no question of fact for determination by the jury. Citing McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198; Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295; Engstrom v. Auburn Auto Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059.

Respondents contend that from these facts, when considered together with other facts and circumstances in the case, an inference may be drawn sufficient to raise a conflict which justified the submission of the question to the jury, and that they have determined the matter adversely to this appellant.

In Mathe v. White Auto Company, 108 Cal.App. 286, 291 P. 599, 600, it was held that where the complaint alleges the ownership in the employer and that the driver of the motor vehicle was the employee of the owner, that such allegation raises the *presumption* that the employee was acting within the scope of his employment. The court in that case said: "It is well settled that in cases of this kind, for injury or damage inflicted by an automobile, allegation and proof showing ownership of the automobile and operation by the owner's employee is sufficient to make out a prima facie case and raise a presumption that the employee acted within the scope of his employment." Citing Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Hathaway v. Mathews, 85 Cal.App. 31, 258 P. 712; Dierks v. Newsom, 49 Cal.App. 789, 194

P. 518; McWhirter v. Fuller, supra; Frierson v. Pacific Gas, etc., Co., 55 Cal. App. 397, 203 P. 788; art. Automobiles, Cal.Jur.Supp. 284.

It was held in Grantham v. Ordway, 40 Cal.App. 758, 182 P. 73 (quoting from the syllabus) that "where it is admitted that the automobile which struck the plaintiff belonged to the defendant employer and that the person driving was its employee, the presumption arises that such person was acting within the general scope of his authority; and such presumption is not destroyed as a matter of law by the testimony of such employee that he was acting on his personal business. The question of whether he was so acting becomes a question of fact for the jury to decide." It was further held that "In an action for damages for personal injuries received through being struck by an automobile driven by an employee of a corporation, proof of the ownership of the automobile by the corporation and its operation at the time of the accident by such employee establishes a prima facie case against the corporation; and where the testimony of such employee is not so convincing, or free from justifiable doubt, as to amount to an admission by the plaintiff, who offers his testimony in evidence, or to eliminate the *presumption* that such employee at the time of the collision was engaged upon the business of his employer, the trial court commits error in granting a nonsuit as to the corporation." (Italics ours.)

In Bushnell v. Yoshika Tashiro, 115 Cal. App. 563, 2 P.2d 550, the court held (also quoting from the syllabus) that "In an action for damages against an employer for personal injuries caused by the negligence of his employee while operating the employer's automobile, proof that the automobile belonged to the employer and at the time of the accident was being operated by the employee raises an *inference* sufficient to establish a prima facie case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment, and the burden is then upon the defendant to overcome or dispel such inference by proof of facts to the contrary. In such a case, such inference is not destroyed or overcome as a matter of law merely because it is contradicted by the testimony of the employee or of other witnesses produced on behalf of the defendants, but the issue remains one of fact for the determination of the jury for the reason that, as sole judges of the weight of the testimony and the credibility of the witnesses, the members of the jury are not bound to accept such testimony as true, but may, if not convinced thereby, reject any portion or the whole thereof. In this action for damages for personal injuries sustained by a pedestrian when struck by an automobile truck owned by a laundry company and driven by its employee and co-defendant, the testimony of witnesses given in contradiction of the inference establishing a prima facie case of liability against the defendant employer did no more than create a conflict therewith, even though said testimony was not rebutted; and in such a case, the determination of the jury on that issue is conclusive on appeal." (Italics ours.)

The court also held in Jessen v. Peterson, Nelson & Co., 18 Cal.App. 349, 123 P. 219, that the question of the *control of the vehicle* was a fact to be found by the trial court. The term "in the control of" in its broadest sense means to exercise directing, governing or restraining power over. Byrne v. Drain, 127 Cal. 663, 667, 60 P. 433. The court held, in this respect, in Jessen v. Peterson, Nelson & Co., supra, that the ultimate finding of the court that the admitted fact, in connection with other facts, that the horse and buggy was at the time of the accident "wholly in the possession and under the control of the defendant" [18 Cal.App. 349, 123 P. 221], a corporation, was a sufficient finding of probative facts to support a declaration that the ultimate fact necessarily results therefrom, i. e., that the driver was acting within the scope of his authority.

These particular quoted facts were admitted by the pleadings in the instant case. Respondents duly objected to the reception of any evidence under the pleadings which would bar the admission of ownership and control contained therein. This objection was overruled.

[2-4] The Supreme Court of this state in Engstrom v. Auburn Auto Sales Corporation, supra, has in a thorough and painstaking decision clarified the distinction between a presumption and an inference and has harmonized the rules applicable thereto. In some of the cases cited and relied on the courts have fallen into the all too prevalent error of using the terms "presumption" and "inference" interchangeably and synonymously, with a

consequent confusion of the rules applicable thereto. It was therein stated that an inference is a permissive deduction from the evidence, while a presumption is a deduction directed to be drawn by law, and the rule governing the dispelling of an inference is materially different from that relating to the dispelling of a presumption. An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt even though such evidence is produced by the opposite side, but if the opposition evidence is conflicting, vague or uncertain or is weakened by contradictions or improbabilities the inference is not dispelled as a matter of law. Generally speaking, a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness when such testimony was not the product of mistake or inadvertence; but a presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive.

In addition to the admissions of the pleadings above related, i. e., that the petitioner corporation *was the owner of* and *in the control of* the truck at the time of the accident, we think the circumstances that should be considered are that Kelly drove his own car to the Osborne lease; that he took the company truck to the Young lease; that he finished his duties there; that he left early before quitting time at the Young lease; that he knew that it would be a violation of his orders to stop at his home unless the truck was loaded; that he was traveling at the speed indicated on a direct route to the Osborne lease. Could it not reasonably be inferred that he was returning to the Osborne lease to terminate his employment for the day and secure his own automobile and return home, notwithstanding his testimony to the contrary? There is evidence displayed in the record which is indicative of the fact that the general attitude of the witness Kelly was more or less evasive. Immediately after the accident the driver, Charles A. Kelly, was interrogated by a traffic officer and Kelly stated to him that the sedan driven by the lady going north on Chester avenue, when Kelly was driving the truck south on that avenue, came across the road, struck the left rear of a coupe just ahead of the truck, and then struck the truck head-on. Also after the accident a Mr. and Mrs. Norman arrived at the scene of the accident and the driver Kelly came to their car when the Normans were ready to depart and inquired if they had seen the accident and they said they had. When he inquired as to whose fault it was, Mr. Norman said: "From the looks of things it was your fault" to which Mr. Kelly replied: "I don't think so." Mr. Norman then said: "Well, you hit the Shell car before you hit Mrs. Day," to which Kelly replied: "I never hit the Shell car." Mr. Norman said: "You did hit the Shell car" and Kelly replied: "Maybe I did." On taking Kelly's deposition, these questions were asked and the related answers were given. By Mr. Campbell: "Q. Did you see Mrs. Day's car at all that day? A. Yes.

"Q. Where was it when you first saw it? A. I refuse to answer."

In a question propounded by Mr. Campbell at the trial the witness was asked: "And you refused to answer because you thought it might incriminate you? A. Yes, sir.

"Q. How did you think it was going to incriminate you if you said you saw the car, or didn't you remember? A. I was told not to answer.

"Q. By Mr. Hays: Why did you refuse to answer this question at the time your deposition was taken: 'How fast were you traveling when you crossed the railroad track?' A. Because it might tend to incriminate me."

[5, 6] It appears to us from an examination of the entire record that the court was justified in holding that the inference arising from the admissions in the pleadings and facts in evidence was not dispelled as a matter of law and that it was not rebutted by clear, positive and uncontradicted evidence not open to doubt; that a conflict of evidence arose sufficient in itself to submit the question for a determination by the jury. Under the instructions given, the jury by its verdict has found that the driver was acting within the course and scope of his employment at the time of the accident. Under the authority of Parsons v. Easton, 184 Cal. 764, 195 P. 419, this finding cannot be disturbed.

Appellant Shell Oil Company admits in its brief that if the defendant and appel-

lant Flacey was guilty of any act or omission constituting negligence on his part that had any causal connection with the injuries suffered by the respondents, then the appellant Shell Oil Company would be liable.

We must then examine the evidence with that admission in mind. The testimony of the witness and appellant Charles A. Kelly bearing on the question is as follows:

"Q. By Mr. Dorsey: Now as you approached the zone where the accident afterwards happened, did you notice or did you see in front of you a Ford automobile? A. No, sir. I seen a car, I couldn't say it was a Ford or what kind it was.

"Q. All right, you saw an automobile. A. Yes, sir.

"Q. Where were you when you saw that automobile with reference to the Standard School or any street there or anything? A. Well, I was following the traffic all down the road there. I never took no particular notice of the automobile, I just know there was traffic ahead of me.

"Q. And did you there at that point when you saw this car ahead of you, did you have any reason to stop, or attempt to stop on the pavement? A. Why, about that same instant that this accident took place, the traffic ahead of me, the car that was ahead of me there diminished speed suddenly or stopped, I don't know which.

"Q. All right, now what did you do when that occurred to you, that that car either decreased its speed or stopped, what did you do? A. I tried to stop.

"Q. What did you do? A. I applied all the brakes I had to stop.

"Q. You put on your brakes? A. Yes, sir.

"Q. Well, when you did that, when you say that car stopped in front of you or decreased its speed, whatever it was, did the occupant of that car, or the driver of that car give any warning that the car was about to stop or the speed decreased? A. No, sir. * * *

"Q. Mr. Kelly, did anything of—any object of any kind strike you at the time that you say you lost your memory there at the point you mentioned a while ago as you were approaching the car in front of you, did anything strike you, any object of any kind? A. Just the sudden stop of the car in front of me, that is all. * * *

"Q. And as you were driving south on North Chester at about what distance were you following this car that was immediately ahead of you? A. I would judge about 75 feet, maybe more or less.

"Q. 75 feet more or less, and how fast was that car going in comparison with the speed of your car? A. I would say about the same. * * *

"Q. By Mr. Hayes: Q. Well, what is your best recollection now as to when you first saw this car that you say stopped or slowed down in front of you? A. I never paid any attention to the car or traffic until just before the emergency.

"Q. You hadn't paid any attention up to that time? A. Well, just to keep my distance from back of the traffic.

"Q. Then you had been watching it to keep your distance, had you? A. Why certainly, absolutely.

"Q. You haven't any idea to tell the jury for what distance you had been driving behind that car? A. I imagine I would be safe in saying a half a mile."

It is quite apparent that the truck struck the left rear portion of the Shell Oil Company's Ford car. It must then follow that either the truck driver increased his speed to bring about such a collision or the Shell Oil Company Ford decreased its speed. There is no evidence that the truck driver accelerated his speed just before the happening of the accident. The only evidence relating to the question is the testimony above quoted and that of Flacey, the driver of the Ford, and his guest passenger, John A. Regan. Flacey testified as follows:

"Q. (By Mr. Petrini). What speed had you been traveling before you came to Wilson Street, that is to say, the street just north of Woodrow Street? A. 20 miles an hour.

"Q. 20 miles an hour; and what speed had you been traveling as you came up to the railroad track? A. About 30.

"Q. And then what did you either accelerate your speed to or reduce your speed to? A. I just took my foot off the accelerator and slowed down gradually.

"Q. Mr. Flacey, then, at a point approximately 100 feet north of the intersection, you felt something that you thought was a flat tire, is that correct? A. Yes, sir.

"Q. Your idea then is, that 100 feet north of the intersection you felt something that led you to believe for the mo-

ment at least that it was a flat tire, is that correct? A. Or had lost a wheel.

"Q. * * * Didn't you at that time slam on your brakes hard? A. No, sir."

Regan testified as follows:

"Q. (By Mr. Hays): What first directed your attention to the fact that something unusual had happened? A. Thought we had a flat tire.

"Q. What did you do when you thought that? A. I told Mr. Flacey 'I think we have got a flat tire'.

"Q. And then did you see anything unusual happen? A. Yes, sir.

"Q. What did you see? A. I looked out the window and saw a truck go to the left of us.

"Q. And up until the time when you felt this jar or flat tire, whatever it was, did he (Flacey) change his speed at all? A. No, sir.

"Q. That is, he didn't make any sudden stop or change in his speed? A. No, sir.

"Q. State whether or not, at the time you thought there was a flat tire, he slammed on his brakes? A. I have no recollection of his slamming on his brakes.

"Q. At any time? A. After he got hit and we thought he had a flat tire."

The broken red glass out of the taillight of the Ford car was found about 100 feet north of the intersection. The appellants Shell Oil Company and J. E. Flacey now argue and strenuously contend that the testimony of Kelly is entirely refuted and completely impeached and is not entitled to any credence and "does not rise to the standard of expression of truth"; that the driver, Flacey, gradually slowed down after he was struck and therefore there was no occasion for him to give any signal to any car on the highway behind him, because under section 544, paragraph (c) of the Vehicle Code, St.1935, p. 185, he was not required to give any signal for the reason that that section provided that "No persons shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal".

[7] Respondents maintain that the evidence above quoted is sufficient to generate a substantial conflict. After a study of the entire record, we are not of the opinion that the testimony of the witness Kelly bearing on this phase of the case should be rejected as untenable. Time and time again it has been held that where the evidence as to the circumstances of an accident is conflicting, or more than one conclusion can be reasonably drawn therefrom, the question of whether the negligence of one driver or both was the proximate cause of the collision is one of fact to be determined by the jury, and if there be evidence to support such determination, it cannot be disturbed on appeal. Smith v. Schwartz, 14 Cal.App.2d 160, 164, 57 P.2d 1386; Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456; Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473; Hill v. Peres, 136 Cal.App. 132, 28 P.2d 946.

It was said in Hardin v. Sutherland, 106 Cal.App. 473, 289 P. 900, 903:

"But we cannot say, in view of all the circumstances surrounding the accident, that, had the driver of the Dodge car extended his hand as required by law at the instant when he saw that a reduction of speed was necessary, the driver of the stage would not have had a more timely warning. We think that the question as to whether or not the failure of the driver of the Dodge car to extend his hand was a proximate cause of the accident is, like other questions of fact in this case, one to be determined by the court."

In Forrest v. Fink, 71 Cal.App. 34, 234 P. 860, the court approved an instruction given to the jury that it was the duty of a driver about to stop a motor vehicle, or to abruptly or suddenly check its speed, to extend his hand and arm as provided by law and that a failure so to do is prima facie evidence of negligence when an accident results. Under the conflicting evidence in that case it was held that the question of fact was properly left to the jury. To the same effect is State Compensation Ins. Fund v. Jorn, 186 Cal. 782, 200 P. 624. It has also been held generally that where a collision between two automobiles is proximately caused by the negligence of both drivers and results in injury to a third party, the injured party may recover from both or either driver, even though the negligence of one may have been greater than the negligence of the other. Smith v. Schwartz, supra; Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.2d 786. In order for one driver to establish that the independent negligence of the other was the sole proxi-

mate cause of the collision, it must appear that his own negligence was so disconnected in time and nature as to make it plain that the damage was not proximately caused by the negligence of the one who is thus seeking to be relieved from liability. Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951; Fishman v. Silva, supra.

[8, 9] The jury, guided presumably by all the criteria by which the law says they must be governed in weighing evidence, decided the issue contrary to appellants' version. This court's duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached. We therefore refrain from encroaching on the proper function of the jury.

[10] Appellants also contend that the trial court committed prejudicial error in instructing the jury, first in giving respondents' instruction No. 36. The court instructed the jury that the admitted fact of ownership of the truck by the company, and that Kelly, the driver, was an employee at the time, gave rise to a *presumption* that he was acting within the general scope of his authority, and that this *presumption* was in itself a species of evidence and should prevail and control the jury's deliberation until it was overcome by satisfactory evidence. (Italics ours.) The respondents support this instruction by the language of Wagnitz v. Sharetg, supra, and other cases heretofore cited on the subject. In Fahey v. Madden, 56 Cal. App. 593, 206 P. 128, the appellate court affirmed an order granting a new trial based on the giving of a somewhat similar instruction. In support of this general contention of error Pozzobon v. O'Donnell, 1 Cal.App.2d 151, 36 P.2d 236; Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178, and Maupin v. Solomon, supra, are cited. As heretofore stated, the facts recited only give rise to an inference and not a presumption. Maupin v. Solomon, supra, 41 Cal.App. at page 326, 183 P. 198 [petition for hearing in Supreme Court denied]; Engstrom v. Auburn Auto Sales Corp., supra; Montanya v. Brown, Cal.App., 84 P.2d 161.

[11] An instruction similar in principle to the criticized instruction, although erroneous in that the word "presumption" was used instead of "inference" was held not to be prejudicial in the recent case of Murdrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 955, 118 A.L.R. 533, wherein the court said: "While courts have frequently called attention to the erroneous use of the terms, 'presume' and 'presumption' in stating the rule of res ipsa loquitur, no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words. While it may be error, the error, in our opinion, has not prejudiced the defendants in any of their rights." We have reached the same conclusion as to the questioned instruction.

We have carefully examined the remaining instructions against which the attack of appellants was directed. Some of them, although unhappily worded, when considered and read in the light of the other instructions given, are not prejudicially erroneous.

[12, 13] We have likewise carefully examined the proffered instructions of appellants which were refused by the court. The subject-matter thereof was properly given and substantially covered in other instructions. The court's refusal to give the requested instructions was not prejudicial error. Silvey v. Harm, 120 Cal.App. 561, 575, 8 P.2d 570; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170. For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must be affirmatively of the opinion that there has been a miscarriage of justice. It appears from the record that after the trial judge instructed the jury, and several hours after it retired for deliberation, the jurors requested that the written instructions given by the court be delivered to them in the jury room. The undenied affidavit of the clerk of the court reveals the following:

"W. Verle Freeman, being first duly sworn, deposes and says: That I am and at all the times herein mentioned was a deputy county clerk; that I served as courtroom clerk throughout the entire trial of the above entitled cause; that immediately after Judge Owen had read the instructions to the jury he left the bench and went into his chambers. I filed the instructions and stapled them together, then took them to the judge's chambers with the judge present, Allan B. Campbell, Senator Hays and Bailiff Sherrill; James

Petrini was standing in the doorway. I stated to the judge that I had the instructions ready and that they might be handed to the jury if they were requested. Thereupon the judge asked the parties present if it would be agreeable to give the instructions to the jury should they request same, to which Allan B. Campbell replied it would be agreeable to him as attorney for plaintiffs, and Senator Hays stated that whatever was the custom in Kern County courts would be agreeable with him, as attorney for Shell Oil Company and Kelly. James Petrini being in the doorway, made no remark or objection to the agreement. Later the Bailiff, without any further instructions, gave the instructions to the jury. I wasn't present at that time but I know this because the jury returned them to me later. The instructions so delivered to the jury by the Bailiff and returned to me by them as aforesaid, contained only the instructions read to the jury by the judge on the submission of the case to them without any change in them whatever."

[14] Appellants contend that the incident recited was violative of not only the statutory but the constitutional rights of the appellants, citing Nelson v. Southern Pacific Co., 8 Cal.2d 648, 655, 67 P. 2d 682, 686, wherein it is said: "Section 614 of the Code of Civil Procedure requires that, if the jury desire further instruction, it shall be conducted into court and the information desired given in the presence of or after notice to counsel. Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances". Fererira v. Silvey, 38 Cal.App. 346, 176 P. 371; Little v. United States, 10 Cir., 73 F.2d 861, 96 A.L.R. 889; and Smith v. McMillen, 19 Ind. 391. The fact that the jury was permitted to take to the jury room the written instructions under the circumstances here related cannot justly be said to be prejudicial. Fererira v. Silvey, supra; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Melikian v. Independent Paper Stock Co., 8 Cal.App. 2d 166, 47 P.2d 539.

Finally, we approach the all-important question pertaining to the amount of the award of damages. It is the earnest contention of appellants that the damages awarded were excessive and that from the facts recited this excess appears as a matter of law and at first blush suggests passion, prejudice or corruption on the part of the jury. While no particular attack is directed toward the award of $7,708.-73 to J. R. Day for special damages and general consequential damages, yet when added to the general verdict of $35,000, it is claimed that the total reflects excessiveness.

[15, 16] In approaching this point, we do so with full knowledge of the law that there is no absolute rule established for determining whether or not a verdict is excessive. One means of measuring a verdict for the purpose of discovering whether or not it was influenced by passion or prejudice is by comparing the amount awarded with the evidence submitted to the trial court, since a declaration that the verdict was influenced by passion or prejudice is but one way of stating that the verdict exceeds any amount justified by the evidence. The Supreme Court has, in determining whether a judgment was excessive, compared verdicts in other cases which were factually similar to the instant case. Maede v. Oakland High School Dist., 212 Cal. 419, 298 P. 987.

In Rosander v. Market Street Ry. Co., 89 Cal.App. 721, 265 P. 541 a verdict in the sum of $35,000 was upheld. Plaintiff was a young married woman and the injuries were of a permanent character.

In Rannard v. Harris, 113 Cal.App. 15, 297 P. 623, a general verdict for the wife in the sum of $30,000, together with a special verdict in favor of the husband for $4,829.11, was held not to be excessive. The injuries sustained in the instant case are factually similar to those in Rannard v. Harris, supra. Other cases have been cited where the award was in excess of the amount of the award in the instant case. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870; Karberg v. Southern Pacific Co., 10 Cal.App.2d 234, 52 P.2d 285.

We note that, due to illness, the judge who heard the motion for new trial was not the judge who tried the case before the jury. Appellants stress this fact in their argument and ask us to consider it in applying the general rule that "a view of the person so afflicted would be of great evidentiary value to a court or jury in fixing the compensation to be awarded. This is also true of the effect of the injuries upon the general health of the wife. Her

general appearance and the manner in which she moved about the court-room—all such matters have no adequate presentation in the record. It is for such reasons as these that our appellate courts have committed to the trial court or jury the practically exclusive function of fixing the amount of damages." Rannard v. Harris, supra, 13 Cal.App. at page 18, 297 P. at page 624.

[17] In view of the facts narrated, showing that the injuries received by Mrs. Alice Day were of a distressing and serious character, and showing also that a great amount of pain and suffering and permanent injury has been sustained by her, we cannot say, as a matter of law, that the verdict was excessive.

The judgment from which this appeal is perfected is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



32 Cal.App.2d 359

McADAMS OIL CO. v. CITY OF LOS ANGELES et al.

Civ. 12157.

District Court of Appeal, Second District, Division 2, California.

April 20, 1939.

Hearing Denied June 19, 1939.

1. Licenses ⇐35

An injunction will be granted to restrain enforcement of an unconstitutional license ordinance containing penal provisions, where irreparable damage to property rights will result if ordinance is enforced.

2. Licenses ⇐6(2)

Under charter authorizing municipality to exact license tax from person or corporation engaged in lawful business, municipality could subject business of pumping of oil wells by owners within municipality to occupational license tax.

3. Licenses ⇐7(9)

License tax imposed by municipality on business of pumping of oil wells by owners within municipality is not an exercise of "police power," but of power of taxation, and the rule that penalties or fees exacted for permits issued under police regulation must bear some reasonable proportion to expenses of regulating business is inapplicable.

[Ed. Note.—For other definitions of "Police Power," see Words & Phrases.]

4. Licenses ⇐7(9)

A municipality in levying license tax for revenue purposes may do so by making tax proportionate to amount of business done, and in measuring the amount of business may use quantity of a commodity produced in such business as the measure for determining such tax.

5. Constitutional law ⇐205(2), 230(2)
Statutes ⇐74(1)

An occupational license tax levied by municipality in proportion to amount of business done is not a violation of equal protection clause of Federal Constitution, or of provision of State Constitution requiring all laws of general nature to have uniform operation, or of privileges or immunities clauses. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, §§ 11, 21; art. 4, § 25, subd. 19.

6. Licenses ⇐1, 7(7)
Municipal corporations ⇐957(3), 958

A tax by municipality on persons engaged in producing oil from ground based on quantity of oil produced is a "privilege" or "occupational tax," and not a "property tax," and hence such tax is not within limitations of State Constitution requiring all property to be taxed in proportion of its value or charter of municipality limiting annual tax rate to $1.25 on each $100 of assessed value of taxable property in city. Const.Cal. art. 13, § 1.

[Ed. Note.—For other definitions of "Occupation Tax," "Privilege Tax" and "Property Tax," see Words & Phrases.]

7. Licenses ⇐7(8)

An ordinance levying an occupational license tax upon the producer of oil, who also pays an ad valorem tax, is not invalid as imposing "double taxation."

[Ed. Note.—For other definitions of "Double Taxation," see Words & Phrases.]

8. Licenses ⇐7(3)

Ordinance requiring owners of oil wells to pay license tax which is measured by amount of oil pumped is not void as discriminatory, although it applies without regard to gravity of oil, which controls mar-

ket price, since it applies to all persons or corporations engaged in the same business in proportion to amount of business transacted by them.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Edward T. Bishop, and B. Rey Schauer, Judges.

Action by the McAdams Oil Company against the City of Los Angeles and others to enjoin the enforcement of a city ordinance exacting a license tax of one-half cent per barrel on oil produced within city limits. From a judgment sustaining a demurrer to plaintiff's first amended complaint without leave to amend, the plaintiff appeals.

Affirmed.

Ernest K. Hartman, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment predicated upon the sustaining of a demurrer to plaintiff's first amended complaint without leave to amend in an action to enjoin the enforcement of an ordinance (No. 56,600, sec. 81) of defendant city, exacting a license tax of one-half cent per barrel on oil produced within the limits of the city of Los Angeles, plaintiff appeals.

The essential allegations of the amended complaint are that:

(a) Defendant city adopted ordinance No. 56,600, in which section 81 reads as follows:

"Every person, firm or corporation conducting, managing or carrying on the business of operating, and/or pumping any oil well or wells, shall pay a license tax upon the gross production of each such well so operated and/or pumped within the limits of the City of Los Angeles, computed as follows:

"Said license tax shall be Two Dollars ($2.00) per quarter for any well producing four hundred (400) or less barrels of oil per quarter, and one-half cent (½¢) per barrel of oil produced at each well producing over four hundred (400) barrels of oil per quarter, said license tax must be paid quarterly."

(b) Plaintiff, as lessee, is producing low gravity oil from wells located within the boundaries of the city of Los Angeles.

(c) The gravity of oil produced within the confines of the city of Los Angeles varies from 14 degrees to 38 degrees Baume, and the market price of the lower gravity oil is 55¢ per barrel, while that of the higher gravity oil is $1.14 per barrel.

(d) If the provisions of the ordinance above mentioned are enforced plaintiff will lose its leasehold estate and suffer irreparable damage.

(e) The prayer is that defendant be enjoined from enforcing the ordinance.

Plaintiff relies for reversal of the judgment on these propositions:

First: An injunction will issue to restrain the enforcement of a void license ordinance of a municipality which otherwise would seriously interfere with property rights.

Second: Section 81 of ordinance No. 56,600 of defendant city (set forth supra) is void and unconstitutional for the following reasons:

(1) Defendant city was not authorized by its charter to adopt the provisions of the ordinance in question.

(2) Pumping of oil wells by the owners thereof is not engaging in a business which may lawfully be subjected to payment of an occupational or license tax.

(3) The questioned levy is by virtue of defendant city's exercise of police power, and the amount collected is far in excess of the amount required by said defendant for inspection, oversight, and police supervision.

(4) Section 81 of the ordinance is discriminatory and is contrary to the United States Constitution, 14th Amendment U.S. C.A. (equal protection clause); the Constitution of the state of California, article I, section 11 (requiring that all laws of a general nature shall have a uniform operation), article I, section 21 (prohibiting the granting to any citizen or class of citizens privileges or immunities which are not on the same terms granted to all citizens), article IV, section 25, subdivision 19 (forbidding the granting to any corporation, association, or individual of any special or exclusive right, privilege, or immunity), and article XIII, section 1 (requiring that property shall be taxed in proportion to its value); also the charter of defendant city, article

I, section 3, subdivision 5 (prohibiting discrimination in the amount of a license tax between persons engaged in the same business otherwise than by proportioning the tax to the amount of business done).

(5) The tax in question is a property tax and is prohibited by the Constitution of the state of California, article XIII, section 1 (requiring all property to be taxed in proportion to its value) and the charter of defendant city, article I, section 3, subdivision 1a (limiting the annual tax rate to $1.25 on each $100 of the assessed value of taxable property in the city).

(6) The levying of the license tax here in question constitutes double taxation.

[1] The first proposition is tenable. The law is settled in California that an injunction will be granted to restrain the enforcement of an unconstitutional license ordinance containing penal provisions, where irreparable damage to property rights will result if the ordinance is enforced. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 407, 65 P.2d 884. The case just cited extends injunctive relief to a class of cases in which it had formerly been denied. See, for example, Sullivan v. San Francisco Gas, etc., Co., 1905, 148 Cal. 368, 83 P. 156, 3 L.R.A.,N.S., 401, 17 Ann.Cas. 574.

The second proposition is untenable and is governed by these established principles of law:

[2] (1) Defendant City of Los Angeles has power under its charter to adopt an ordinance exacting a license tax from a person or corporation engaged in a lawful business within the confines of said city. Section 2, subsec. 11e of the charter of the city of Los Angeles; Los Angeles Brewing Co. v. Los Angeles, 8 Cal.App.2d 379, 385, 48 P.2d 65.

(2) Pumping of oil wells by the owners thereof (fee or lessee) is a business which may lawfully be subjected to the payment of an occupational or license tax. Oklahoma v. Texas, 266 U.S. 298, 45 S.Ct. 101, 69 L.Ed. 296; Barwise v. Sheppard, 299 U.S. 33, 36, 57 S.Ct. 70, 81 L.Ed. 23; Flynn, Welch & Yates v. State Tax Comm., 38 N. M. 131, 28 P.2d 889, 892.

[3] (3) The tax here questioned is not an exercise of the police power but of the power of taxation, and the rule that penalties or fees exacted for permits issued under police regulation must bear some reasonable proportion to the expenses of regulating the business is inapplicable. Los Angeles Brewing Co. v. Los Angeles, 8 Cal. App.2d 391, 396, 48 P.2d 71; Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 769, 93 P. 1006.

[4, 5] (4) The City of Los Angeles in levying a license tax for revenue purposes may do so by making the tax proportionate to the amount of business done, and in measuring the "amount of business" may use the quantity of a commodity produced in such business as the measure for determining such tax. Such an ordinance is not discriminatory nor contrary to the United States Constitution, 14th Amendment, U. S.C.A. the Constitution of the state of California, article I, sections 11 and 21, article IV, section 25, subdivision 19, article XIII, section 1, or article I, section 3, subdivision 5, of the charter of defendant municipality. Oliver Iron Min. Co. v. Lord, 262 U.S. 172, 179, 43 S.Ct. 526, 67 L.Ed. 929; Ex parte Mirande, 73 Cal. 365, 375, 14 P. 888; Los Angeles Brewing Co. v. Los Angeles, 8 Cal.App.2d 379, 387 et seq., 48 P.2d 65.

In the case last cited the court had under consideration the validity of a section of the ordinance here in question which imposes a license tax upon the manufacture, sale, and distribution of beer. The tax, as in the instant case, was based upon the volume of business done. The court there held that the tax was valid and not obnoxious to the various constitutional and charter provisions which are urged in the instant case as a reason for holding invalid the section of the ordinance now under consideration. We have read the case referred to and believe the reasoning therein to be sound and that such decision is controlling in the matter before us.

There is no merit in plaintiff's contention that it may be distinguished from this case, because in the Los Angeles Brewing Company case the basis of taxation was beer, which plaintiff asserts to be of a uniform quality; while in the present case the basis of taxation is oil, which varies in gravity. It is a matter of common knowledge that beer varies in gravity and also in alcoholic content. 3 Enc.Brit., 14th ed., [1929] 314. It is still fresh in the memory of all that there was a period during Prohibition when beer could be legally sold which contained not more than one-half of one per cent of alcohol by volume, while today beer containing in excess of ten per cent of alcohol by volume may be purchased in the open market.

[6] (5) A tax on persons engaged in producing oil from the ground based on the quantity of the product thus produced is a privilege or occupational tax and not a property tax. Therefore, such a tax is not within the limitations of the Constitution of the state of California, article XIII, section 1, or the charter of defendant municipality, article I, section 3, subdivision 1a. Oliver Iron Min. Co. v. Lord, supra, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929, 935; Brown-Forman Co. v. Kentucky, 217 U.S. 563, 571, 30 S.Ct. 578, 54 L.Ed. 883; San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 249, 135 P. 971; Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 767, 93 P. 1006.

[7] (6) Levying of an occupational tax upon the producer of oil, who also pays an ad valorem tax, does not constitute double taxation. Ex parte Mirande, supra; City of Sonora v. Curtin, 137 Cal. 583, 585, 70 P. 674; Producers' Oil Co. v. Stephens, 44 Tex.Civ.App. 327, 99 S.W. 157, 158.

[8] Applying the foregoing rules to the undisputed facts in the instant case, the ordinance here questioned is valid as levying an occupational license tax upon oil which tax is not discriminatory and applies to all persons or corporations engaged in the same business in proportion to the amount of business transacted by each.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



32 Cal.App.2d 337

COHEN v. METROPOLITAN LIFE INS. CO.

Civ. 11898.

District Court of Appeal, Second District, Division 2, California.

April 20, 1939.

Rehearing Denied May 10, 1939.

Hearing Denied June 19, 1939.

1. Appeal and error ⇐931(1)

On plaintiff's appeal from judgment for defendant in action tried to court without jury, evidence would be viewed in light most favorable to the defendant.

2. Insurance ⇐147(2)

In action for disability benefits under life policies which were made, executed and delivered in New York, wherein insurer filed cross-action to recover amount of payments made and premiums waived, interpretation of policies would be in accordance with laws of New York.

3. Contracts ⇐144

The construction of a contract in the absence of an agreement to the contrary is to be determined by the law of the place where it is made.

4. Appeal and error ⇐533(1), 717

The written opinion of a trial court is no part of the record on appeal and will not be considered for the purpose of predicating error in the rulings of the trial court or in determining whether the findings of fact are supported by evidence, since question for determination by reviewing court is whether decisions of trial court were correct, irrespective of accuracy of judicial reasoning or argument.

5. Insurance ⇐400

In action for disability benefits under life policies which was commenced more than two years after issuance of policies, provision of policies that they should not be contestable after two years had elapsed from date of issuance prevented court from considering fraud which might otherwise have been predicated upon misrepresentations made by insured in application.

6. Insurance ⇐665(5)

In action for disability benefits under life policies wherein insurer filed cross-actions for recovery of disability benefits paid and amount of premiums waived on ground of fraud, evidence justified finding that insured falsely represented date of origin of disease of pulmonary "tuberculosis" and disability therefrom as having occurred subsequent to issuance of policy.

A distinction exists between the phrases "tuberculous infection" and "tuberculous disease," "tuberculous disease" existing when the clinical symptoms first manifest themselves, regardless of the medical or pathological cause which antedates it; while tubercle bacilli or germs are in the body without the manifestation of any clinical symptoms.

7. Insurance ⇐665(5)

In action for disability benefits under life policies wherein insurer filed cross-ac-

tions to recover disability benefits paid and amount of premiums waived, on ground of fraud, evidence justified finding that insured in proof of claim falsely represented that up to date given as origin of disability from tuberculosis he had been working full time at his occupation, whereas he had been confined for approximately one year prior to such date in sanatorium for active tuberculosis.

8. Insurance ⇐665(1)

In action for disability benefits under life policies wherein insurer filed cross-action for disability benefits which had been paid and for amount of premiums waived, on ground of fraud, evidence justified finding that insurer had not been guilty of laches or unreasonable delay in denying liability and that insured had not been prejudiced by failure of insurer to contest claim for disability benefits for period of five years after claim was filed.

9. Insurance ⇐665(1)

In action for disability benefits under life policies wherein insurer filed cross-action for amount of disability benefits paid and amount of premium which had been paid on ground of fraud, evidence justified finding that none of allegations of defense against first cause of action of cross-complaint were true except allegations as to death of two physicians.

10. Insurance ⇐665(1)

In action for disability benefits under life policies wherein insurer filed cross-action for amount of disability benefits and amount of premiums which had been waived on ground of fraud, evidence justified finding that insured suffered no prejudice on account of death of two physicians subsequent to commencement of action whose testimony insured made no effort to obtain after issue was joined.

11. Insurance ⇐645(2)

In action for disability benefits under life policies, insured had burden to plead and prove that at time of filing claim for benefits, insured was suffering from disease occurring and originating after issuance of policy within coverage of policy.

12. Insurance ⇐400

An incontestable clause of a life policy does not extend the coverage beyond the terms thereof.

13. Insurance ⇐400

The incontestable clauses of life policies providing for payment of benefits for disabilities as result of disease occurring and originating after issuance of policy did not relieve insured from burden of proving that disease for which claim was made originated and occurred after issuance of policies or prevent insurer from proving that disease originated before date of issuance of policy.

14. Insurance ⇐665(5)

Evidence justified judgment denying insured recovery of disability benefits under life policies on ground that insured had not become totally and permanently disabled as result of disease occurring and originating after issuance of policies within coverage thereof.

15. Insurance ⇐645(3)

An insured may not rely on waiver of provisions of policy unless waiver is pleaded.

16. Insurance ⇐645(3)

In action on insurance policy, evidence of waiver is inadmissible under allegation of performance of conditions of contract.

17. Insurance ⇐645(3)

In action for disability benefits under life policies, contention that insurer waived right to claim that disability did not arise as result of bodily injury or disease occurring and originating after issuance of policy within coverage thereof was not available where insured did not plead waiver but alleged performance of conditions of contract.

18. Estoppel ⇐107

Estoppel as to any defense which would otherwise be available to the defendant under facts stated in the complaint may not be relied on unless the estoppel is pleaded.

19. Insurance ⇐645(3)

In action for disability benefits under life policies, insurer was not estopped to deny that disability arose as result of disease occurring and originating after issuance of policies within coverage thereof, where estoppel was not pleaded in insured's complaint.

20. Appeal and error ⇐1032(2)

In action for disability benefits under life policies, admission in evidence of depositions was not prejudicial error in absence

of showing wherein prejudice resulted to appellant therefrom.

21. Appeal and error ⇐1043(6)

Admission of depositions of physicians was not prejudicial error, where depositions were taken on written stipulation of parties, since weight to be given answers of witnesses in response to hypothetical questions was for trial court and not reviewing court.

22. Fraud ⇐41

The essential averments in pleading "fraud" are fraudulent representations, knowledge by defendant of falsity, intent to deceive, reliance on representations believing them to be true and injury suffered as result thereof.

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

23. Fraud ⇐41

In action for disability benefits under life policy providing for payment of disability benefits for disability resulting from disease occurring and originating after issuance of policies, insurer's cross-complaint alleging that insured had made false representations as to date of origin of disease, which were known by him to be false with intent to deceive insurer and which were relied on and did deceive insurer to its injury, was sufficient to plead cause of action sounding in "fraud."

24. Estoppel ⇐52, 53, 54

To constitute a "waiver" there must be an existing right, benefit or advantage, knowledge, actual or constructive of existence of such right, benefit, or advantage, and actual intention either constructive or implied to relinquish such right, benefit, or advantage.

[Ed. Note.—For other definitions of "Waiver," see Words & Phrases.]

25. Insurance ⇐377(1)

Under life policies providing for payment of benefits for disabilities as result of disease occurring and originating after issuance of policies, insurer did not by acceptance of proof of claim and payment of benefits waive right to claim that disability did not arise as result of disease occurring and originating after issuance of policies, where insurer did not have knowledge of fraud practiced on it by insured as respects date of origin of disease and disability at time it accepted proof of claim and made payment.

26. Insurance ⇐388(2)

Under life policies providing for payment of benefits for disabilities as result of disease originating after issuance of policies, letter from insurer to insured calling attention to insured's misrepresentation in application that he had never had tuberculosis and calling attention to disability provisions in policy stating that insurer would be liable for disability occurring after issuance of policy did not constitute "waiver" of fraud except as to fraudulent answers in application.

27. Estoppel ⇐59

The doctrine of estoppel is intended for the protection of the party and is not intended to be used for purpose of permitting one to perpetrate fraud on another.

28. Insurance ⇐371

An insurer was not "estopped" to deny that insured's disability arose as result of disease occurring and originating after issuance of policies within coverage of policies in view of trial court's finding supported by substantial evidence that insured did not suffer prejudice by reason of insurer's acts.

29. Estoppel ⇐58

An essential element of "estoppel" is that the party relying thereon has been prejudiced as result of the other party's acts.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

30. Action ⇐63

The doctrine of laches is inapplicable to action at law.

31. Insurance ⇐188(1), 601

In action for disability benefits under life policies, insurer's cross-action for recovery of sum equivalent to amount of payment of disability benefits which had been made and amount of premiums which had been waived on ground of fraud was not barred by laches, since cross-action was "action at law" to which doctrine of laches was inapplicable.

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

32. Limitation of actions ⇐100(1)

Statute of limitations does not commence to run on an action predicated on fraud until discovery of the fraud by the aggrieved parties. Code Civ.Proc. § 338, subd. 4.

33. Limitation of actions ⇐100(2)

In action for disability benefits under life policy, insurer's cross-action for sum equivalent to disability payments made on policies and premiums waived, which had been induced by fraud between 1931 and 1935 was not barred by limitations, where action in which cross-action was asserted was filed in 1936 and insurer had not discovered fraud until 1935. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Los Angeles County; Charles E Haas, Judge.

Action by Benjamin Cohen against Metropolitan Life Insurance Company for permanent disability benefits under life policy wherein the defendant filed a cross-action to recover a sum equivalent to disability payments made on policies and premiums waived on policies. Judgment for the defendant, and plaintiff appeals.

Affirmed.

Arthur Rosenblum and J. J. Krutoff, both of Los Angeles, for appellant.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz and Norman Newmark, both of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From judgments in favor of respondent after trial before the court without a jury in (a) an action to recover permanent disability benefits of insurance policies and (b) a cross-action to recover a sum equivalent to disability payments made on insurance policies and premiums waived on said policies both induced by fraud, appellant appeals.

[1] Viewing the evidence most favorable to respondent, the essential facts are:

Pursuant to the recommendation of his physician, appellant in November, 1927, entered the New York State Hospital for Incipient Tuberculosis at Raybrook, New York, and remained there suffering from tuberculosis until October 1928, when he was discharged as "arrested".

In November and December, 1928, respondent issued, executed, and delivered in the state of New York to appellant life insurance policies in the aggregate sum of $20,000. Under the terms of the policies respondent agreed to pay $10 per month per thousand dollars' worth of insurance to appellant if he was totally and permanently disabled "as the result of bodily injury or disease occurring and originating after the issuance of" the policies. In his applications for these insurance policies appellant specifically denied that he had either had tuberculosis or that he had been in any hospital or sanitarium.

The policies contained these provisions:

"Incontestibility:—This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for nonpayment of premiums, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to, and made part of, this Policy."

"The provision of the said Policy as to incontestability shall apply hereto, but shall not preclude the Company from requiring as a condition to recovery hereunder, due proof of such total and permanent disability as entitles him to the benefits hereof."

December 21, 1928, appellant under the assumed name of Dave Cohn made application for admission to the Jewish Consumptive Relief Society Sanitarium at Spivak, Colorado. He was admitted to this institution in March, 1929, and remained there until May 1, 1930, when he was discharged therefrom, the disease from which he had been suffering being classified as "apparently arrested".

In January, 1931, appellant filed his claim with respondent for permanent disability. In the statement of claim were the following questions and appellant's answers thereto:

"5. Nature of present sickness or injury. Pulmonary Tuberculosis.

"6. On what date were you totally disabled by this sickness * * *, so that you were wholly unable to work? April 28—1930."

"8. On what date were you first treated by a physician? May 15—1930."

For five years respondent paid appellant the sum of $200 a month as disability benefits under the terms of the policies and in addition waived premiums on the policies throughout this period. This sum totaled $15,098. September 5, 1935, respondent notified appellant that it had just learned that he had been afflicted with tuberculosis prior to the issuance of the

policies and that it would not make any future disability benefit payments nor would it continue to waive premiums on the policies.

Preliminarily to a discussion of the questions involved in this case this court recognizes the following:

(a) There is a difference between the phrases "tuberculous infection" and "tuberculous disease". Tuberculous disease exists when the clinical symptoms first manifest themselves, regardless of the medical or pathological cause which antedates it; while tuberculous infection exists when tubercle bacilli or germs are in the body without the manifestation of any clinical symptoms. Whenever either of the above mentioned phrases are used in this opinion they will be used in the sense just attributed to them.

[2,3] (b) Since it is conceded that the insurance policies here involved were made, executed, and delivered in New York state, the interpretation of the policies will be in accordance with the laws of the state of New York, as the law is established in this jurisdiction that the construction of a contract in the absence of an agreement to the contrary is to be determined by the law of the place where it is made. Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 485, 265 P. 190, 57 A.L.R. 696; 5 Cal.Jur.[1922] 449, sec. 26; 3 Cal.Jur.Ten Year Supp.[1936] 726, sec. 26; Restatement of the Law of Conflict of Laws [1934] 408, sec. 332.

[4] (c) The written opinion of the trial court is no part of the record on appeal and will not be considered by this court for the purpose of predicating error in the rulings of the trial court or in determining whether the findings of fact are supported by the evidence. Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 704, 74 P. 307; DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444. The question for determination by the appellate court is whether the decision of the trial judge was correct and we are not concerned with the accuracy of his judicial reasoning or argument.

[5] (d) The provision in the policies that they should not be contestable after two years had elapsed from the date of issuance thereof prevents our considering any fraud which might otherwise have been predicated upon the misrepresentations made by appellant to respondent in his applications for the issuance of the insurance policies. Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 208, 149 P. 171, Ann.Cas.1917E, 34. It is also to be noted that respondent is not endeavoring to cancel the insurance policies but on the contrary is insisting that it will not waive future premiums on them and that appellant must pay the premiums specified in the policies in order to continue them in force.

A.

These are the questions necessary to be determined in connection with the main action:

First: Was there substantial evidence to sustain the trial court's findings of facts as follows:

"XII.

" * * that in and by said proof of claim he represented to defendant that the nature of his then present sickness was pulmonary tuberculosis, that he first was totally disabled by this sickness so that he was wholly unable to work on April 28, 1930, and that said pulmonary tuberculosis originated and occurred subsequent to the issuance of each and all of said policies."*

"XIII.

*"It is true that plaintiff had been afflicted with and suffering from pulmonary tuberculosis prior to the issuance of each and all of said three policies of insurance, and since 1927 has from time to time continued to suffer therefrom, and that the present disability of plaintiff and the disability claimed by him to have commenced in April 1930, in fact commenced prior to the issuance of each and all of said policies, and is due to the same disease of pulmonary tuberculosis, and that plaintiff has been afflicted therewith continuously since 1927 * * *."*

"XV.

" * * In this connection the court finds that plaintiff was requested in and by said proof of claim, and otherwise, to inform defendant as to the date of origin of the disease of pulmonary tuberculosis and the disability therefrom. The court further finds that in and by said proof of claim referred to in paragraph III, plaintiff represented in writing that he had been working full time and continuously at his occupation of diamond setter and dealer up to April 28, 1930, and had not been laid off or idle prior thereto, and that*

his earnings at the beginning of disability were approximately $6,000 per annum, all of which facts were false and untrue and known to plaintiff to be false and untrue, in that in truth and in fact plaintiff continuously from March 1929 up until April 28, 1930 had been incarcerated in a sanitarium for active tuberculosis, suffering from tuberculosis, and during all of said period was unable to do, and was not doing, any work whatever. The aforesaid representations were made by plaintiff with the intent and purpose of deceiving defendant into believing that the disease of pulmonary tuberculosis and the disability therefrom, had its origin on April 28, 1930."

"XVI.

"It is true that at various and sundry times subsequent to January 28, 1931, plaintiff furnished to defendant, upon defendant's request, further proofs of disability, upon printed blanks furnished by defendant, and that on or about and shortly after January 28, 1931, and at various times subsequent thereto, plaintiff did, at the request of defendant, submit himself to examinations by physicians of defendant, and was examined by them. In this connection the court finds that at all such times plaintiff represented that there had been a sudden onset of the disease of pulmonary tuberculosis on or about April 28, 1930, accompanied or caused by a sudden hemorrhage, and that plaintiff represented at all such times that he had never before been afflicted with pulmonary tuberculosis, all of which representations were false and untrue and known by plaintiff to be false and untrue, and uttered with the intent and purpose of deceiving defendant and its medical examiners as to the date of the onset of the disabling disease of pulmonary tuberculosis, and that defendant and its medical examiners were in fact deceived thereby. The court further finds in this connection that plaintiff in December, 1928, applied in New York for admission to a tuberculosis sanitarium in Colorado, representing that he had been ill from pulmonary tuberculosis for more than a year, and that plaintiff was admitted in said sanitarium during March 1929, and remained therein continuously until April 28, 1930, during all of which time he was afflicted with and suffered from pulmonary tuberculosis, and that neither on said date of April 28, 1930, nor during May 1930, did plaintiff suffer a hemorrhage or onset of the disease of pulmonary tuberculosis."

"XXII.

"It is not true that defendant has been guilty of laches or any unreasonable delay, nor is it true that plaintiff has in any way been prejudiced by the failure of defendant to contest plaintiff's claim for disability benefits and waiver of premiums until the latter part of August 1935."

"XXX.

"None of the allegations of paragraph I of the sixth defense set up by plaintiff against the first cause of action of defendant's amended cross-complaint are true, except that it is true that prior to the trial of this action Dr. B. K. Gordon and Dr. Herman Schwatt, of Spivak, Colorado, died. In this connection the court finds that the said Dr. Schwatt did not die until subsequent to the filing of this action, and that plaintiff made no effort to obtain the testimony of Dr. Schwatt by deposition after issue joined herein. The court further finds that plaintiff has suffered no prejudice whatever on account of the death of said two doctors or either of them."

Second: Did appellant prove that he had "become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of" the insurance policies which are the basis of the present suit?

Third: Had respondent waived the right to claim that appellant's disability did not arise "as the result of bodily injury or disease occurring and originating after the issuance of" the insurance policies?

Fourth: Was respondent estopped to deny that appellant's disability arose "as the result of bodily injury or disease occurring and originating after the issuance of" the insurance policies?

Fifth: Did the trial court commit prejudicial error in receiving in evidence the depositions of Mary E. Barry, Cecelia Hentel, and Charles Miller?

Sixth: Did the trial court commit prejudicial error in receiving in evidence the depositions of Dr. Bray and Dr. Richardson?

[6-10] The first question must be answered in the affirmative. An examination of the record discloses there was substantial evidence considered in connection with such inferences as the trial judge

may have reasonably drawn therefrom to sustain the findings of facts set forth above and each and every material finding of fact made by the trial judge; for example, "the statement of claim" executed by appellant contained in answer to the question, "On what date were you totally disabled by this sickness * * * so that you were wholly unable to work?" the answer in appellant's handwriting "April 28—1930". This supports the court's finding No. XII, supra. It is conceded that appellant had been afflicted and suffering from pulmonary tuberculosis prior to the date of the issuance of the policies herein. Dr. Pottenger, a tuberculosis specialist, stated that in his opinion the tuberculosis from which appellant was suffering in 1930 was the same disease from which he had suffered in 1927. This evidence is sufficient to sustain the trial court's finding of facts No. XIII. Further discussion of the evidence is unnecessary.

The second question must be answered in the negative and is governed by the following applicable principles of law:

[11] (a) It was incumbent upon appellant to plead (as he did) and prove that at the time of the filing of his statement of claim for total disability that he was suffering from "a disease occurring and originating after the issuance of" the policies. John Hancock Mut. Life Ins. Co. v. Hicks, 43 Ohio App. 242, 183 N.E. 93, 95.

[12-14] (b) An incontestible clause in an insurance policy does not extend the coverage beyond the terms of the policy. Therefore, it does not relieve the insured (appellant) from the burden of proving that the disease from which he is suffering originated and occurred after the issuance of the policies nor prevent the insurer (respondent) from proving that the disease originated before the date of the issuance of the policies. Apter v. Home Life Ins. Co. of New York, 266 N.Y. 333, 194 N.E. 846, 848, 98 A.L.R. 1281. Since finding No. XIII of the trial court supported by substantial evidence found as a fact that the disease from which appellant is suffering originated prior to the date of the issuance of the policies, appellant did not sustain the burden of proving that the disease from which he is suffering occurred and originated subsequent to the issuance of the policies, and he therefore failed to prove that his disability came within the coverage of said policies.

[15-17] The third question must also be answered in the negative. The law is settled that an insured may not rely upon a waiver of a provision of an insurance policy, unless such waiver is pleaded, and that evidence of waiver is not admissible under an allegation of performance of the conditions of the contract. Distributors P. Co. v. Pacific I. Co., 21 Cal.App.2d 505, 509, 70 P.2d 253. In the present case appellant did not plead a waiver in his complaint as amended but on the contrary alleged performance of the conditions of the contract.

[18, 19] The fourth question must likewise be answered in the negative. It is the law of California that estoppel as to any defense which would otherwise be available to the defendant (respondent) under the facts stated in a complaint may not be relied upon unless the estoppel is pleaded. Goorberg v. Western Assurance Co., 150 Cal. 510, 519, 89 P. 130, 10 L.R.A., N.S., 876, 119 Am.St.Rep. 246, 11 Ann. Cas. 801. In the instant case estoppel was not pleaded in appellant's complaint as amended.

[20] The fifth question must be answered in the negative, since appellant has failed to show wherein any prejudice resulted to him from the admission in evidence of the depositions in question.

[21] The sixth question must also be answered in the negative. There is no merit in appellant's contention that the trial court committed prejudicial error in receiving the depositions in evidence, for the reason that the depositions here attacked were taken upon the written stipulation of the parties and the weight to be given to the answers of the witnesses in response to hypothetical questions was a matter for the trial court and not for this court upon review.

B.

These are the questions necessary to be determined in connection with the cross-action:

First: Did respondent's cross-complaint properly plead a cause of action sounding in fraud?

Second: Had respondent waived the right to claim that appellant's disability did not arise "as the result of bodily injury or disease occurring and originating after the issuance of" the policies?

Third: Was respondent estopped to deny that appellant's disability arose "as the re-

sult of bodily injury or disease occurring and originating after the issuance of" the policies?

Fourth: Was respondent's cause of action on its cross-complaint barred by (a) laches, or (b) the statute of limitations (sec. 338, subd. 4, Code Civ.Proc.)?

[22] The first question must be answered in the affirmative. The essential averments in pleading fraud are:

(1) Fraudulent representations, (2) knowledge by defendant of their falsity, (3) intent to deceive plaintiff, (4) reliance upon the representations by plaintiff believing them to be true, and (5) injury suffered as a result thereof by plaintiff. 12 Cal.Jur.[1923] 807, sec. 64.

[23] In the present case respondent in simple and concise language pleaded the fact that appellant had made false representations as to the date of the origin of his disease, known by him to be false, that they were made with intent to deceive respondent, and were relied upon by and in fact did deceive respondent to its injury.

[24] The second question must be answered in the negative. To constitute a waiver the following elements must be present:

(1) An existing right, benefit, or advantage,

(2) Knowledge actual or constructive of the existence of such right, benefit, or advantage, and

(3) An actual intention either constructive or implied to relinquish such right, benefit, or advantage. 25 Cal.Jur. [1926] 927, sec. 3.

[25] In the instant case the trial court found, supported by substantial evidence, that respondent did not have any knowledge of the fraud practiced upon it at the time it accepted appellant's proof of claim and made payments to him. Therefore, the second and third elements of a waiver mentioned above are absent from the instant case.

[26] The following letter was written to appellant by respondent on September 5, 1935:

"In Re: Policies 5536939-A
5536940-A
5381969-A

"Mr. Benjamin Cohen, 233 North Kenmore Avenue, Los Angeles, California

"Dear Sir: The above numbered policies were issued to you November 2, 1928, and December 4, 1928, respectively. When you applied to the Company for the insurance, you specifically denied that you ever had tuberculosis or that you had resided with any person suffering from tuberculosis or that you had ever been an inmate of or ever received treatment at a hospital or sanatorium.

"It has now come to our attention that you have been tubercular at least since 1927 and that you were in different sanatoria for the treatment of the disease prior to the issuance of the policies. As you probably know, had you stated your true condition of health and the previous history of your illness in making application for the policies, they would not have been issued to you.

"The disability provisions in the policies specifically state that the Company will be liable only for a disability due to a disease that occurred and originated after the issue dates of the policies. As it is well established that your disease occurred and originated before the policy dates, you do not appear to have a valid claim and those moneys paid you since 1930 under misstatement of fact should be refunded to the Company.

"Under Policy 5536939-A, 65 monthly installments at $50 each, as well as 5 annual premiums of $144.90 each; and under Policy 5536940-A, 65 monthly installments at $50 each and 5 annual premiums at $144.90 each, as well as 65 monthly installments at $100 each and 5 annual premiums at $289.80 each under Policy 5581969-A, making a grand total of $15,898 should be refunded and demand is hereby made for reimbursement.

"Yours truly,
"(Signed) H. A. Bayer,
"Superintendent of Claims."
(Italics ours.)

There is no merit in appellant's contention that the foregoing letter constituted a waiver by respondent of the fraud practiced upon it, excepting as to the fraudulent answers of appellant in his applications for the insurance policies, which fraud respondent could not rely upon because of the incontestability clauses in the insurance policies.

A reading of the letter, particularly the portion which we have italicized, shows clearly that respondent stated to appellant that it would be liable, under the provisions of its policies, only for a disability arising from a disease that occurred and

originated after the date of the issuance of the policies.

[27-29] The third question must be answered in the negative. The doctrine of estoppel is intended for the protection of a party and is not intended to be used for the purpose of permitting one to perpetrate a fraud upon another. Franklin v. Merida, 35 Cal. 558, 575, 95 Am.Dec. 129. In the instant case the trial court found, supported by substantial evidence, that appellant did not suffer any prejudice by reason of respondent's acts. One of the essential elements of estoppel, i. e., that the party relying thereon has been prejudiced as a result of the other party's acts, was not present in this case, and therefore the doctrine was not applicable.

The fourth question must be answered in the negative, and is controlled by the following principles of law:

[30, 31] (a) The doctrine of laches is inapplicable to an action at law. San Francisco Credit C. House v. Wells, 196 Cal. 701, 706, 239 P. 319. The present action is one at law.

[32, 33] (b) The statute of limitations does not begin to run on an action predicated on fraud until the discovery of the fraud by the aggrieved party. Sec. 338, subd. 4, Code Civ.Proc. In the instant case the trial court found, supported by substantial evidence, that respondent did not discover the fraud practiced upon it by appellant until 1935. Therefore, since the present action was filed in 1936, the statute of limitations was inapplicable.

For the foregoing reasons, the judgments appealed from are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

32 Cal.App.2d 407

PEOPLE v. BENTON.

Cr. 1668.

District Court of Appeal, Third District, California.

April 24, 1939.

Rehearing Denied May 9, 1939.

1. Witnesses ⇐392(1)

In robbery prosecution, statement detailing commission of other crimes made by accused's accomplices and truth of which was admitted by accused was admissible to impeach testimony of accomplice who testified in accused's behalf.

2. Robbery ⇐24(1)

Evidence sustained conviction of robbery in the first degree, notwithstanding that accused did not actually enter store with companion who robbed the store but waited in automobile in which they left the scene of the crime. Pen.Code, § 971.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Henry Benton was convicted of robbery in the first degree, and he appeals.

Affirmed.

Henry Benton, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Appellant was convicted of the crime of robbery in the first degree, by a jury, and now appeals from the judgment of conviction and order denying a motion for new trial.

On September 19, 1938, appellant, his half-brother Ralph Benton, and one John Suttle, drove to the city of Modesto, in an automobile. They stopped near a Safeway store at approximately 4:30 o'clock in the afternoon, entered the store, and bought some coca cola. They stayed in the store from about twenty to twenty-five minutes, and then left the premises, entered their automobile, and drove around a few blocks. After an interval of several hours they again parked their automobile near the store. Defendant and John Suttle got out of the automobile. The latter returned to the store, and his testimony at the trial indicates just what he did: "I went up to the store and knocked on the door, and the clerk come to the door and asked me what I wanted, and I told him a coca cola. He opened the door and I went in and I got my coke, went over and drank a little of it, put a gun on him and took the money and marched him into the back room looking for the rest of it; I couldn't get it so I took him out back to the store and left." This happened at about 8 o'clock on the evening of the day mentioned. Defendant did not approach or enter the premises upon this occasion. Suttle then proceeded to where the automobile was parked, and he there met defendant. Both of them entered the automobile in which the third member of the trio, Ralph Benton, had been seated during all of the times mentioned. Before he left the store Suttle took with him over $100 in cash, which came from two cash registers, and was placed in a paper bag by the clerk in the store upon the demand of Suttle. Taking the money with them, the three drove the automobile to the town of Tuolumne, and there divided the proceeds among them equally.

Upon being arraigned for trial, an attorney was appointed by the court to represent defendant, but this attorney thereafter withdrew upon defendant's request. The latter refused an offer of the court to appoint other counsel for him, and stated that he would act in his own behalf and represent himself at the trial. This was done, and the defendant now appears in propria persona upon this appeal.

Appellant opens his argument with the following language: "The case was miserably tried and conducted." An examination of the record fails to substantiate this observation. Although the defendant acted as his own counsel, it would appear that in this case, at least, the old adage that "he who acts as his own counsel has a fool for a client", is very definitely refuted. Defendant showed a surprising knowledge of legal trial tactics, and his statement of his grounds for various objections made, indicates considerable familiarity on his part with legal procedure.

There is one assignment of error in appellant's brief, and that is the insufficiency of the evidence to support the verdict. At the trial a rather unusual situation was presented. Suttle and Ralph Benton had already pleaded guilty to the charge of robbery, which the court found to be of the second degree. At the trial Ralph Benton appeared as a witness for the People,

and Suttle appeared as a witness for the defendant. The chief contention of appellant seems to be that because he did not actually enter the store with Suttle, he could not be convicted of the crime. We are of the opinion that there is ample evidence in the record to sustain the conviction. "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." Section 971, Pen.Code. The clerk in the store at the time of the robbery identified appellant and Suttle as two of the men who had visited the store earlier in the afternoon of the day mentioned. He also positively identified Suttle as the man who committed the robbery. Ralph Benton testified that he, appellant, and Suttle parked their automobile near the Safeway store just prior to the robbery, and that he stayed in the car; that his brother Henry (appellant) and John Suttle left the car; that before they left the car, Suttle had exhibited an automatic pistol; that his brother was the first to return to the car, and Suttle came later; that he saw a paper bag in Suttle's hand, and later learned that there was money in it; that he got a portion of the money, Suttle received a portion, and he did not recall whether or not appellant received any. He admitted, however, on cross-examination, that he recalled telling an officer that the money was divided equally between him, Suttle and appellant. He also admitted that he told the officers that the reason he came to Modesto was to hold up the store. Suttle took the witness stand on the part of the appellant and detailed, as we have stated, just how the robbery occurred. He stated that appellant did not have any part in the affair, and that the latter had never been to Modesto with him.

[1, 2] In connection with the cross-examination of witness Suttle, and by way of impeachment, the prosecution offered, and the court admitted in evidence, a statement made by Suttle and Ralph Benton in Sacramento before two officers of the police department. One of the officers testified (referring to appellant): "I handed him a statement that had been taken from Ralph Benton and John Suttle, and typed by Mr. Smith in longhand. I let him read it, and asked him if it was true. He said, 'Well, I guess it is.'" This statement details the commission of several crimes of like character by Ralph Benton, and Suttle on several occasions, and on one occasion, by Ralph Benton, appellant and Suttle. From this statement it appears without question that these three young men had been consistently engaged in a series of criminal escapades in and around the city of Sacramento. It is urged by appellant that the admission in evidence of this statement was erroneous and highly prejudicial to his case, and that were it not for such statement, he would never have been convicted. We are convinced that there is ample evidence in the record to sustain the conviction without the necessity of resorting to the statement. Unquestionably, the statement could be used in connection with the cross-examination of Suttle, for the purpose of impeachment. There would be a grave question as to whether or not it would be evidence of any facts as against appellant, if there were not evidence in the record to the effect that appellant, after hearing the statement read to him, admitted that it was true. In any event, we are satisfied that the evidence of guilt is so clear and convincing that the conviction would have resulted even though the statement mentioned was never before the jury. If appellant was absolutely innocent of any participation in this crime, as he contends, it is rather strange that he did not appear as a witness in his own behalf, and explain, or attempt to explain the facts and circumstances which point so unerringly to his guilt. No doubt this course of action on his part was another factor which would reasonably lead the jury to believe that he and these other two young men were all equally guilty of the crime.

The record is free of prejudicial error, and there is ample evidence to support the verdict. It is therefore ordered that the order denying the motion for a new trial, and the judgment, be affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

LESTER v. FAIRBAIRN.

Civ. 2424.

District Court of Appeal, Fourth District, California.

April 25, 1939.

Hearing Denied June 22, 1939.

1. Elections ⇐186(4)

Ballot cast for a justice of peace, which contained crosses made with some form of ink not stamped with stamp provided by officers but drawn with edge of stamp or other instrument, was invalid. Pol.Code, § 1205.

2. Elections ⇐180(4)

Ballots for justice of peace, which contained crosses opposite the name of each of two candidates so that it could not be determined for whom voters intended to vote, were properly rejected. Pol.Code, § 1359.

3. Elections ⇐216

Under statute providing that an absent voter may mark his ballot by making a cross with a stamp provided by the officers, with pen and ink, or with an indelible pencil, it was error to reject absentees' ballots on ground that it was possible to erase portions of the marks made with an ordinary eraser. Pol.Code, § 1359.

4. Evidence ⇐519

In election contest, refusal to permit contestee to offer testimony of experts upon question whether part of absentee ballots were in fact marked by indelible pencil as required by statute was error. Pol.Code, § 1359.

5. Elections ⇐216

Absentee ballots, marked with some form of ink with marks which appeared in form of square and as having been stamped with a square instrument similar to square erasers found on pencils, were invalid. Pol.Code, § 1359.

6. Elections ⇐186(4)

Ballots marked with proper stamps superimposed over pencil crosses placed upon the ballots, where it did not appear that pencil crosses were placed thereon for purpose of identifying ballots, were valid. Pol. Code, § 1211, as amended by St.1903, p. 149, § 3.

7. Elections ⇐186(4)

Ballot which was properly stamped was valid as against contention that cross mark opposite name of certain candidate was reprint of cross marks opposite name of another candidate. Pol.Code, § 1211, as amended by St.1903, p. 149, § 3.

8. Elections ⇐186(4)

Ballot marked with regular election stamp on which voter either had too much ink or which was pressed down too hard was valid, as against contention that it was marked with some blunt instrument differing from regulation election stamp. Pol. Code, § 1205.

9. Elections ⇐186(4)

Ballots marked both "yes" and "no" on one of the questions in proposition submitted on the ballot, and containing two red circles around two crosses, which circles were placed thereon by election officers to call attention to fact that voter had voted both ways, were properly counted. Pol.Code, § 1211, as amended by St.1903, p. 149, § 3.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action for a recount of votes cast in an election by Cal D. Lester, contestant, against David Fairbairn, contestee. From a judgment for the contestant, contestee appeals.

Reversed with directions.

Hearing denied by Supreme Court; EDMONDS, J., not participating.

Drumm, Tucker & Drumm, of Santa Ana (J. B. Tucker, of Santa Ana, of counsel), for appellant.

Warren L. Schutz and Leo J. Friis, both of Anaheim, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in an action for a recount of the votes cast in an election held in Orange Township, in Orange County. David Fairbairn was declared by the board of supervisors, acting as a canvassing board, to have been elected to the office of justice of the peace of that township by a majority of eight votes. Cal D. Lester brought this action for a recount, as a result of which he was declared to have been elected by a majority of one vote. From the judgment entered Fairbairn has appealed.

While more than 5000 votes were cast for this office at this election, only a few are here questioned and in these instances the original ballots have been transmitted to this court and are before us.

[1] The first ballot which is questioned is contestant's "exhibit 19", which was counted for Lester. It is very clear that the crosses on this ballot were not made with the stamp provided by the officers, as required by section 1205 of the Political Code. The nature of the stamp provided is apparent from the many other ballots in evidence which, with the exception of the absentee ballots, disclose the form of stamp used. While the crosses on this ballot were made with some form of ink they are not uniform, each is a distinct and individual mark, and it is perfectly clear that each cross was not stamped but was drawn with an edge of the stamp or with some other instrument. The cross marked for Lester having been drawn and not stamped with the stamp provided by the officers, this ballot was improperly counted for him. Morrison v. White, 10 Cal.App.2d 266, 52 P.2d 263.

[2] It is next contended that the court erred in rejecting contestee's exhibits "P" and "X" and that the court should have counted both of these ballots for Fairbairn. In each of these instances a heavy cross is stamped opposite the name of Fairbairn and a lighter cross opposite the name of Lester. It is perfectly clear that neither of these crosses is an offset or blot from another mark, and in each instance a stamped cross clearly appears opposite each name. It cannot be told for whom these voters intended to vote and both ballots were properly rejected. Evarts v. Weise, 176 Cal. 218, 168 P. 122.

The next ballot questioned is contestee's exhibit "M", which was stamped for Fairbairn and rejected by the court. It appears perfectly regular on its face, but it was found in an envelope which was marked "Spoiled and Unused Ballots". However, the ballot was not marked across its face in the manner provided by section 1207 of the Political Code for a spoiled or unused ballot. Further, there is no proof that the envelope in which this ballot was found was marked with the signatures of the election officers, as required by said section. It was suggested at the oral argument that evidence was available which might clarify the situation with respect to this ballot. There is no evidence before us as to the total number of votes cast and the number of spoiled ballots, from which it can be determined whether or not another ballot may have been given to a voter in place of this one. Since a rehearing is necessary, further evidence should be taken relating to the validity or invalidity of this ballot.

This brings us to the ballots cast by the absentee voters, of which twelve were marked for Fairbairn and ten for Lester. Two of those marked for Fairbairn contain crosses made with pen and ink, were accepted and counted, and are not questioned here. The remaining twenty were rejected by the court, nineteen of them on the ground that they had not been marked with an indelible pencil.

Section 1359 of the Political Code provides that an absent voter may mark his ballot by making a cross with the stamp provided by the officers, with pen and ink, or with an indelible pencil. In passing upon these ballots the court stated that the purpose of the statute "is to require the cross to be made by some substance which cannot be readily eradicated or erased". The court further stated: "Now, regardless of the name or brand or the kind of pencil used, if the court or anyone else can take an ordinary lead pencil eraser like the one I hold in my hand and erase that, certainly that isn't the kind of 'indelible pencil' which the statute requires and that is what I did. That is the test I made on every one of those ballots." It appears that the court rejected nineteen of these ballots because he was able to erase portions of the marks made with an ordinary eraser. The court refused to permit the appellant to offer the testimony of experts upon the question as to whether a part or all of these ballots were, in fact, marked by an indelible pencil.

[3, 4] We think that the court erred in this ruling and in rejecting these nineteen ballots on the ground that the crosses marked thereon could be readily erased by an ordinary pencil eraser. The respondent argues that the true meaning of the statute is that a ballot shall be marked with a pencil which makes a mark which is not capable of being removed or erased. The statute does not provide that the mark made by the pencil shall be indelible, but merely that an indelible pencil shall be used. Indelible pencils are very common and most people are more or less familiar with the marks made by them. It requires but slight observation and experiment to demonstrate that the fact that a mark can be erased is not sufficient, in itself, to show that the mark was not made with an indelible pencil. While certain pigments

might be left in the paper after erasure, the mark made by an indelible pencil can frequently be erased leaving an appearance, so far as visible to the naked eye, similar to that left by the erasure of a mark made by an ordinary pencil. A much better test is to moisten the pencil marks. Very often in such a case the mark of an indelible pencil shows a purplish or greenish tinge which is readily discernible. Even that test is not infallible, and much depends upon how the mark is made and the kind and quality of the paper. Of the nineteen ballots here in question, it appears to us that eight of those marked for Fairbairn and seven of those marked for Lester were made with an indelible pencil. One of those marked for Fairbairn appears to have been made with an ordinary pencil, and another marked for Fairbairn and two others marked for Lester appear more doubtful and should be examined with facilities which are not available to us.

In view of what is frequently done by modern scientific methods it seems incredible that properly qualified persons, by the use of powerful microscopes, chemicals and other means, could not throw light upon the question as to whether certain of these ballots were or were not marked with an indelible pencil, although the truth in that regard may not clearly appear from an examination with the naked eye. Expert evidence was peculiarly appropriate in this case and should have been received for any possible aid to the court.

[5] The other absentee ballot, contestee's exhibit (for identification) number 33, while marked with some form of ink was properly rejected. This was one marked for Lester. All of the marks on this ballot are in the form of a square and have the appearance of having been stamped with a square instrument similar to the square erasers found on some pencils. There is no cross and the marking in no manner complies with the requirements of section 1359 of the Political Code and the ballot should not be counted.

[6, 7] The respondent questions certain ballots which were accepted by the court and counted for Fairbairn. It is first contended that contestee's exhibit "Z" and "F–1" were improperly accepted because there were certain distinguishing marks on the ballot. Exhibit "Z", in seventeen places, being all of the places where that voter voted, had a cross made with a pencil and a cross made with the proper stamp superimposed thereon. A similar thing appears on exhibit "F–1", except that the pencil crosses appear on all of the state, congressional and legislative candidates for which the voter voted and does not appear on the remainder of the ballot, the vote for Fairbairn being marked only with the regular stamp. Apparently these voters marked certain of the candidates for whom they intended to vote, with a pencil, and then used the regular stamp. It in no way appears that these pencil crosses were placed upon these ballots for the purpose of identifying them and, under the 1903 amendment to section 1211 of the Political Code (St.1903, p. 149, § 3), the court was justified in accepting and counting these ballots. Turner v. Wilson, 171 Cal. 600, 154 P. 2. It is urged that in contestee's exhibit "O", the cross after the name of Fairbairn is a reprint of the cross mark opposite the name of another candidate and that the ballot should not have been counted. It is perfectly clear that the cross in question is not a reprint of another mark and the court correctly counted the ballot.

[8, 9] The respondent further challenges contestee's exhibits "B-1", "C-1" and "D-1", which were counted by the court in favor of Fairbairn. It is contended that the cross opposite the name of Fairbairn in exhibit "B-1" was stamped with some blunt instrument different from the regulation election stamp. It clearly appears that this cross was made with the regular stamp and that the voter either had too much ink on the stamp or pressed down too hard. It is claimed that exhibits "C-1" and "D-1" contained distinguishing marks in that, in each instance, the voter voted both yes and no on one of the "questions and propositions submitted" and two red circles appear around the two crosses on each ballot. Apparently these were placed thereon by the election officers or someone else to call attention to the fact that the voter had voted both ways on a particular proposition. In any event, both ballots were properly received under the rule set forth in Turner v. Wilson, supra.

The action should be retried and further evidence taken in accordance with the suggestions above made. Obviously, it would serve no useful purpose to recount any of the ballots other than those which have been questioned on this appeal.

The judgment is reversed with directions to the trial court to take further evidence as herein indicated, to make appropriate

findings from the entire evidence in the case and in accordance with the views herein expressed, and to enter a judgment in accordance with such findings.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 403

RUNKLE v. LANE et al.

Civ. 12026.

District Court of Appeal, Second District, Division 1, California.

April 24, 1939.

Appeal and error ⇐786, 1126

Where appeal presented a debatable question of law, motion to dismiss or affirm was denied.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Milton S. Runkle against W. G. Lane and another to rescind three certain documents denominated certificates of assignment which purported to assign an undivided interest in certain notes secured by deed of trust, wherein plaintiff contemporaneously instituted attachment proceedings. From an order denying a motion to dissolve the attachment, defendants appeal. On motion to affirm or dismiss the appeal.

Motion denied.

C. H. Scharnikow and William J. Clark, both of Los Angeles, for appellants.

Thomas F. McCue, of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent has made a motion in this court to dismiss the within appeal from an order of the trial court denying appellants' motion to dissolve and discharge an attachment, or to affirm such order, on the grounds that appellants have failed to present any substantial question and that said appeal appears to have been taken for delay only.

The clerk's transcript reveals that respondent purchased from appellants three certain documents denominated "Certificates of Assignment" which purported to assign to respondent undivided interests in certain notes, each certificate stating: "Note above described is a portion of a loan aggregating $90,000.00 secured by Deed of Trust covering lands in Modoc County, California." Alleging fraud, respondent served notice of rescission and sued for money had and received, and filed contemporaneously with the complaint his affidavit for attachment. Appellants thereupon filed their motion to dissolve the attachment and respondent filed his amended affidavit which was stricken upon motion of appellants. Respondent then filed another amended affidavit in support of the attachment, alleging that the certificates issued to him were void because no permit from the corporation commissioner had first been obtained, and also alleging that if they could be deemed security, such security had become valueless. The trial court denied the motion to dissolve the attachment, and this appeal is prosecuted from such order of denial, in which it is urged (a) that the complaint and the exhibits attached thereto show that respondent had a lien on both real and personal property, and that therefore his claim is secured; (b) that the amended affidavit for attachment is insufficient to support the attachment.

Appellants assert in their opening brief on appeal that the amended affidavit is insufficient because (1) it does not show that respondent's claim is not secured; (2) that it does not show that if originally secured the security has become valueless; (3) that on the contrary it shows that there is security of substantial value.

Respondent in the instant proceeding to dismiss or affirm restates the questions upon appeal and urges the following propositions:

1. That the instrument sued upon in each instance constitutes a corporate security;

2. That because it constitutes such security it is void;

3. That being void it does not constitute any security.

From the foregoing resume it readily appears that the appeal herein presents a debatable question of law. Therefore, the motion to dismiss or affirm is denied. Taketa v. Policy Holders' Life Ins. Association, 127 Cal.App. 758, 16 P.2d 312.

We concur: DORAN, J.; WHITE, J.

32 Cal.App.2d 380

PEOPLE v. CHRISTENSEN.

Cr. 3155.

District Court of Appeal, Second District, Division 1, California.

April 21, 1939.

Infants ⇐20
Rape ⇐52(1)

Evidence *held* sufficient to support conviction of rape and commission of lewd or lascivious acts on or with the body of a child under 14 years of age. Pen.Code, §§ 261, 288.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Nicholas P. Christensen was convicted of rape and commission of lewd or lascivious acts on or with the body of a child under the age of 14 years, and he appeals.

Affirmed.

S. W. Thompson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

DORAN, Justice.

This is an appeal from the judgment and from the order denying the motion for a new trial after a verdict of guilty on four counts, two of which were based on section 288 of the Penal Code and two counts on section 261 of the Penal Code.

The defendant, a married man 51 years of age, was by occupation an auto trimmer. His hours of work were from 5 o'clock in the evening until 1:30 o'clock in the morning. His wife, who was also employed, worked from 9 o'clock in the morning until 5 o'clock in the evening.

The home of the defendant and the home of the prosecutrix were about two blocks apart. The prosecutrix, a girl 13 years of age, testified that she first met the defendant as she was passing in front of his home, at which time her attention was attracted to a kite entangled upon the rear bumper of defendant's car. She asked the defendant for the kite, which he gave her. He then took her by the hand, and at his request she entered his home, where she remained about an hour. Upon this first visit the defendant held her on his lap and talked with her, gave her sixty cents and asked her to return. A day or so later upon her return from school she visited the defendant, at which time the alleged acts occurred. He again gave her sixty cents and told her to return, which she did on another day shortly thereafter, when similar acts occurred. She testified that her return to the defendant's home on several occasions was for the purpose of getting the money that the defendant gave to her.

Fred M. Hash, a witness for the prosecution, testified that he lived on one side of a duplex, the other side of which was occupied by the defendant; that he (Hash) was ill at home with a cold during the last week in April and the first week in May, 1938; that he saw the prosecutrix enter the defendant's house on April 27th at about 3:30 o'clock in the afternoon; that he saw her enter the house again on April 29th and on May 2d, at the same time of the day; that a partition separated his bedroom from the defendant's bedroom; that on one of these times when he saw the prosecutrix go into the house he had occasion to go into the closet in his own home to hang up his little girl's coat, and that he heard the prosecutrix "whining or crying or moaning"; that he reported the matter to the police department on May 2d.

According to the testimony of police officers the defendant admitted that the prosecutrix had been in his home on several occasions and that he had given her money.

The offenses are alleged to have been committed on April 29, and on May 2, 1938.

Appellant contends, in substance, that the evidence is insufficient to support the verdict, and in that connection urges that the statements in the testimony of the prosecutrix were "incredible" and "unreasonable"; that the jury, as indicated by their verdict of not guilty on certain of the counts set forth in the information, disbelieved the story of the prosecutrix, and that the verdict was therefore a compromise verdict.

Appellant's contention that the testimony of the prosecutrix is incredible and unreasonable is based largely on the fact, as the record reveals, that the prosecutrix became somewhat confused at times as to dates, principally as to what occurred on April 27th. The importance of the alleged

confusion on the part of the witness is exaggerated, for the testimony, when taken as a whole, at once refutes its characterization as incredible.

The evidence is sufficient to support the verdict. The fact that the defendant was adjudged guilty on some counts and not guilty on others, under the circumstances, gives rise to no suspicion that the action of the jury was a compromise. The uncertainties about which appellant complains might well account for the verdicts as returned.

It is also contended that the court erred in refusing to give certain instructions tendered by the defendant. From an examination of all of the instructions given, together with those referred to by appellant as having been refused, it is evident that there is no merit to this contention.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.



32 Cal.App.2d 391

Ex parte McNEAL.

Cr. 1673.

District Court of Appeal, Third District, California.

April 22, 1939.

1. Food ⇐5, 6

The Sanitary Bakery Law was enacted under state's police power to enforce sanitary conditions and to procure the use of pure, wholesome ingredients in the manufacturing of bread and pastry. Gen.Laws 1937, Act 610, § 8.

2. Constitutional law ⇐46(3)

The constitutionality of a statute under which petitioner has been convicted could be tested by habeas corpus.

3. Food ⇐1

Under police powers, the Legislature is authorized to enact statutes in interest of public health, regulating the manufacture and sale of foods, including bread. Gen. Laws 1937, Act 610, § 8.

4. Food ⇐1

The Legislature, for benefit of public health, may regulate conditions where food is manufactured, handled, and sold, and also reasonably control business of manufacturing, producing, and handling food, under police powers to prevent fraud, so long as operating rules adopted reasonably tend to prevent fraud and to promote peace, health, or general welfare, provided they do not violate provisions of constitution.

5. Constitutional law ⇐81

Doctrine that police power is a law of necessity determines what is within and what is without the boundaries of such power; not that a police regulation to be legitimate must be an absolute essential to public welfare, but the exigency to be met must so concern such welfare as to suggest, reasonably, necessity for a legislative remedy.

6. Constitutional law ⇐70(3)

Exercise of a state's police power is a matter resting in discretion of Legislature, and courts will not interfere therewith except where regulations adopted are arbitrary, oppressive, or unreasonable.

7. Constitutional law ⇐48

Questions regarding exigencies demanding legislation to prevent fraud, trade abuses, or unsanitary conditions dangerous to public health or detrimental to public welfare, are usually for legislative determination; every reasonable presumption being indulged in by courts in support of Legislature's conclusions, and, in absence of clear showing to contrary, a court cannot substitute its judgment for that of Legislature.

8. Constitutional law ⇐48

A classification adopted by Legislature in a statute will be upheld if any reasonable cause appears for such classification.

9. Constitutional law ⇐48

A statute enacted under police power for purpose of regulating the manufacturing and marketing of a common food product in interest of public health and general welfare should be upheld unless it clearly appears unconstitutional.

10. Food ⇐1

Enactment of a Sanitary Bakery Law requiring a label or trade-mark indicating name of manufacturer to be affixed to each

loaf of bread sold through an agent or intermediate dealer was within the Legislature's "police power." Gen.Laws 1937, Act 610, § 8.

[Ed. Note.—For other definitions of "Police Power," see Words & Phrases.]

11. Food ⇐25

Negligence in permitting glass to be mixed with the dough and baked in bread renders manufacturer liable for damages to a customer injured thereby.

12. Constitutional law ⇐296(1)
Food ⇐1

A Sanitary Bakery Law requiring loaves of bread sold through an agent or intermediate dealer to bear a label or trade-mark identifying manufacturer was not an unwarranted burden upon baker or an unreasonable regulation depriving him of property without due process of law, in view of necessity for precaution in the manufacture and sale of bread to protect consumer. Gen. Laws 1937, Act 610, § 8; U.S.C.A.Const. Amend. 14.

13. Food ⇐1

That Sanitary Bakery Law requiring loaves of bread sold through an agent or intermediate dealer to bear a label or trade-mark identifying manufacturer did not require address of manufacturer to be placed on label or trade-mark did not render such law unconstitutional. Gen.Laws 1937, Act 610, § 8; U.S.C.A.Const. Amend. 14.

14. Trade-marks and trade-names and unfair competition ⇐43

An individual or firm may preserve the exclusive right to use a particular trade-mark. Civ.Code, § 655; Pol.Code, § 3197.

15. Trade-marks and trade-names and unfair competition ⇐45

A trade-mark may become a "public record" by recording it with the secretary of state. Pol.Code, § 3197.

[Ed. Note.—For other definitions of "Public Record," see Words & Phrases.]

16. Food ⇐1

That the Sanitary Bakery Law requiring loaves of bread sold through an agent or intermediate dealer to bear a label or trade-mark identifying manufacturer did not apply to smaller rolls did not render such law discriminatory or unconstitutional; the fact that the greater proportion of bread is sold in loaves and the distinguishing characteristics in the two classes of bread furnishing a sufficient ground to uphold classification as reasonable. Gen.Laws 1937, Act 610, § 8; U.S.C.A.Const. Amend. 14.

17. Food ⇐6

The Sanitary Bakery Law does not prohibit the sale by either the manufacturer or a dealer of old or stale bread, which is wholesome, in the same manner that fresh bread may be sold. Gen.Laws 1937, Act 610, § 8.

18. Constitutional law ⇐81

Under guise of police regulations, the Legislature cannot enact laws which do not pertain to the public health, peace, morals, or general welfare, and which impose unnecessary burdens upon business and property.

19. Food ⇐1

Rule that under guise of police regulations, Legislature cannot enact laws which do not pertain to public health, peace, morals, or general welfare, and which impose unnecessary burdens upon business and property, was inapplicable to a statute requiring a label or trade-mark indicating name of manufacturer to be affixed to loaves of bread sold through an agent or intermediate dealer. Gen.Laws 1937, Act 610, § 8.

Proceeding in the matter of the petition of Goerge McNeal for a writ of habeas corpus to obtain petitioner's liberty from imprisonment under a conviction of a misdemeanor by selling loaves of bread to which labels or trade-marks designating the manufacturer thereof were not attached, contrary to provisions of the Sanitary Bakery Law.

Writ denied and petitioner remanded.

A. D. Ericksen, of Oakland, and R. Platnauer, of Sacramento, for petitioner.

F. C. Clowdsley, Dist. Atty., and Donald D. Boscoe, Asst. Dist. Atty., both of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The petitioner was convicted of a misdemeanor committed by selling loaves of bread to which labels or trademarks designating the manufacturer thereof were not attached, contrary to the provisions of section 8 of the Sanitary Bakery Law of California. Stats.1921, p. 1191, and amendment of 1931, p. 250, 1 Deering's Gen.

Laws of 1937, p. 192, Act 610. The petitioner was imprisoned as a penalty for that offense, and now seeks to regain his liberty by means of habeas corpus.

It is contended the act is unconstitutional for the reason that it imposes onerous burdens on the business of manufacturing bread, and because it unlawfully discriminates between "loaves of bread" as a class, and rolls, buns and biscuits, by requiring labels or trademarks identifying the manufacturer thereof to be attached to the loaves, but fails to compel the identification of the baker of the latter class in that manner.

[1] The bakery statute was enacted under the police power of the state to enforce sanitary conditions and to procure the use of pure, wholesome ingredients in the manufacturing of bread and pastry. Bread is the chief article of food consumed by the human race. The days of homemade bread have passed. The baking of bread is among our greatest industries. More than a million loaves of bread are daily sold to the public in California. It is therefore important that every reasonable precaution should be taken to provide the public with pure, wholesome bread.

The California Sanitary Bakery Law purports to regulate the establishments, machinery, equipment and materials with which bread and pastries are manufactured, and marketed. It specifies in detail the means of maintaining sanitary conditions. It requires the use of pure, wholesome ingredients. Bread which is sold through intermediate dealers must be wrapped with paper to protect it from dirt and contamination. For the same reason, the act provides that "no bakery products, other than hearth-baked bread and rolls" shall be returned from any consumer or other purchaser to the baker or dealer.

The state board of health is authorized to adopt reasonable rules to carry out the purpose of the act. A violation of the provisions of the statute is made a misdemeanor. Section 8 of the Sanitary Bakery Law, under which the petitioner in this proceeding was convicted, reads as follows: "Every loaf of bread made or procured for the purpose of sale, sold or offered for sale except when sold directly from the manufacturer to the consumer, shall have affixed thereon in a conspicuous place a label indicating the manufacturer, or bearing the registered trademark or trade label of such manufacturer. In case of wrapped bread, such information shall be stated in a plain position upon the wrapper of each loaf, and in the case of unwrapped bread shall be stated upon a label no larger than one by one and one-half inches in size and not smaller than one inch by three-quarters of an inch, and such label affixed to an unwrapped loaf shall not be affixed in any manner or with any gums or pastes which are unsanitary or unwholesome."

[2-4] The constitutionality of the statute under which the petitioner was convicted may be properly tested by means of habeas corpus. In re Leach, 215 Cal. 536, 547, 12 P.2d 3; 13 Cal.Jur. 225, sec. 8; 32 A.L.R. 1054, note. Under the police powers of the state, the legislature is authorized to enact statutes in the interest of public health, regulating the manufacture and sale of foods, including bread. 12 Cal.Jur. 584, sec. 1; 26 C.J. 752, secs. 3 and 4; 6 R.C.L. 214, secs. 209, 210; In re Bear, 216 Cal. 536, 15 P.2d 489, 83 A.L.R. 1402; Affonso Bros. v. Brock, Cal. App., 84 P.2d 515; Schmidinger v. Chicago, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364, Ann.Cas.1914B, page 284; State v. Normand, 76 N.H. 541, 85 A. 899, Ann. Cas.1913E, page 996; McDermott v. State, 143 Wis. 18, 126 N.W. 888, 21 Ann.Cas. 1315; 35 A.L.R. 782, note; 83 A.L.R. 1409, note. Not only may the legislature, for the benefit of public health, regulate conditions and surroundings where food is manufactured, handled and sold for human consumption, but it may also reasonably control the business of manufacturing, producing and handling food under the police powers of the state to prevent fraud, so long as the operating rules which are adopted reasonably tend to prevent fraud and to promote the peace, health or general welfare of the public, provided they do not violate the provisions of the state or federal Constitutions. 2 Meigs' Constitution and Courts, p. 802. In 11 American Jurisprudence, page 1053, section 289, it is said: "The rule is established that all trades, callings and occupations may be regulated which affect the public health. * * * Callings relating to dealing in foodstuffs directly affect the public health and hence are regulated. Among the enterprises affected are bakeries, dairies, meat shops, and confectionaries."

[5, 6] The rule regarding the necessity for the enactment of statutes adopted

under the police power for public health or general welfare is expressed in 2 Cooley's Constitutional Limitations, 8th ed., page 1227, as follows:

"'The doctrine that the police power is a law of necessity may well be said to furnish the key to what is within and what is without the boundaries of such power; not that a police regulation to be legitimate must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as to suggest, reasonably, necessity for a legislative remedy.'

"The exercise of the power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property. It is a matter resting in the discretion of the legislature, and the courts will not interfere therewith except where the regulations adopted are arbitrary, oppressive, or unreasonable. Their wisdom or expediency cannot be subjected to judicial review."

It is frequently difficult to determine whether statutes enacted for public health or general welfare impose unnecessary and onerous burdens which deprive one of property without due process of law, or whether classifications of persons or property are reasonable under the circumstances of a particular case.

In 2 Cooley's Constitutional Limitations, 8th edition, page 813, it is said: "A State may classify with reference to an evil to be prevented, and if the class discriminated against is, or reasonably might be, considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. * * * 'It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'"

[7-9] Questions regarding the exigencies which demand legislation to prevent fraud, trade abuses or unsanitary conditions which are dangerous to public health or detrimental to public welfare, are usually problems which must be determined by the legislature. 11 Am.Jur., p. 1065, sec. 296. Every reasonable presumption in that regard is indulged in support of the conclusions reached by the legislature. In the absence of a clear showing to the contrary, a court may not substitute its judgment in that regard for that of the law-making power. If any reasonable cause appears for the classification adopted by the legislature it will be upheld. 11 Am. Jur., p. 1088, sec. 306. A statute which is enacted under the police power for the avowed purpose of regulating the manufacturing and marketing of a common food product in the interest of public health and general welfare should be upheld unless it clearly appears to be unconstitutional. In re Sutter-Butte By-Pass Assessment No. 6, 191 Cal. 650, 671, 218 P. 27.

In Reid v. State of Colorado, 187 U.S. 137, 23 S.Ct. 92, at page 98, 47 L.Ed., page 108, at page 116, it is said in that regard: "The principle is universal that legislation, whether by Congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear; and as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the state."

Regarding the discretion of the legislature to determine what trade evils require regulation, it is said in 1 Cooley's Constitutional Limitations, 8th edition, page 264: "What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful."

In Schmidinger v. City of Chicago, supra, the Supreme Court said [226 U.S. 578, 33 S.Ct. 184]: "This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred."

[10, 11] It is conceded that a high degree of care should be exercised in manufacturing and handling food prepared for

human consumption, among the commonest of which is bread, to prevent contamination, infection and disease. The petitioner in this case does not challenge the Sanitary Bakery Law as a whole. It is merely contended that section 8 of that act, which requires a label or trademark indicating the name of the manufacturer thereof to be affixed to each loaf of bread, as distinguished from rolls or buns, is unconstitutional. We are of the opinion the bakery statute is not only within the police power of the legislature to enact, but that it is a necessary, wise and valuable regulation of an important industry for the preservation of public health and welfare. Probably no other item of food furnishes so large a part of the diet of human beings as does bread. A tremendous quantity of it is manufactured, sold and consumed daily throughout the civilized world. It is sold over counters, carried by hand and delivered by machines in crowded cities and in the highways and byways of remote districts. Bread is susceptible to contamination from the presence of so-called "rope" which is caused by a slimy substance permeated with bacillus panis. Carelessness or fraud may lead to the use of impure or deleterious ingredients in the making of bread. Negligence in permitting glass to be mixed with the dough and baked in bread renders the manufacturer liable for damages to a customer who is injured thereby. Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833. How important it is to employ every precaution to procure pure, wholesome bread for the multitude of those who use it as their staple article of food. It is a reassuring precaution against contamination and infection in bread, cakes, cookies, buns, pies and all sorts of pastry to find them in stores neatly wrapped for sale in wax paper or cellophane. It is a guarantee of comparatively pure, wholesome food free from germs, dirt and contamination.

[12] We may not say, in view of the apparent necessity for great precaution in the manufacture and sale of bread, that the requirement to place upon each loaf a label or trademark identifying the maker of the bread is an unwarranted, onerous burden upon the baker; that it is an unreasonable regulation or that it deprives him of property without due process of law in violation of the Fourteenth Amendment of the federal Constitution, U.S.C.A. A label containing the name or trademark of the manufacturer is required to be placed on each loaf which is sold through an intermediate dealer, and not directly from the baker to the consumer, to enable the purchaser or the officers to trace the identity of the manufacturer when the bread is found to be unfit for human use on account of violations of the provisions of the act. Except for the presence of the label or trademark, a manufacturer who is guilty of wilful violation of the statute or of fraud in making or marketing the bread might escape the penalty of his offense and continue to perpetrate the wrong to the detriment of the public. The presence of the label or trademark furnishes the means of identifying the manufacturer and of enforcing the law.

[13-15] Section 8 of the act is not unconstitutional or ineffectual merely because the address of the manufacturer is not also required to be placed on the label or trademark. The provision would make the discovery of the manufacturer easier and more certain. The legislature no doubt assumed that when the consumer bought his bread directly from the manufacturer he could readily identify him, and when the consumer purchased bread from an intermediate dealer, who might be handling the bread of several manufacturers, the dealer could more certainly identify each producer by means of the labels or trademarks contained on the loaves. At least the presence of the labels or trademarks would aid in identifying the manufacturers of deleterious bread. The owner of a trademark may be easily traced. An individual or firm may preserve the exclusive right to use a particular trademark. Ida May Co., Inc. v. Ida May Ensign, 20 Cal.App.2d 339, 66 P.2d 727; section 655, Civ.Code; section 3197, Pol.Code. A trademark may become a public record by recording it with the secretary of state. (Section 3197, Pol.Code; 24 Cal.Jur. 623, sec. 11.)

[16] We are of the opinion section 8 of the Bakery Act is not discriminatory or unconstitutional merely because rolls are excepted from the requirement that each loaf of bread shall have attached to it, when sold through an intermediate dealer, a label or trademark indicating the manufacturer thereof. There appears to be good reason for classifying loaves of bread as distinguished from smaller rolls. Bread is ordinarily sold in loaves. The great bulk of bread which is sold daily

upon the market is in the form of loaves of a specified and uniform size and weight. The very fact that bread is usually sold in loaves, that by far the greater proportion of bread is marketed in that form, has been held to furnish sufficient ground for upholding such a classification as reasonable. The rolls are baked with a hard crust which entirely surrounds them, and which renders them less susceptible to contamination from absorption or germs acquired in handling them. The large loaf, as a rule, has a crust only on the top and bottom. It contains a greater mass of porous substance and is, therefore, much more liable to deterioration or infection from surrounding conditions or from handling. We are not warranted in holding that section 8 of the act is void because it applies only to loaves of bread as distinguished from rolls.

[17] There is nothing in the act to prohibit the sale of so-called "stale bread" which is wholesome, in the same manner that fresh bread may be sold. The act merely precludes a purchaser of bread or pastry from returning or exchanging wholesome food which has not been used. That provision was undoubtedly enacted to minimize or prevent the danger of reselling bread which might be more likely to have become infected by unsanitary conditions in private homes or public eating places. The act does not prohibit the sale by either the manufacturer or a dealer of old or stale bread which is wholesome.

In support of his contention that section 8 of the act is unconstitutional for the reason that it imposes upon the baker onerous burdens by requiring the labels or trademarks designating the manufacturer of bread to be attached to each loaf, and because the exclusion of bread rolls from that requirement is an asserted unreasonable classification of commodities, the petitioner relies on the following cited authorities: In re Foley, 172 Cal. 744, 158 P. 1034, Ann.Cas.1918A, 180; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A., N.S., 184, 109 Am.St.Rep. 183; Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A., N.S., 588, 3 Ann.Cas. 878, and Jewett Bros. & Jewett v. Smail, 20 S.D. 232, 105 N.W. 738.

We are of the opinion the preceding cases are not in conflict with what we have said regarding the constitutionality of the Sanitary Bakery Law of California. Those cases may be readily distinguished on principle from the present proceeding, with the possible exception of the South Dakota case. In the Smail case, supra, it was held that a statute which made it unlawful to sell or offer for sale any article of prepared foods unless the true name and address of the manufacturer were plainly printed on the package or container, constituted *an unreasonable interference with interstate and foreign commerce*. Interstate commerce is not involved in the present action. No question was raised in this case regarding the effect of the Bakery Act upon interstate commerce.

In the Foley case, supra, it was held that a statute was unreasonable, onerous in the burdens which it imposed, and unconstitutional, which required a poultry dealer to clearly mark upon each egg received by him from outside the state of California the word "Imported", to display in his place of business a conspicuous sign reading, "Imported Eggs Sold Here", and requiring him to regularly report to the state board of health the number and dates of his receipts and sales of eggs. It was held that these requirements infringed upon interstate commerce, and that they did not reasonably tend to prevent fraud or deception in the sale of eggs.

However, in the later case of In re Bear, 216 Cal. 536, 15 P.2d 489, 83 A.L.R. 1402, the Supreme Court definitely held that a statute is neither unreasonable, discriminatory nor unconstitutional, which requires every person who sells imported, liquid or dried eggs (Stats.1931, p. 584) to have such products first inspected and certified, to clearly mark each package or container as "imported egg products", and to conspicuously display in his place of business a sign reading, "frozen eggs * * imported from without the United States used here". Section 5.

The case of Ex parte Drexel, supra, relied on by the appellant, appears to have no bearing upon the question of requiring a label or trademark identifying the manufacturer of bread to be placed on each loaf sold. That opinion does appropriately quote certain fundamental principles which are involved in the extent to which the legislative power may invade private rights to own and control property. But those principles do not conflict with what we have previously said regarding the

Sanitary Bakery Law. The Drexel case merely involved the validity of the Anti Trade Stamp or Coupon Act of California. Stats.1905, p. 67. That act was held to be unconstitutional because it interfered with the right of an individual to lawfully contract. The court said [147 Cal. 763, 82 P. 434]:

"An ordinary trading stamp or coupon is, in substance, a mere form of allowing discounts on cash payments, and its issuance is entirely harmless *and within the constitutional right of contract.* * * *

"Our conclusion is that the said act of March 7, 1905, so far as it undertakes to make the issuance of trading stamps and coupons such as were used by the petitioners herein a misdemeanor, is unconstitutional and void."

Nor is the case of Ex parte Hayden, supra, upon which the petitioner also relies, in conflict with what we have said. That case is clearly distinguishable from the present proceeding. The petitioner, Hayden, was convicted of violating a statute which required every person who shipped fruit from any point in this state to conspicuously stamp, stencil or label every box, package or barrel with a statement designating "the county and immediate locality in which such fruit was grown". Stats.1903, p. 338, § 1. That act did not purport to have been passed in the interest of health or public welfare. It did not help to identify the manufacturer or packer. It had no relation to or tendency to prevent fraud, deceit, or the sale of inferior, defective or unwholesome fruit. The court said in that regard [147 Cal. 649, 82 P. 317]: "It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others."

[18] The court did appropriately say in that case, after mentioning the general purposes for which the legislature is authorized to enact laws under its police powers for public health, peace, morals or general welfare, that: "The Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property."

[19] With that statement we are in hearty accord. But we are of the opinion it does not apply to the clear purpose of the legislature in the present case to wisely and reasonably regulate the manufacture and sale of pies and pastry for the general health and welfare of the public.

Many authorities support the constitutionality of acts which require the attachment of labels to packages of commodities disclosing the ingredients or contents thereof. Such statutes are uniformly upheld as a proper exercise of the police power in the interest of preserving the public health. 57 A.L.R., p. 686, note.

In Polk Company v. Glover, D.C., 22 F.Supp. 575, the constitutionality of an act was upheld which required every container used for citrus fruit juice produced in the state of Florida to have stamped on the tin or glass the word "Florida". It was held to be unlawful for any person to can for sale juice from any fruit grown in that state, without so marking the container.

In the following New York and Minnesota cases it was held that statutes requiring the placing of labels on packages of food materials showing the ingredients, the names and addresses of the manufacturers thereof were not unconstitutional, discriminatory nor in conflict with personal rights to conduct legitimate private business or to contract in relation thereto. People v. Bishopp, 106 App.Div. 266, 94 N.Y.S. 773; People v. Windholz, 92 App.Div. 569, 86 N.Y.S. 1015; State v. Sherod, 80 Minn. 446, 83 N.W. 417, 50 L.R.A. 660, 81 Am.St.Rep. 268.

We conclude that the requirement of section 8 of the Sanitary Bakery Law to affix labels or trademarks identifying the manufacturer of loaves of bread which are sold through an intermediate dealer or agent is a reasonable regulation of the bakery business to prevent fraud and to procure wholesome food products. It does not impose on the business onerous burdens, or infringe upon personal rights to conduct legitimate private business. Nor does it deprive the owner of property without due process of law.

The writ is denied and the petitioner is remanded.

We concur: PULLEN, P. J.; TUTTLE, J.

32 Cal.App.2d 382

DAVIDSON v. AMERICAN LIQUID GAS CORPORATION et al.

Civ. 2240.

District Court of Appeal, Fourth District, California.

April 21, 1939.

1. Negligence ⇐121(2)

Generally, res ipsa loquitur doctrine is inapplicable, where plaintiff sets out specifically negligent acts or omissions complained of, instead of relying on general allegation of negligence, in complaint.

2. Gas ⇐20(2)

A complaint, alleging that defendants, in refilling plaintiff's gas tanks, negligently permitted gas to escape, ignite, and burn plaintiff's house, did not allege specific acts of negligence, and hence did not prevent application of res ipsa loquitur doctrine.

3. Negligence ⇐3

The essence of "negligence" is failure to exercise due care and take proper precaution in particular case.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

4. Negligence ⇐121(2)

The "res ipsa loquitur doctrine" is that, where thing which caused injury sued for is shown to be under management of defendant or his servants and accident is such as does not happen in ordinary course of things, if those having management or control of such thing use proper care, it affords reasonable evidence that accident arose from want of care, in absence of explanation by defendant.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

5. Negligence ⇐121(2)

To justify invocation of "res ipsa loquitur doctrine," instrumentality which caused injury sued for must have been under defendant's exclusive management, and doctrine is inapplicable where cause of accident is unexplained and it might have been due to one of several causes for some of which defendant is not responsible.

6. Negligence ⇐121(2)

When cause of injury sued for is established by witnesses' testimony as to defendant's negligent acts, res ipsa loquitur doctrine is inapplicable.

7. Gas ⇐20(2)

In action for damages to plaintiff's house and contents by fire, resulting from escape of gas being transferred from defendant's tank truck to plaintiff's storage tanks, evidence justified trial court's finding that fire was not caused by plaintiff's negligence, but by defendant's negligence in allowing excess amount of gas to escape.

8. Appeal and error ⇐931(1)

In reviewing question whether damages sued for were caused by defendants' negligence on appeal from judgment for plaintiff, all inferences reasonably possible to be drawn from evidence most favorable to plaintiff must be indulged by Court of Appeal in order to sustain judgment.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mike Davidson against the American Liquid Gas Corporation and another for damages to plaintiff's dwelling house and its contents as alleged result of defendants' negligence in permitting escape of gas being transferred from defendant corporation's tank truck to storage tanks on plaintiff's premises. Judgment for plaintiff, and defendants appeal.

Affirmed.

Tripp, Penney & Callaway, of Los Angeles, for appellants.

K. Kuyumjian and Hayhurst & Gibson, all of Fresno, for respondent.

GRIFFIN, Justice.

This action was instituted by Mike Davidson against the American Liquid Gas Corporation and C. E. Coen for damages to the respondent's dwelling house and contents alleged to have been caused by the negligence of the appellants in permitting Butane gas to escape during the transfer of the gas from a tank truck of the appellants to two storage tanks installed by the respondent on his premises. The gas was procured from the appellant corporation for use as fuel in the respondent's home. Respondent owned and procured the two metal tanks adjacent to his house for the purpose of storage of the gas supplied by the appellant American Liquid Gas Corpo-

ration, a dealer in Butane gas. On January 5, 1938, the appellant C. E. Coen, employed by the appellant American Liquid Gas Corporation, visited the respondent's premises for the purpose of refilling the respondent's gas tanks in accordance with a standing order for such service. The atmosphere was heavy and foggy. Appellant Coen was familiar with respondent's premises and with the make of respondent's storage tanks and had absolute control and management of the equipment belonging to the appellant American Liquid Gas Corporation. While appellant Coen was refilling the tanks respondent was milking a cow. Appellant Coen's young son, about 13 years of age, was seated in the driver's seat of the truck. A man in the neighborhood by the name of Cecil Dodson came up to the back end of the truck, stood there and conversed with appellant Coen while he finished filling the tanks. Coen and Dodson were talking so loudly that they disturbed Mrs. Davidson and awakened the baby in the house, both of whom were in the front or west room of respondent's home. During the process of filling the tanks a blast occurred. Dodson, who was standing back of the truck, stated that the truck moved two or three feet and a flash hit him and burned his sweater, his right eye and the back of his neck. Respondent's house and the household furnishings located therein were totally destroyed by the fire. Respondent's tanks were of standard construction and were those commonly used for the storage of Butane gas.

There was no explanation given by appellants as to the cause of the fire; no showing that respondent's storage tanks were defective or improperly installed. The driver Coen, drove near the house and close to the tanks on the south side of respondent's home. The gas was pumped by means of the motor from the truck through a rubber hose which was attached near the middle of the truck. The engine of the truck was left running during the entire filling process. Respondent's tanks were located immediately adjacent to the outer walls of his residence and were so installed that they could have been easily removed, filled and replaced. However, Coen testified that they did not remove more than five per cent of the tanks when refilling them. The tanks were fitted with two valves, one of which was used for a "fill" valve and the other for an "escape" valve. The tank could not be filled unless the "escape" valve was left open. These 50-gallon tanks were maintained on a low platform adjacent to the house where they were connected for fuel supply. A judgment in the sum of $3,825 was obtained by respondent against both appellants.

[1-3] Appellants' first contention is that the doctrine of res ipsa loquitur could not be relied upon by respondent in this case because the complaint alleges specific acts of negligence, and cites as authority Ingledue v. Davidson, 102 Cal.App. 697, 283 P. 837; Hall v. San Joaquin Light & Power Corp., 5 Cal.App.2d 755, 43 P.2d 856; Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202; Keller v. Pac. Tel. & Tel. Co., 2 Cal.App.2d 513, 38 P.2d 182, and Klenzendorf v. Shasta Union High School District, 4 Cal.App.2d 164, 40 P.2d 878.

The general rule is that where a plaintiff in his complaint gives an explanation of the cause of the action, that is to say, where the plaintiff, instead of relying on a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply. The allegations of negligence are found in paragraph IV of respondent's complaint, which reads as follows:

"That from time to time as the gas from said tanks was exhausted it became necessary to replenish said fuel by refilling said tanks with butane; that said defendants were dealers in said gas and were accustomed to and did from time to time, as needed, service or refill plaintiff's said tanks with said gas; that said defendants maintained and used for that purpose a certain motor truck with tank thereon and on the 5th day of January, 1938, said defendants drove said motor tank truck onto plaintiff's property and proceeded to refill plaintiff's said tanks with said gas; *that in doing so said defendants failed to exercise proper care and caution and negligently and carelessly suffered, allowed and permitted gas to escape and ignite, and so burn, damage and completely destroy plaintiff's said home together with all the fixtures, furniture and other personal property therein.*"

We have italicized the portions relating to the allegation of negligence. We are of the opinion that the allegations did not in effect allege specific acts of negligence but at most merely charged that appellants negligently allowed gas to escape and ignite and burn respondent's home. No attempt was made to describe the negligence in de-

tail or charge why or under what circumstances it occurred. Such an allegation is analogous to a complaint of an injury by a guest in an automobile who alleges that the operator so negligently and carelessly drove and operated the car as to strike an obstruction, causing the injury complained of, or of a brick falling from a building upon a passerby below and inflicting damage. We are of the opinion, therefore, that the form of the complaint is not such as to prevent the application of the doctrine. The essence of negligence is the failure to exercise due care and take proper precaution in a particular case. This the pleader alleges, but as to the particular causes which constitute the detail of the defendant's omissions, the pleader apparently knew nothing and alleged nothing. Whether the explosion was due to defective contrivances or to what other specific defect or neglect, the pleader did not know and did not attempt to set forth in his pleadings. The pleadings in the instant case come well within the holding in Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740. See, also, Ales v. Ryan, 8 Cal. 2d 82, 93, 64 P.2d 409; Damgaard v. Oakland High School District, 212 Cal. 316, 318, 298 P. 983; Atkinson v. United Railroads of San Francisco, 71 Cal.App. 82, 89, 234 P. 863; Lejeune v. General Petroleum Corporation, 128 Cal.App. 404, 412, 18 P. 2d 429.

[4] Appellants next contend that the doctrine of res ipsa loquitur does not apply to the facts of the instant case, citing the case of White v. Spreckels, 10 Cal.App. 287, 101 P. 920, and cases therein reviewed, wherein it was stated the doctrine of res ipsa loquitur only applies where the cause of the injury is shown to be under the specific control and management of the defendant and can have no application where it is under the management and control of the plaintiff and her employer, nor in a case of divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is responsible. The generally accepted statement of the res ipsa loquitur doctrine most frequently adopted and applied is this: "Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, at page 687, 80 P.2d 185, at page 196, 1016.

[5] To justify the invocation of the rule, the instrumentality which caused the injury must have been under the exclusive management of the defendant, and it does not apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible. Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873.

[6] The principal case was apparently not tried upon the theory of the doctrine of res ipsa loquitur. Respondent called witnesses to establish the negligent acts. When the cause is thus established the doctrine is not then applicable. Gorden v. Goldberg, 3 Cal.App.2d 659, 40 P.2d 276.

Let us assume for the purpose of argument that the excessive amount of gas that escaped was due to an unnoticed natural defect in the gas tank owned by the respondent that was being filled by appellant Coen. In that event it could not rightfully be said that this instrumentality would be under the exclusive control and management of appellant. Therefore, the doctrine would not apply under the rule above cited. Hill v. Pacific Gas & Electric Company, 22 Cal.App. 788, 136 P. 492; White v. Spreckels, supra; Biddlecomb v. Haydon, supra; Ingledue v. Davidson, supra; Lewis v. Southern California Gas Co., 92 Cal.App. 670, 268 P. 930. However, there is language used in the case of Hilson v. Pacific Gas & Electric Company, 131 Cal.App. 427, 21 P.2d 662, 666, whereby the general rule is relaxed and gives some impetus to respondent's contention. The court therein approved an instruction to the jury to the effect "that only if they found that the explosion was proximately caused by the 'flow, supply and distribution of gas to the building' over which defendant 'admitted that it had control' would the res ipsa loquitur doctrine be applicable."

[7] Respondent contends that assuming the doctrine of res ipsa loquitur is not applicable, there is sufficient evidence of negligence to sustain the findings of the trial court to the effect that appellants negligently allowed an excessive amount of gas to escape. The evidence shows that there

was a floor furnace in the front or west room of the house. It was about six feet west of respondent's tanks and four or five feet back from the south side of the house. A four-inch galvanized pipe led from the furnace underneath the floor to the south side of the house and up through the roof. There was a trap door on the south side leading to the furnace, but it was closed tight so nothing could get under the house. The windows on the south side of the house were closed and Mrs. Davidson extinguished the fire in the furnace with the exception of the pilot light, when the truck drove in. She was in the front room with the baby and sitting within two or three feet of the furnace. She testified definitely that there was no flash from the furnace in the house and that the fire and explosion originated outside and did not start at the furnace. Mrs. Davidson saw the gas man and another man conversing with each other. They carried on such a loud conversation that it almost made her nervous and awakened her baby.

Appellant Coen testified that he smoked occasionally but was not smoking at the time of the explosion. The truck engine was running during the entire filling process. The exhaust from the truck was within a few feet of the tanks. There were no lighted fires around except the fire from the exhaust and the lighted pilot as above described. Two witnesses testified that just prior to the fire they heard a noise from the truck which sounded like two shots being fired (which they described as a backfire). This latter description was ordered stricken from the record. Immediately thereafter they saw a big flame in back of the truck; the two tanks were burning and fire was shooting up the side of the house. The driver could not loosen the hose attached from the truck tank to respondent's tank, so he mounted the truck and, by force, broke the connection at the end of the hose, drove into an adjoining field, and by smothering the fire emanating from the end of the hose extinguished that blaze. He then returned to the scene of the fire. Two witnesses stated that soon thereafter Coen returned to his truck, took something out of his pocket, laid it down on the ground and buried it with his left foot.

Coen testified that when these particular tanks were filled it was necessary for him to open a valve (denominated a 10 per cent valve) in order that he could determine when the tank was full; that when this valve was opened it permitted vaporized Butane to come into the air; that a whistling noise developed when the tank was filled. In addition to this warning, he had on his truck another gauge that would approximate the amount of Butane released from his truck tank. During the time of the transfer of the gas as above related, the driver Coen was engaged in conversation with some stranger who arrived at the truck shortly before the explosion.

From the facts and circumstances of this case we are of the opinion that the trial court was justified in believing that the fire was not caused by any negligence on the part of respondent and that there are sufficient facts and circumstances established from which it could rightfully and reasonably infer and conclude that appellants allowed an excess amount of gas to escape and that by reason of that negligent act the fire occurred and resulted in the damage alleged. Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544.

In Merrill v. Los Angeles Gas & Electric Company, 158 Cal. 499, 111 P. 534, 139 Am. St.Rep. 134, it was held that "The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoined with the original act to create the disastrous result."

In Ray v. Pacific Gas & Electric Company, 3 Cal.App.2d 329, 330, 39 P.2d 812, we find this: "The rule that a person or concern engaged in distributing an essentially dangerous commodity is held to a very high degree of care to see that in its distribution and while under the control of the distributor it shall not be permitted to harm anyone, as applied to gas, is limited to the time that the gas is contained in the gas company's own pipes or containers, unless it has negligently allowed it to escape, or, having escaped, has created a dangerous hazard known or which should be know to the distributor, and he has neglected to remedy the condition." See, also, Bergen v. Tulare County Power Company, 173 Cal. 709, 161 P. 269.

[8] In reviewing a question of this kind all the inferences reasonably possible to be drawn from the evidence most favorable to the respondent must be indulged in by this court in order to sustain the judgment. Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 174 P. 44; Mah See

v. North American Accident Insurance Company, 190 Cal. 421, 213 P. 42, 26 A.L.R. 123.

By the process of elimination of all evidence of any possible negligence on the part of respondent or that the excess amount of escaping gas might have been ignited by any act of his, and in view of the fact that the escaping gas was ignited and the remaining evidence produced indicates that the only reasonable inference that could be drawn from the circumstances was that the back-fire from the exhaust ignited the excess escaping gas, we feel that the court was reasonably justified in finding that the damage was the result of appellants' negligence.

We have reached the conclusion that as the trial court drew the inference of negligence on the part of Coen from the evidence and having particularly found that such negligence existed and that it was a proximate cause of the fire and resulting loss to respondent, we cannot disturb the judgment on appeal.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

32 Cal.App.2d 418

PEOPLE v. ELLIS.

Cr. 3199.

District Court of Appeal, Second District, Division 2, California.

April 26, 1939.

Criminal law ⇐1131(4)

Where appellant failed to make his appearance, file briefs or seek an extension of time, motion to dismiss the appeal was granted. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding by the State of California against Berne Ellis. From a judgment in favor of the State, the defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

Harry D. Parker and Raymond Stanbury, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

PER CURIAM.

This case comes before the court on the motion of the attorney-general to dismiss the appeal under section 1253 of the Penal Code upon the failure of the appellant to enter an appearance. No briefs have been filed by the appellant; no extensions of time have been requested; and no appearance has been made by him.

Motion granted.

32 Cal.App.2d 405

WIERSMA v. CITY OF LONG BEACH.

Civ. 12034.

District Court of Appeal, Second District, Division 1, California.

April 24, 1939.

1. Appeal and error ⇐800

The failure to file printed transcript of record within 40 days after certification as required by court rule did not require dismissal of appeal, where transcript was on file when notice of motion to dismiss appeal was given. Code Civ.Proc. § 953a; Rules for Supreme Court and District Courts of Appeal, rule 1, § 1; rule 5, § 1.

2. Appeal and error ⇐767(1)

The appellant's opening brief would not be struck from files for failure to state separately and under appropriate heading each point relied upon as required by court rule, but appellant would be given opportunity to file a supplement setting forth the points separately and under appropriate headings. Rules of Supreme Court and District Courts of Appeal, rule 8, §§ 2, 4.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Henry Wiersma against the City of Long Beach, a municipal corporation. From the judgment, the plaintiff appealed, and the defendant moved to dismiss the appeal and to strike from the files the opening brief of the plaintiff.

Motion to dismiss appeal and to strike opening brief from files denied.

Frank E. Downey, of Long Beach, for appellant.

Joseph A. Ball, of Long Beach, C. A. Pinkham, of Los Angeles, and Geo. W. Trammell, Jr., City Atty., of Long Beach, for respondent.

YORK, Presiding Justice.

Respondents move to dismiss the appeal herein and to strike from the files the opening brief of appellant for the following reasons:

1. That said appellant has not filed the printed transcript of the record in said cause within the time specified by rule I of the Rules for the Supreme Court and the District Courts of Appeal.

2. That in his opening brief appellant has not complied with section 2 of rule VIII of said Rules, in that he has failed and neglected to set forth on the first page thereof a brief statement of the question involved, and in that he has not presented therein separately and under an appropriate heading each point relied upon by him, and the nature of the question to be presented.

[1] There was filed in this court on October 11, 1938, a typewritten transcript which was certified by the trial judge under date of August 31, 1938, as constituting the judgment roll, as the same appeared in the files and records of the within action, followed by the court reporter's transcript, documentary evidence, and other matters, proceedings and records, and in which appears a stipulation of the attorneys of record dated July 18, 1938, as to the correctness both of the judgment roll and the reporter's transcript. The certificate of the clerk of the superior court attached to the notice of motion herein shows that while no clerk's transcript under section 953a of the Code of Civil Procedure was filed, an engrossed bill of exceptions was filed, settled and allowed on August 31, 1938, and that, according to the register of actions, the reporter's transcript was settled on August 31, 1938.

While it is true that forty-one days elapsed between the date of settlement and certification and the date of filing, and rule I, section 1 of the Rules of the Supreme Court and District Courts of Appeal provides that the transcript shall be filed within forty days after certification, nevertheless, rule V, section 1 provides: "If the transcript * * * though not filed within the time prescribed, be on file at the time such notice (to dismiss) is given, that fact shall be sufficient answer to the motion." The notice of motion in the instant proceeding to dismiss was filed January 3, 1939.

[2] In his statement of the questions involved, appellant in his opening brief sets forth eight questions spreading such statement over two and one-half pages, instead of complying with section 2, rule VIII to the effect that such statement "in its entirety should not exceed twenty lines, must never exceed one page * * *". Appellant also makes ten specifications of error, but in presenting his points he neither states them separately nor under appropriate headings, as required by said rule VIII, supra. However, section 4, said rule VIII, as amended in 1937, provides that "For any failure to observe this rule, the court shall not dismiss the appeal, but may, of its own motion, or on motion of an opposing party, order a proper statement or index to be made, or the transcript or briefs to be amended or a supplement thereto to be filed, supplying such omissions and curing such defects as are in violation of this rule." See Kindred v. Pacific Auto Insurance Co., 10 Cal.2d 463, 75 P.2d 69.

It is therefore suggested that appellant file a supplement to his opening brief setting forth his points separately and under appropriate headings.

The motion to dismiss the appeal and to strike the opening brief from the files is denied.

We concur: DORAN, J.; WHITE, J.

32 Cal.App.2d 419

KNOWLTON v. HEZMALHALCH, City Clerk.

Civ. 2417.

District Court of Appeal, Fourth District, California.

April 26, 1939.

1. Municipal corporations ⇐108

Under the city initiative and referendum statutes, right of signers to withdraw names from referendum petition is restricted to the period before the filing of the petition with the officer or body authorized to receive it. Gen.Laws 1937, Act 3651, § 1.

2. Municipal corporations ⇐108

City clerk was without authority to withdraw names or to allow names to be withdrawn from referendum petition after it had been filed with him, since the filing of petition with city clerk was "presenting it to the legislative body" within meaning of the referendum act as against contention that signers of petition had the right to withdraw names until referendum petition was filed with or presented to city council. Gen.Laws 1937, Act 3651, § 1.

3. Mandamus ⇐154(10)

In proceeding for writ of mandate to compel city clerk to certify referendum petition as sufficient, it was error to refuse to permit an amendment which would show that several acts referred to in the referendum petition were connected together or constituted one act. Gen.Laws 1937, Act 3651, § 1.

4. Municipal corporations ⇐108

The selection and designation of a city hall site and steps incident to the determination that a city hall should be erected on proposed site are legislative acts subject to referendum. Gen.Laws 1937, Act 3651, § 1.

5. Municipal corporations ⇐108

The right of initiative and referendum is a right reserved to the people under the Constitution and not a grant of power and should be liberally construed in order to uphold basic right. Gen.Laws 1937, Act 3651, § 1; Const. art. 4, § 1.

6. Municipal corporations ⇐108

Separate acts of city council relating to selection of city hall site and construction of city hall constituted the declaration of a public purpose and provision for ways and means of its accomplishment and was subject to referendum as an entire act and it was not necessary that separate petition be procured for each of the resolutions relating to the construction of the city hall. Gen. Laws 1937, Act 3651, § 1.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Petition for writ of mandate by Hollis H. Knowlton against Fred C. Hezmalhalch, City Clerk, to compel defendant to certify a referendum petition and supplements thereto as sufficient. From a judgment for the defendant, plaintiff appeals.

Reversed.

Sam L. Collins and Harold A. McCabe, both of Fullerton, for appellant.

Lloyd S. Verry, of Fullerton, and George F. Holden, of Anaheim, for respondent.

GRIFFIN, Justice.

This is an appeal by petitioner from a judgment made and entered by the superior court of Orange county dismissing the petition for a writ of mandate seeking to compel respondent city clerk of the city of Fullerton to certify a certain referendum petition and supplement thereto as sufficient. A demurrer by respondent to the petition was sustained without leave to amend and a judgment of dismissal was entered pursuant to the order.

The appeal involves the question whether the petition for writ of mandate states facts sufficient to constitute a cause of action against respondent. Summarizing the petition, we find that appellant therein alleges: (1) Petitioner is a taxpayer and qualified elector of the city of Fullerton. (2) That respondent is the duly elected, qualified and acting city clerk of the city of Fullerton. (3) A referendum petition was filed in the office of the respondent city clerk on August 20, 1938 (exhibit "A"). The referendum petition contained signatures of 626 registered qualified electors of said city and the total number of qualified electors of said city was 6122. (4) On August 29, 1938, respondent city clerk made and filed his certificate applicable to the signatures on said referendum petition and a true copy of such certificate is annexed as exhibit "B". (5) A supplemental referendum petition was filed in the office of the respondent city clerk on September 8, 1938 (exhibit "A"), it being in the exact form of the original referendum petition,

and there was attached thereto the signatures of 100 registered qualified electors of said city. (6) On September 17, 1938, the respondent city clerk made and filed his certificate applicable to the signatures on said supplemental petition (exhibit "C"). (7) On August 25, 1938, requests for the withdrawal of names from the original referendum petition were made and filed in the office of the respondent city clerk (exhibit "D"). (8) On August 27, 1938, further requests for the withdrawal of names from the original referendum petition were made and filed in the office of the respondent city clerk (exhibit "E"). (9) Certain other requests for the withdrawal of names from the original referendum petition were made and filed in the office of the respondent city clerk (exhibit "F"). The requests were so made and filed on the dates set opposite the respective names in said exhibit. (10) All of said requests for withdrawal were for names appearing on the original referendum petition, and were subsequent to the date of the filing thereof in the office of the respondent city clerk. (11) No requests for the withdrawal of names from said petitions were considered by respondent city clerk other than those therein set forth, and all such signatures were disallowed by respondent solely upon the ground of said withdrawals and for no other reason. (12) Respondent failed to examine and from the records of registration ascertain whether said petitions were sufficient, in that he allowed and certified to certain requests for the withdrawal of names, as hereinbefore alleged, and failed to certify and count, as registered qualified electors, certain other names appearing on said referendum petitions.

The petition concludes with a prayer that a writ of mandate issue, directing respondent either to certify said original and supplemental petitions or to show cause why he should not be compelled to certify the said petitions as sufficient, to totally disregard all requests for withdrawal of names from the original petition subsequent to the filing thereof in the office of respondent, and to certify to other names appearing on said petition as the names of registered qualified electors of the city of Fullerton.

Exhibit "A", attached to the petition, purports to be a referendum petition, directed to the city council of the city of Fullerton, and reads as follows:

"We, the undersigned registered, qualified electors of the City of Fullerton, California, hereby protest against the passage of a legislative act or acts passed by you on July 22, 1938, and August 2, 1938, as hereinafter set forth, and hereby request that your honorable body reconsider and entirely repeal the same or submit the question of the passage of the said legislative act or acts to the vote of the electors, either at a regular municipal election or a special municipal election called for the purpose. Said legislative act or acts are as follows and are numbered I to III inclusive.

"I.

"Part of the Minutes of a Regularly Adjourned Meeting of the City Council Held at the City Hall 7:30 p. m. July 22, '38.

"The Mayor stated that on investigation as to the purchase of possible sites for a City Hall, the two most likely proved to be the Northwest corner of Highland and Commonwealth, a total footage of 242 feet for $27,800.00, and the Northeast corner, a total of 225 feet for $25,050.00. The latter being not only a saving of $3,250.00 over the price of two years ago but the lowest in price for the present location, the Council had decided to purchase same for the City Hall Site.

"Resolution Number *920*.

"A Resolution of the City Council of the City of Fullerton Directing the Purchase of Certain Real Property.

"Was read and on motion duly seconded, passed. * * *

"On motion of Councilman Muckenthaler, seconded by Councilman Kohlenberger, the following Minute Resolution was unanimously carried: * * *

"Whereas, the City Council of the City of Fullerton has elected to purchase certain real property in the City of Fullerton and

"Resolved, That there is hereby appropriated from the General Fund of the City of Fullerton the sum of $25,050.00, to be used for the purchase of said real property, and the proper city officials are hereby authorized and empowered to draw from the said General Fund a sum not exceeding $25,050.00, and are directed to deposit the same immediately, or as soon as escrow instructions have been written and deposited in escrow with escrow officer, handling the escrow in the purchase of said real property.

"II.

Resolution Number *920*.

"A Resolution of the City Council of the City of Fullerton, Directing the Purchase of Certain Real Property.

"Whereas, There exists a necessity for the immediate purchase of a certain real property situated in the City of Fullerton; and

"Whereas, It is deemed advisable and very advantageous and for the best interests of the City of Fullerton to purchase that certain property situated at the northeast corner of Commonwealth and Highland Avenues in the City of Fullerton; and

"Whereas, The City of Fullerton has secured options looking to the purchase of the property described in this Resolution for the sum of $25,050.00; and

"Whereas, It appears that said sum of $25,050.00 is a fair and reasonable price for said property; now therefore be it

"Resolved, By the City Council of the City of Fullerton in a regularly adjourned meeting that the City of Fullerton purchase the following property, to wit: (legal description) and that T. K. Gowen, one of its members, the City Clerk, and the Assistant City Attorney be and they are hereby directed and empowered to consummate said purchase for the City of Fullerton before the option expiration date; and said T. K. Gowen and the Assistant City Attorney and City Clerk are hereby directed and authorized to open an escrow and do any and all acts necessary or convenient and proper to consummate the immediate purchase of this property. * * *"

There is appended to the foregoing the certificate of the city clerk that the foregoing resolution was unanimously passed at a regularly adjourned meeting of the city council held on July 22, 1938. There also appears the mayor's signed approval of said resolution.

"III.

"Part of the Minutes of Regular Meeting of City Council Held at the City Hall 7:30 p. m. August 2, 1938.

"Minute Resolution

"It was moved by Councilman Kohlenberger and seconded by councilman Cole and unanimously carried

"That the following described property situated in the City of Fullerton, Orange County, California, now the property of the City of Fullerton, to wit: (legal description) be and the same is hereby designated as a site for a City Hall and that steps be taken immediately looking to the construction of the City Hall for the City of Fullerton on said property.

"Minute Resolution

"It was moved by Councilman Muckenthaler and seconded by Councilman Bowen and unanimously carried

"That G. Stanley Wilson, architect, be directed and authorized to proceed with plans and take all necessary steps for a W. P. A. project for construction of a City Hall on the property described as (legal description) and that the City Engineer, City Attorney, and other city officials lend G. Stanley Wilson such assistance in said project as may be necessary or convenient for an early construction of said City Hall."

Exhibit "B", attached to the petition, purports to be the certification by respondent city clerk to the referendum petition, and recites in substance as follows: Respondent has examined the names on the referendum petition filed with him, and finds that there are 626 signatures thereon, and that 57 of the persons who signed the same are not eligible to vote, because they are not registered or have not correctly signed the petition. He further certifies that he has filed in his office requests from 59 of the signers of said petition to have their names withdrawn therefrom, thus leaving only 510 good and sufficient signatures on said petition; that there are 6122 registered electors in the city of Fullerton, and that signatures of 612 qualified electors are necessary for certification of the referendum petition as sufficient; and that the petition does not have sufficient signatures of registered qualified electors, as required by law. The certification is signed by respondent and is dated August 29, 1938.

Exhibit "C", attached to the petition, purports to be the certification of respondent city clerk to the supplemental referendum petition, and recites in substance as follows: Respondent certified that he has examined the supplemental petition filed with him,and finds that there are 100 names thereon, and that 6 of the persons whose names appear thereon are not eligible to vote because they are not duly registered qualified electors, leaving 94 valid registered qualified electors; that there were 510 good and sufficient signatures on the original petition, which, with the 94 signatures, makes a total of 604 names; that since the

certification of the original petition, requests have been received from 11 of the persons who signed the petitions to have their names withdrawn therefrom, leaving a total of 593 names on the original and supplemental petitions; that there are 6,122 registered electors in the city of Fullerton, and the total number of signatures required for certification of a referendum petition is 613; and that the petition as filed, together with the supplemental petition, does not have sufficient signatures as required by law.

Exhibit "D" attached to said petition, consists of a request for the withdrawal of the names of two registered qualified electors of the city of Fullerton from the referendum petition, and is marked as filed on August 25, 1938.

Exhibit "E", attached to the petition, is a similar request for withdrawal from the referendum petition of the names of 56 registered qualified electors of the city of Fullerton, filed August 27, 1938.

Exhibit "F", attached to the petition, is a similar request for the withdrawal from the referendum petition of the names of 11 registered qualified electors of the city of Fullerton. Four of said requests are marked as filed September 6, 1938, two as filed September 10, 1938, and three as filed September 12, 1938.

On October 7, 1938, respondent city clerk filed a demurrer to the petition for writ of mandate and for grounds of demurrer alleged that (1) the petition failed to state facts sufficient to constitute a cause of action against respondent; and (2) that the petition was uncertain, ambiguous and indefinite in that in paragraphs 3 and 5 thereof it could not be ascertained what portions or sections of exhibit "A" are legislative acts; nor what portions or sections of said exhibit are requested to be submitted to the electors by reason of said referendum petition; nor that said alleged referendum petition was ever presented to the legislative body of said city, as required by law.

The main question presented on this appeal may be stated thus: Was the respondent clerk clothed with authority to withdraw the names or to allow names to be withdrawn from the referendum petition after it had been filed with him under the circumstances related and to disregard those names requested to be withdrawn in making his certificate and return? If this authority to withdraw the names existed and the certificate of the clerk as issued reflects the correct result of his examination from the records of registration, then the petition falls short of having the required number of qualified voters necessary to refer any legislative act to the electorate. Otherwise, the referendum petition is signed by a sufficient number of qualified electors of the city.

The statute applicable to the referendum herein sought to be invoked is the City Initiative and Referendum Law (Stats. 1917, p. 655, as amended, Deering's Gen. Laws 1937, Act 3651), section 1 of which provides in part:

"Except an ordinance calling or otherwise relating to an election, no ordinance passed by the legislative body of a city or town * * * shall go into effect before thirty days from its final passage.

"And if, during said thirty days, a petition, signed by not less than ten per cent of the electors of such city or town, protesting against the passage of such ordinance, be presented to the legislative body, the same shall thereupon be suspended from going into operation, and it shall be the duty of the legislative body to reconsider such ordinance. If said legislative body shall thereupon not entirely repeal said ordinance, it shall submit the same to a vote of the electors either at a regular municipal election or a special election to be called for the purpose, and such ordinance shall not go into effect or become operative unless a majority of the voters voting upon the same shall vote in favor thereof. Such petitions and the provisions of the law relative to the duty of the clerk in regard thereto and the manner of voting thereon, shall conform to the rules provided therein for the initiation of legislation by the electors."

Some of the provisions of the act in reference to initiation of legislation by the electors are:

"Ordinances may be enacted by and for any incorporated city or town of the state in the manner following: Any proposed ordinance may be submitted to the legislative body of such city or town by a petition *filed with the clerk of such legislative body* after being signed by qualified electors of the city or town not less in number than the percentages hereinafter required. * * *

"Within ten days from the date of filing such petition, the clerk shall examine, and from the records of registration, ascertain whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate showing the result of said examination. * * *

"If by the clerk's certificate the petition is shown to be insufficient, it may be supplemented within ten days from the date of such certificate by the filing of additional papers, duplicates of the original petition except as to the names signed. The clerk shall, within ten days after such supplementing papers are filed, make like examination of the supplementing petition, and if his certificate shall show that all the names to such petition, including the supplemental papers, are still insufficient, no action on the petition shall be mandatory on the legislative body; but the petition shall *remain on file* as a public record; * * *

"If the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body at its next regular session." (Italics ours.)

Respondent endeavors to justify his certificate and refusal to certify the sufficiency of the referendum petition as to qualified electors signing the same upon the theory that the act above cited requires that the referendum petition be *presented to the legislative body* within 30 days, and that the *filing* of such a petition *with the city clerk* was not *presenting it to the legislative body* within the meaning of the statute and therefore the signers of the petition had the legal right to withdraw their names from it up until the time the referendum petition was filed with or presented to the *city council* and not the city clerk; that the referendum petition was never in fact presented to the city council, as such, and therefore the time for withdrawal of names had, as yet, not run, citing Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370; Locher v. Walsh, 17 Cal.App. 727, 121 P. 712; McAulay v. Board of Supervisors, 178 Cal. 628, 174 P. 30.

No provision appears either in our Constitution or general laws for withdrawal of names from a referendum petition. Nevertheless, the great majority of cases recognize the right of withdrawal as incidental to the right of the petition itself. A conflict exists, however, in many states as to the period within which this right may be exercised. Many of the decisions hold that withdrawal is permissible up to the time that "final action is taken" or until the jurisdiction of the officer to whom the petition is addressed attaches. See State ex rel. Mohr v. Seattle, 59 Wash. 68, 109 P. 309; Littell v. Board of Supervisors, 198 Ill. 205, 65 N.E. 78; Territory v. Mayor and City Council of Roswell, 16 N.M. 340, 117 P. 846, 35 L.R.A.,N.S., 1113.

[1] In this state a different rule has been laid down, restricting the right of withdrawal to the period before the filing of the petition with the officer or body authorized to receive it. Uhl v. Collins, supra.

In Beecham v. Burns, 34 Cal.App. 754, 168 P. 1058, 1061, the court said: "The remaining question in this case is based upon the claim that certain signers of the recall petition requested the clerk to withdraw their names therefrom after the petition was filed with the clerk and before that officer had certified the result of his examination as required by the statute. * * * The clerk is not clothed with authority to alter the petition when it has been filed; he is not authorized to receive extraneous evidence of its contents, or to base his certificate upon statements made to him by electors who have signed it. His certificate must show the result of an examination whereby 'from the records of registration' he shall ascertain whether or not 'said petition' is signed by the requisite number of qualified voters. In our opinion, the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed."

[2] It was aptly stated in the Uhl case that in order to accomplish the intent, the proponents of a measure must be able to rely upon the signatures obtained, and if continually forced to seek new ones to take the place of withdrawals, they may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed and the work of securing signatures abandoned, it seems to us would make the system wholly unworkable. This mere implied power of the signer, which is not expressly provided for in the Constitution or statutes, cannot be used so as to jeopardize the exercise of the constitutional right itself.

Construing the referendum provisions of Act No. 3651, above cited, with the sections relating to the procedure in reference to initiative petitions, to us it becomes immediately apparent, and the conclusion is irresistible, that respondent's claimed justification in refusing to certify the petition as sufficient, for this reason would be a strained construction of the statute. We are firmly of the opinion that the filing of the referendum petition with the city clerk, who in fact is the clerk of the legislative body, constitutes the act *of presenting it to the legislative body*. If it were otherwise, any city council, maliciously conspiring to defeat the object and purpose of the referendum law, could adopt a legislative act repugnant to the interests of the public and purposely adjourn for a longer period than 30 days. In such case there would be no legislative body in session with whom referendum petitions could be filed or to whom they might be presented. Under the circumstances, the construction given this act by respondent would become palpably fallacious and justice would become but a fleeting fancy.

Applying the rule announced in Uhl v. Collins, supra, to the facts pleaded in this case, the original and supplemental petitions contain a sufficient number of names of qualified electors and exceed in number the required 613.

The remaining point presented and raised by the demurrer, which is necessary to determine on this appeal, may be stated as follows: Respondent contends here, as he did in the trial court, that the act or acts as set forth in the referendum petition are multifarious, that they constitute several independent acts, part of which are legislative and part of which are administrative and not legislative in character. He contends, therefore, that they are not subject to the right of referendum, citing Bricker v. Banks, 98 Cal.App. 87, 276 P. 399; Woodlawn v. Cain, 135 Ala. 369, 33 So. 149; Dwyer v. City Council of the City of Berkeley, 200 Cal. 505, 253 P. 932; Foster v. City Council of the City of Berkeley, 201 Cal. 769, 255 P. 1118; Riedman v. Brison, 217 Cal. 383, 18 P.2d 947; McKevitt v. City of Sacramento etc., 55 Cal.App. 117, 203 P. 132; Burdick v. City of San Diego, Cal.App., 84 P.2d 1064; Hyde v. Wilde, 51 Cal.App. 82, 196 P. 118; Chase v. Kalber, 28 Cal.App. 561, 153 P. 397.

Respondent argues that under the law but one single legislative enactment may be embraced in any given petition for a referendum, and that a petition for referendum which includes more than one legislative measure within its scope is defective and not entitled to be filed, certified or otherwise acted upon, and claims that it definitely appears that the referendum petition herein seeks to subject at least six purported legislative acts of the city council of the city of Fullerton to a single vote of the electorate, thereby depriving the voter, as well as the person approached to sign the petition, of the right to freely exercise the suffrage guaranteed him by the state Constitution and the referendum law, citing Bennett v. Drullard, 27 Cal.App. 180, 149 P. 368, 369. In that case the appellant petitioned for a writ of mandate to compel the city council and city clerk of the city of Santa Cruz to submit a certain initiative ordinance to the electors of that city. Accompanying such proposed ordinance and contained in the same initiative petition, were two alternative propositions, purporting to make certain changes in the main proposed ordinances, which alternative propositions petitioner also sought to have submitted and voted upon at said election. The petition for a writ was denied in the superior court and in affirming that decision the District Court of Appeal adopted the opinion of the trial court and quoted therefrom as follows:

"On the first point, that is, the claim that an initiative petition may contain more than one ordinance, no provision of the city charter to that effect has been shown to the court, and after a somewhat exhaustive search the court has been unable to find any. On the contrary, in every section throughout the article of the charter dealing with the initiative the singular, 'ordinance,' is used, and there is nothing contained in said sections which gives the slightest encouragement to the claim of petitioner."

In Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 P. 977, 978, three legislative acts were sought to be submitted to referendum and a separate petition for referendum was employed and a mandate proceeding instituted as to each. In that case the court said:

"These two resolutions are dependent upon that involved in case No. 7270. They need not be separately considered. * * *

"The resolutions of the Richmond city council come within the principles established by these authorities. They involv-

ed and required a determination by the council that the public interest of the city required that it should have a city hall; that the same should be located on the land offered for that purpose; that said offer should be accepted; that a suitable building should be erected thereon; that the money of the city should be appropriated and used in the construction thereof; and that, when completed, the building should be occupied and used by the city officers as a city hall and for municipal purposes, and the declaration by the council that all of these things should be done accordingly. *This constituted a declaration of a public purpose* and a provision for ways and means of its accomplishment. As said in the quotation from People v. Parks, 58 Cal. [624], 643, it was to that *extent a thing* which the legislative power alone may declare and determine. The council could consider the questions of public good, public interests, and public policy involved solely by virtue of and in the exercise of its legislative powers, and its *action* thereon *was clearly an act in the exercise of that power.*" (Italics ours.)

It is to be noted that the court therein considered the resolutions as dependent upon one another and as one act and referred to the act repeatedly in the singular, saying, "This constituted * * * a public purpose", that "it was to that extent a thing", and that "its action thereon was clearly an act in the exercise of that power".

It seems clear that the court considered it one act and done for one purpose, even though included therein was the purchasing and acquiring of real property upon which the city hall was to be located. Logically, then, in the instant case, the only way in which the people could intelligently vote upon the act of the council would be to vote upon the entire act. To do otherwise would lead to confusion. To refuse the right to vote, simply because of carelessness or intentional confusion by the legislative body itself, would be to allow the council to do indirectly that which it could not do directly, i. e., defeat the right of referendum, and this certainly would not amount to a liberal construction of the initiative and referendum law, for which the law itself provides (Deering's Gen.Laws, Act 3651). Section 1, paragraphed "Liberal Construction", provides as follows: "All the provisions of this statute are to be liberally construed for the purpose of ascertaining and enforcing the will of the electors."

[3] Appellant in his brief recites "that during the argument, when the court stated that it did not believe the petition was sufficient because it did not appear on its face that the act or acts were in any way connected together or constituted one act, the attorneys for the petitioner stated that they would like to amend the petition to allege, in substance, that all of the acts or parts of an act set forth in the petition were connected together and were parts of one and the same act, towit, selecting a city hall site and locating a city hall and city offices thereon. Such amendment, however, was refused, and the court said in substance, that the only way to cure this defect was to have a separate referendum petition for each act of the council. The statutory thirty-day period having elapsed, the petitioner could not circulate additional referendum petitions and so stated to the court, whereupon the court issued the order sustaining the demurrer without leave to amend."

An amendment to the complaint should have been allowed. It is appellant's contention that the matter or matters as set forth in the petition were simply the form and manner that the council chose to exercise the legislative act of selecting a city hall site and locating city offices thereon, and that the form and manner which the council chose, whatever might have been its reason or purpose for doing so, could not defeat the right of referendum; that all of these preliminary steps, to-wit, setting aside the money, acquiring the property, designating the city hall site, and finally authorizing plans and specifications for the early construction of a city hall on the property, were procedural steps, and when considered together, were legislative in character and connected together in their commissions, citing Burdick v. City of San Diego, supra, and Harbor Center Land Co. v. Richmond, 38 Cal.App. 315, 176 P. 50.

[4] The different parts of the act, standing alone and by themselves, are indefinite and uncertain and incapable of being understood. They are interdependent, one upon the other, because it takes all of them to make a complete act, and each act could not be intelligently voted upon separately by the people. To do so would lead to much confusion. If the act could be divided into separate parts as the

council did in passing it, the parts would have to be grouped together in order to determine what the act of the council really was. It is well settled in California that the selection and designation of a city hall site and the steps incident to the determination that a city hall should be erected on the proposed site, are legislative acts subject to referendum. Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509; Burdick v. City of San Diego, supra.

[5] In approaching the question presented, we must examine the pleadings and facts in the light of the provision of the initiative and referendum act that "All the provisions of this statute are to be liberally construed for the purpose of ascertaining and enforcing the will of the electors." The right of initiative and referendum is a right reserved to the people under the Constitution, and not a grant of power. Therefore it should be liberally construed in order to uphold this basic right. Art. IV, sec. 1, Constitution of California. This same power is reserved to the electors of each county, city and county, and city and town of the state, to be exercised under such procedure as may be provided by law. Hopping v. Council of the City of Richmond, supra; Ley v. Dominguez, 212 Cal. 587, 299 P. 713. The law will not allow a person to do indirectly that which he cannot do directly, that is, defeat the right of referendum of a legislative act by purposely causing a legislative act to be divided into several separate acts.

[6] Under the first part of the minutes of the council meeting of July 22, 1938, the mayor stated that the council had decided to purchase the property in question for a *city hall site*. Immediately following that, and at the same meeting, a resolution was adopted setting aside the purchase price and directing the purchase of certain property, without designating the purpose of the purchase, i. e., that it was for a city hall site. If the council decided to perform a legislative act upon the statement of the mayor in an open meeting and if the minute entry designating the intention of the city council to purchase a city hall site is essentially necessary to construe the intent of the council in a subsequent resolution appropriating funds and directing the purchase of property, respondent cannot complain of multifariousness. The resolution of August 2, 1938, when considered with the other resolutions, merely designates the site for a city hall. A subsequent minute resolution authorized a certain architect to proceed with plans and construction. The referendum petition is prepared in the most logical manner obtainable in order to express the will of the petitioners. There is no conflict between the various portions of the petition. Considered together, they constitute a legislative act occurring within thirty days prior to the filing of the petition. The reasons for the application of a strict rule which might apply to a proposed ordinance instituted by an initiative measure such as stated in Bennett v. Drullard, supra, should not be held to apply to the referendum. The appellant was obliged to adopt the form chosen by the city council in determining that the public interest of the city required that it should have a city hall; that the same should be located on the land offered for that purpose; that the offer should be accepted; that a suitable building should be erected thereon; that money belonging to the city should be appropriated and used in the construction thereof; and that when completed, the building should be occupied and used by the city officers as a city hall. All of these separate acts constituted a declaration of a public purpose and a provision for ways and means of its accomplishment. Hopping v. Council of the City of Richmond, supra. If the council elected to adopt a separate resolution or ordinance for each of these acts stated, could it be rightfully said that it would be necessary to secure a separate petition and separate signatures for the purpose of submitting each of the resolutions to the people? This would be but a mechanical view of the law and would render inefficacious for any purpose the constitutional guaranty of the right of referendum.

In the light of the reasoning herein expressed, we are of the opinion that the judgment of dismissal should be reversed. The court is directed to overrule the demurrer. The judgment is reversed.

I concur: BARNARD, P. J.

CALIFORNIA REPORTER

IN VOLUME

90 PACIFIC REPORTER
SECOND SERIES

13 Cal.2d 343

STEVENS et al. v. OAKDALE IRR. DIST.

Sac. 5223.

Supreme Court of California.

April 26, 1939.

Rehearing Denied May 25, 1939.

1. Waters and water courses ⇐127, 130, 142

Generally, producer of artificial water flow owes lower riparian users thereof no obligation to continue maintenance of such flow, and they acquire no right against him by appropriation or prescription to continued augmentation of natural volume of stream.

2. Waters and water courses ⇐151

While lower riparian proprietors may acquire rights in such portions of foreign flow of water in stream as have been abandoned by producer of such flow, such rights are subject to contingency that supply may be intermittent or terminated by producer.

3. Waters and water courses ⇐142

Appropriators of foreign waters, imported into creek from river draining different area by irrigation district on latter's lands above point of appropriators' diversion, acquired no right to compel district to continue such importation.

4. Waters and water courses ⇐151

Waters, brought into stream from different watershed and reduced to possession by riparian owners, are private property during such possession, but property therein ceases when possession of actual water is relinquished or lost by discharge thereof without intent to recapture it.

5. Waters and water courses ⇐151

An irrigation district's abandonment of such portions of water, imported by it into creek from river draining different area, as it permitted to drain down to lower riparian owners' land, conferred on latter no right to compel like abandonment in future or control district's use of imported water on its own lands.

6. Waters and water courses ⇐151

The discharge of considerable volume of artificial flow of water from works, erected by irrigation district to bring water into creek from river draining different area, during development of irrigation system, did not constitute abandonment of district's right to use such waters or impose duty thereon to maintain same volume of discharge always.

7. Waters and water courses ⇐142

One diverting appropriable water from stream by expenditure of money and labor is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to wastage from surface run-off and deep percolation necessarily incident to practical irrigation.

8. Waters and water courses ⇐142

One producing flow of foreign water for beneficial use and thereafter permitting it to drain down natural stream channel ordinarily owes lower riparian claimants no duty to continue to import supply or maintain volume of discharge into stream at fixed rate.

9. Waters and water courses ⇐142

Generally, irrigation district, importing water from river, passing it through irrigation works and discharging it into natural creek bed in another watershed, may change flow thereof or volume of water discharged from its works into second stream or stop flow entirely above point where water leaves district's works or lands.

10. Waters and water courses ⇐144

Where producer of foreign flow of water into stream recaptures it before it passes from his lands and control, he has right to make temporary use of natural channel traversing his property as conduit or drain for such flow so long as normal conditions on stream are not injuriously affected.

11. Estoppel ⇐62(8)

Neither expenditures by persons appropriating foreign waters, imported into stream from river draining different area by irrigation district on its lands above appropriators' point of diversion, district's knowledge of such expenditures, nor its silence during construction of diversion system, established estoppel of district to assert its title to such waters, in absence of showing of any turpitude in district's conduct.

12. Waters and water courses ⇐138

Riparian owners, appropriating foreign waters, imported into creek by irrigation district on latter's lands above such owners' point of diversion, acquired no title thereto by adverse possession, as their taking thereof was not hostile to district's title, but mere taking of water, as distinguished from water right, to which district had relinquished all claim.

In Bank.

Appeal from Superior Court, San Joaquin County; A. Caminetti, Jr., Judge.

Action by R. Stevens and wife against the Oakdale Irrigation District to recover damages caused by deprivation of water for irrigation purposes, enjoin defendant from maintaining sump and pumping plant for recapture of waste, spill, and seepage water from creek, and compel it to permit such water to drain down stream channel in accustomed manner. Judgment for plaintiffs, and defendant appeals.

Reversed.

Griffin & Boone, of Modesto, for appellant.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondents.

PER CURIAM.

The sole question for decision is that of the right of plaintiffs, appropriators of foreign waters, to restrain the producer of the foreign flow (defendant irrigation district) from increasing its beneficial use of such waters by recapturing them within its own boundaries, thus cutting off their escape and drainage in accustomed manner down a natural stream channel to plaintiffs' land and point of diversion.

The trial court entered judgment decreeing that as against defendant, plaintiffs have the right to two cubic feet of water per second continuous flow in the creek over their land, perpetually enjoining any interference by defendant with this right, and awarding plaintiffs damages in the sum of $3,000, together with costs. Defendant has appealed.

Concerning the essential facts there is little dispute. The Stanislaus river, a typical western stream having its source in the high snows of the Sierra Nevada Mountains, flows in a general westerly direction across the San Joaquin valley, and empties into the San Joaquin river. Lone Tree creek is also a tributary of the San Joaquin river, but it flows from the low foothills of the Sierra Nevada range, and under natural conditions is fed solely by rain water from them, and not by the snows; therefore, it carries water only in the season of heavy rains, about October to May, and is dry during the remainder of the year. The watershed and drainage area of the Stanislaus river is entirely different from that of the Lone Tree creek, and the meandering courses of the two streams are some five to fifteen miles distant one from the other.

The land of plaintiffs is located in an arid portion of the San Joaquin valley, riparian to Lone Tree creek, and for many years plaintiffs and their predecessors have utilized the waters of the creek for irrigation. Some seven miles upstream from this land of plaintiffs, the creek traverses the property of defendant irrigation district. Defendant district was organized in the year 1909. It covers an area of approximately 70,000 acres, which territory is susceptible of irrigation by waters diverted from the Stanislaus river. About the year 1912 defendant commenced to conduct water from the river through its irrigation ditches and laterals, and the portions of this flow which reached points without the watershed of the river but within the watershed of the Lone Tree creek, were permitted to enter the creek bed as seepage, waste, and spill, and to drain down to plaintiffs' premises. The result was that after the year 1912 there was a continuous flow of water past plaintiffs' land in augmentation of the intermittent natural flow of the stream. In 1927, at a cost of over one million dollars, defendant constructed the Melones reservoir on the Stanislaus river, for the purpose of procuring storage water with which to continue irrigation after exhaustion of the normal flow of the river in the middle of summer. The use of this reservoir increased the amount of water available to defendant during the late summer for irrigation of its lands in the vicinity of Lone Tree creek, and consequently created a corresponding increase and regularity of flow in the creek channel at plaintiffs' point of diversion. Subsequent to the year 1926, so the trial court found, this flow exceeded two cubic feet per second of water the year round. In 1927, plaintiffs filed notice of appropriation, followed by an application to the state division of water rights, and on July 15, 1929, received a permit to appropriate, from April first to November thirtieth of each year, two cubic feet per second continuous flow over and across their land of waters of the creek. They thereupon commenced the construction of an adequate diverting system, including dam, laterals, ditches, and canals. In all, during the next few years, they expended in excess of $7,000. The trial court found that defendant had knowledge of this construction work.

In the spring of 1934, defendant for the first time, manifested an intention to recapture the waste, spill, and seepage water from the creek, and to reapply it to beneficial uses. At a point within its own boundaries, and above the land of plaintiffs, it built a dam and commenced to pump from the creek, thus depriving plaintiffs of the flow from which they had been irrigating an average of 100 acres each year. In the fall of 1934, defendant removed the dam, in its place dug a large sump in the course of the creek, and established a pumping plant therein. As a result of this activity plaintiffs were deprived of water during the irrigating seasons of the years 1934, 1935, and 1936, and were unable to raise and mature crops on their land, to their damage in the sum of $3,000.

The present action was commenced in July, 1934, but by supplemental pleadings the issues were enlarged to embrace defendant's activities up to the fall of 1936. Plaintiffs' final prayer was for the recovery of damages sustained up to that time, and for an injunction restraining defendant from maintaining the sump and pumping plant, and compelling it to permit the water to drain down the stream channel in accustomed manner. By its pleadings defendant asked for a declaration of its ownership and right to use all of the waters flowing into the creek as a result of its operations.

No issue whatsoever was raised concerning the respective rights of the parties in and to the natural flow of the creek. The sole subject of controversy was the status of the foreign waters brought into the creek watershed by defendant. Furthermore, plaintiffs attempted to limit even this issue, in that they did not claim a right to compel defendant to continue importation of the foreign flow, but merely asserted that they were entitled to enjoin defendant from recapturing it after it had once drained into the channel of the creek.

Upon trial of the cause the court found, in addition to the facts which have already been related, that from 1912 to the spring of 1934 plaintiffs and their immediate predecessors made complete beneficial use, to and including the amount of two cubic second feet, of all seepage, waste, and spill water flowing in the creek during the irrigation seasons of each year, and that such use was open, notorious, continuous, uninterrupted, under claim of right, and hostile and adverse to the rights of any other person in and to use of the water during said periods. Further the court found it to be true that the "defendant abandoned its rights to the water it allowed and/or allows to get into Lone Tree Creek as seepage, waste and spill", and that plaintiffs acquired a right to two second feet continuous flow prior to the time that defendant manifested any intention of attempting to recapture the waste, spill and seepage water from the creek. Upon these premises the court rested its conclusion and judgment that plaintiffs, as against defendant, have the right to take all of the water flowing in the creek to the extent of two cubic second feet continuous flow over their land, and that defendant is perpetually enjoined from in any manner interfering therewith.

Defendant seeks a reversal of the judgment, contending that the real purport of the adjudication is to impress upon it a duty to continue to conduct from the Stanislaus river, and pass through its irrigation system, a constantly sufficient quantity of water to produce a flow in Lone Tree creek equal to plaintiffs' requirement. Apart from the question of the scope of the judgment, this contention touches the principal point of dispute on this appeal, to-wit: What is the extent of the right which a down stream proprietor, by appropriation and use of abandoned foreign water, may acquire against the producer of the flow?

It is plaintiffs' theory that, regardless of whether a lower claimant may compel continuance of importation of a foreign water supply, once such water has actually been conducted into the foreign watershed and drained into a natural watercourse therein, the further interception or recapture of the flow by the producer may constitute an invasion of a right thereto acquired by the lower claimant—and this despite the fact that the retaking occurs before the water leaves the control of the producer or passes the boundaries of his land. Defendant, on the other hand, vigorously asserts that the lower appropriator of the foreign supply is not only without right to enforce continued importation of the water into the second watershed, but he is also without right to compel the producer to continue abandoning any particular portion of the flow. The status of the imported water is not changed, according to defendant, by the mere fact that the producer, upon his own property within the second watershed, uses the channel of a natural watercourse as a temporary conduit or drain, retaking the water therefrom for further beneficial application within his boundaries.

[1,2] It is the general rule, probably subject to exceptions not here involved, that the producer of an artificial flow is for the most part under no obligation to lower claimants to continue to maintain it. At any time he may forsake the practice, and lower users will not have acquired a right against him, either by appropriation or prescription, to continued augmentation of the natural volume of the stream. E. C. Horst Co. v. New Blue Point Min. Co., 177 Cal. 631, 171 P. 417; Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 187 P. 555; Wiel, Mingling of Waters, 29 Harvard Law Review 137; 25 Cal.Law Review 124. While rights may be acquired by lower proprietors in and to such portions of the foreign flow as have been abandoned by the producer and thus made available for other use, these rights are always subject to the contingency that the supply may be intermittent or may be terminated entirely at the will of the producer. In other words, although the fact that the producer may discontinue the foreign supply does not preclude others from acquiring a right to it, when and if it exists, such fact does not affect the value of the right so acquired, in that its permanency is not assured. Crane v. Stevinson, 5 Cal. 2d 387, at page 394, 54 P.2d 1100. Mr. Wiel, discussing in the article on Mingling of Waters, supra, the restricted point of the effect of the negative act of the producer of a foreign flow in failing to keep up the addition to the second stream states:

"He (one who conducts water from First River into the watershed and stream channel of Second River) * * * has the ownership of the right to the flow of First River to the intake of his conduit, and, it may be, the ownership of such specific water as is actually passing through his works, but the water that has left the mill and has gone down Second River is again neither his property nor anyone's. It is however, affected by the important consideration that its continued going is not of natural but is of artificial cause; it is not a natural body of water, nor a natural formation; its existence as a whole depends upon the action of this man. It is from this consideration, and not from ownership of any water as such, that a question first arises between him and lower claimants upon Second River. As a result he is, for the most part, under no obligation to them to continue to maintain the flow. At any time or in any manner he pleases he may act upon the water at a point above where it leaves his control, although the result is to stop the flow into Second River. He may be in the situation in this respect of having a right as to lower parties to have the water drain down Second River, without right in them to have him continue exercising his right, just as a right-of-way over another's land is no evidence that the party entitled thereto is under duty to walk. * * * Maintaining for years a pump which leaked water onto a neighbor's land, creates no duty that the pump must go on leaking. The millowner may cease to operate his conduit across the divide, or may cease to operate his mill, or his water wheels, or may change his location, or otherwise take away or alter, in whatever way he pleases, the artificial source of the flow into Second River. This principle is well settled in the decisions."

[3] It follows that plaintiffs in this action cannot predicate their claims upon any acquired right to compel defendant district to continue the importation of water from the Stanislaus river into Lone Tree creek.

The problem then is to determine whether plaintiffs have acquired any lesser right against defendant which entitles them to the relief accorded by the trial court herein, such as a right to compel defendant, if and when it has imported the water, to maintain its past practice of abandoning in the channel of the creek within its boundaries, a sufficient supply to fill plaintiffs' requirements. Stating the question another way, where the producer of an artificial flow does not decrease it at the source, but after importing it, acts upon it a second time while it is still within his land and before it leaves his control, does the doctrine above set forth apply, or may lower proprietors assert a right to enjoin any decrease in the volume of abandoned water?

In finding the solution of this problem, the distinction must be observed between abandonment by one who creates an artificial flow, of his water right (the right to divert and use the water of the first stream), and abandonment of used water itself (the very body or corpus thereof), after it has been imported into the second watershed. (See Kinney on Irrigation and Water Rights, 2d Ed., vol. 2, p. 2005, sec. 113, et seq.)

[4,5] Waters brought in from a different watershed and reduced to possession are private property during the period of possession. When possession of the

actual water, or corpus, has been relinquished, or lost by discharge without intent to recapture, property in it ceases. This is not the abandonment of a water right but merely an abandonment of specific portions of water, i. e., the very particles which are discharged or have escaped from control. E. C. Horst Co. v. New Blue Point Min. Co., supra; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A. L.R. 200, 204. So in the present case, for example, there has been no abandonment by defendant of a water right, but only an abandonment of those portions of the imported water which have actually been permitted to drain down to plaintiffs' land. As to this specific flow, discharged without intent to recapture, the abandonment has been complete, and plaintiffs have properly exercised a right to take the waters at their point of diversion. Defendant, having no further interest in the discharge, could not have stopped them from so doing. But this past abandonment by defendant of certain water, as distinguished from a water right, has not conferred upon plaintiffs any right to compel a like abandonment in the future, or to control defendant's use upon its own land of such water as it imports. The principle is clearly stated in Dannenbrink v. Burger, 23 Cal.App. 587, 596, 597, 138 P. 751, 755, where in part it is said: "'The lower claimant who received and put to use this water would only have a right to use it, for any purpose to which it was applicable so long as it continued there. Time would raise no presumption of a grant nor found any claim to a continuance of the discharge. * * *' In other words, the appropriator merely secures the corpus of the water thus escaping as personalty, but does not thereby secure or acquire the right to the continuous flow of such water."

[6, 7] While at first blush the above doctrine might seem a harsh one in its present application because plaintiffs here have expended a considerable sum for the construction of diversion works in the mistaken expectation that the foreign flow past their property would be permanent, upon mature consideration the injustice which would result if the rule were to the contrary is plainly to be seen. Defendant irrigation district has expended vast sums for the erection of the storage and diversion facilities which make possible the bringing of a continuous flow from the Stanislaus river to the Lone Tree creek watershed. The development of any irrigation district must necessarily be a gradual one. A perfection of the system to the point where fullest beneficial use is made of all water passing through the irrigation works is not attained in a day. As a district is brought to the peak of development, an increasing use of water may be anticipated, and also a more efficient method of use, with resultant decrease in the amount of abandoned waste, spill, and seepage. In this process of growth, the discharge of a considerable volume of artificial flow over a long period of formative years should not and does not invariably constitute an abandonment by the district of its right to such waters, or impose upon it a duty to always maintain the same volume of discharge. In this connection, the following observation made in a case concerning the government's right to recapture waste waters is pertinent:

"One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule." Note 89 A.L.R. 212, quoting from United States v. Haga, D.C., 276 F. 41, 43.

[8, 9] To summarize, one who produces a flow of foreign water for beneficial use and thereafter permits it to drain down a natural stream channel, is ordinarily under no duty to lower claimants to continue importing the supply or to continue maintaining the volume of discharge into the second stream channel at any fixed rate. The rule may have exceptions, as perhaps where the artificial condition has become inherently permanent and there has been a dedication to the public use, or where the drainage is stopped wantonly to harm a lower party, without other object. But as a general proposition, an irrigation district, after importing water from one river, passing it through irrigation works, and discharging it into a natural creek bed in the second watershed, may change the flow of water imported or the volume of water discharged from its works into the second stream, or stop the flow entirely, so long as this is done above the point where the water leaves the works of the district or the boun-

daries of its land. An exception to the rule is not created by the fact that the district may act upon the water a second time while in its possession, by retaking it at a point of drainage for further beneficial application.

[10] In the present case the recapture of the water from the stream channel by defendant district, upon its own land, and the use of the channel as a temporary drain, neither adds to nor detracts from plaintiffs' claims to the artificial flow. The right to use a natural channel as a temporary conduit or as a drain for artificial flow has been frequently upheld. See cases digested in note, 89 A.L.R. 210. There are cases where even after a foreign flow has left the land and control of its producer, he has been permitted to recapture it from the second stream, when it has been shown that such recapture was a part of his original project, and the water was discharged into the stream, not simply to be rid of it, but for the express purpose of retaking at a lower point. Where the recapture occurs before the foreign flow passes from the lands and control of the producer there can be no doubt of his right to make temporary use of a channel traversing his property, so long as normal conditions on the stream are not injuriously affected thereby. In such case the stream bed merely serves the purpose of the drainage ditch which might be constructed were no natural channel available. See Hoffman v. Stone, 7 Cal. 46; Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am.Dec. 769; E. C. Horst Co. v. New Blue Point Min. Co., supra, 177 Cal. at page 636, 171 P. 417; 26 Cal.Jur. p. 143, et seq.; Kinney on Irrigation and Water Rights, 2d ed. vol. 2, p. 1457, et seq.; Wiel on Mingling of Waters, supra.

[11, 12] Plaintiffs suggest, although with little vigor, that the doctrines of estoppel, adverse possession, or nonuser may be invoked to sustain their position. The findings of the court bearing on these subjects have already been set forth. The most that can be said on behalf of plaintiffs is that defendant, with knowledge of plaintiffs' construction of diversion works, stood silent. But in the absence of other essential elements neither expenditures by plaintiffs, defendant's knowledge thereof, nor its silence are sufficient to establish an estoppel. There is no showing whatsoever of any degree of turpitude in the conduct of defendant which would estop it from assertion of its title before a court of equity. See Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 367, et seq.; Dougherty v. Creary, 30 Cal. [290], 291, 89 Am.Dec. 116; Stockman v. Riverside Land & Irr. Co., 64 Cal. 57, 28 P. 116; Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 674, 93 P. 1021; Kinney on Irrigation and Water Rights, 2d ed. vol. 2, p. 2034, et seq.; Wiel, Water Rights in the Western States, sec. 593, 594, 3d Ed. vol. 1. As to adverse possession, it is apparent that plaintiffs' taking of the foreign water at its point of diversion was not hostile to defendant's title, but was a mere taking of certain water (the corpus as distinguished from the water right), to which defendant had relinquished all claim.

The judgment is reversed.

I concur in the judgment: HOUSER, J.



13 Cal.2d 368

ECHLIN v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

S. F. 16170.

Supreme Court of California.

April 28, 1939.

1. Attorney and client ⇐75(1)

The English common law recognized the right of a client to change his attorney by court order.

2. Attorney and client ⇐75(1)

The right to change attorneys, with or without cause, is universal.

3. Attorney and client ⇐134(1)

If discharge of attorney is without cause, client is liable for compensation and damages.

4. Attorney and client ⇐76(1)

Only where attorney has a "power coupled with an interest" must he be retained, and an interest in and to fruits or proceeds to be derived from the action is not such a power. Civ.Code, § 2356.

[Ed. Note.—For other definitions of "Power Coupled with an Interest," see Words & Phrases.]

5. Attorney and client ⇐75(1)

In absence of statutory provision for court order of substitution of attorney, court would have inherent power to make such an order which is necessary to orderly conduct of litigation. Code Civ.Proc. § 284, subd. 1.

6. Attorney and client ⇐75(1)

Substitution of attorney in litigation is not effective unless based on court order. Code Civ.Proc. § 284, subd. 1.

7. Constitutional law ⇐43(1)

Client, filing application for change of attorney under authority of statute providing for a court order of substitution, did not waive her right to challenge 1935 amendment to such statute requiring court ordering substitution in case in which fee of attorney is contingent to determine amount and terms of payment of fee, where, before attorney had filed an affidavit regarding legal service performed by him, client filed objections to court fixing attorney's fee. Code Civ.Proc. § 284, subd. 1, and subd. 2, as amended by St.1935, p. 1647.

8. Attorney and client ⇐174

Attorney has no lien in absence of an agreement therefor.

9. Attorney and client ⇐75(2)

An attorney's remedy for a wrongful discharge is by an independent action, and order of substitution of attorney cannot be made conditional on the client compensating discharged attorney.

10. Attorney and client ⇐75(1)

Where a cause is pending on appeal, substitution of attorney is to be effected by order of the appellate court.

11. Statutes ⇐72

Where statute provided for a court order of substitution of attorney in pending litigation, 1935 amendment limiting right of attorney to have his fee determined in main action and to have substitution made conditional on payment, to the type of cases in which fee is contingent upon the recovery of money is unconstitutional as "special legislation." Code Civ.Proc. § 284, subd. 2, as amended by St.1935, p. 1647.

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

12. Attorney and client ⇐134(1)

An attorney discharged without probable cause may recover the reasonable value of his services to date in an action brought for that purpose or he may sue for the fee contracted to be paid.

13. Attorney and client ⇐134(2)

If fee agreed to be paid to attorney is contingent on recovery of money or other property, the right of discharged attorney to sue for agreed fee does not arise until recovery through the services of a substituted attorney.

14. Jury ⇐9

The right of trial by jury is guaranteed by the Constitution only in those cases where it existed at common law. Const. art. 1, § 7.

15. Attorney and client ⇐75(1)

In personal injury action where plaintiff's attorney was to receive contingent fee, plaintiff was entitled to an order of substitution of attorney without the determination of compensation to which her discharged attorney might be entitled. Code Civ.Proc. § 284, subd. 1, and subd. 2, as amended by St. 1935, p. 1647.

In Bank.

Proceeding by Madeline Echlin against the Superior Court of the State of California in and for the County of San Mateo and Honorable A. R. Cotton, Judge thereof, for a writ of mandate to compel the respondent court to make an order substituting attorneys for petitioner in a pending action for personal injuries.

Writ of mandate granted.

For prior opinion of district court of appeals see 82 P.2d 717.

Robert E. Hatch, of San Francisco, for petitioner.

J. E. McCurdy, of San Mateo, and Theodore M. Stuart, of San Francisco, for respondents.

SEAWELL, Justice.

Petitioner seeks by writ of mandate to compel the Superior Court of San Mateo County to make an order substituting Robert E. Hatch as her attorney, in place of J. E. McCurdy, in a pending action for personal injuries wherein she is plaintiff. The action has not yet been brought to trial.

Subdivision 1 of Section 284, Code of Civil Procedure, provides for substitution of counsel "upon the consent of both client and attorney, filed with the clerk, or en-

tered upon the minutes". Subdivision 2 provides for substitution "upon the order of the court, upon the application of either client or attorney, after notice from one to the other". In 1935 there was added to subdivision 2 a further provision, as follows: "except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party". St.1935, p. 1647. The contract under which petitioner employed McCurdy provided for compensation in the amount of one-third the recovery by judgment or settlement.

Petitioner contends that the 1935 amendment is special legislation and therefore unconstitutional in that there is no reasonable distinction in the matter of determining attorney's fees between cases where the fee is "contingent on the recovery of money" and other cases. By this proceeding she seeks to compel the trial court to order a substitution without fixing the fee of her discharged attorney, leaving that matter to be determined in a separate action. She further contends that the amendment is unconstitutional for the reason that it denies a jury trial in the determination of the attorneys fee. The decision of the appellate department, superior court of Los Angeles, in Cassel v. Gregori, 28 Cal.App.2d,Supp. 769, 70 P.2d 721, supports petitioner's contentions.

Respondent contends that since the petitioner, rather than her attorney, asked for the substitution under section 284 she may not question the constitutionality of any part of said section, but must accept it in its entirety. The principle for which respondent contends, although frequently invoked, is not of invariable application. Thus, in Mojave River Irrigation District v. Superior Court, 202 Cal. 717, 262 P. 724, we sustained the contention of the district as to the unconstitutionality of a 1923 amendment to the Water Commission Act under which procedure and practice in superior court actions based on orders of the division of water rights differed from practice in other actions in the superior courts. We rejected the contention that the district was estopped to challenge the amendment for the reason that it had obtained an order or permit for the appropriation of water under other provisions of said act, which permit was the basis of the action brought against it in the superior court. 202 Cal. 717, 730, 262 P. 724.

[1] In the instant case, as in the cited case, the statute has stood for years without the amendatory provision, which, if unconstitutional, is plainly severable. Furthermore, the right to an order of substitution would exist without section 284. The English common law recognized the right of a client to change his attorney by court order. MacPherson v. Rorison, [1779] 1 Doug. 217, 99 Eng.R.Rep. 142; Perry v. Fisher, [1805] 6 East, 549, 102 Eng.R.Rep. 1398; Hill v. Roe, [1816], 6 Taunt. 532, 128 Eng.R.Rep. 1141; Ginders v. Moore, [1823] 1 B. & C. 654, 107 Eng. R.Rep. 241; Langley v. Stapleton, Barnes, 40, 94 Eng.Rep.R. 796; Weeks on Attorneys, 2d ed., 513-522.

[2-4] Petitioner did not aver in her notice of application for change of attorney that she had cause to discharge attorney McCurdy. But the right to change attorneys, with or without cause, has been characterized as "universal". 5 Am.Jur. 281; 7 C.J.S., Attorney and Client, § 109, page 940; 19 Ann.Cas. 592; 1 Thornton, Attorneys at Law, p. 253; California cases: Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A.L.R. 938; O'Connell v. Superior Court, 2 Cal.2d 418, 41 P.2d 334, 97 A.L.R. 918; Wright v. Security First Nat. Bank, Cal.Sup., 88 P.2d 125; 3 Cal. Jur. 635. If the discharge is without cause the client is liable for compensation and damages. Only where the attorney has a "power coupled with an interest" must he be retained, and an interest in and to the fruits or proceeds to be derived from the action is not such a power. O'Connell v. Superior Ct., supra, note: 97 A.L.R. 923; Wright v. Security First Nat. Bank, supra. This is consistent with the rule as to agents generally. Sec. 2356, Civ.Code.

[5, 6] Section 284, Code of Civil Procedure, providing for a court order of substitution, has been a part of our statutory law since the enactment of the codes in 1872. But in the absence of statutory provision the courts would have inherent power to make such an order, which is necessary to the orderly conduct of litigation. Indeed it was held in England at an early date that a substitution was not effective unless based on court order. (English cases cited, supra.) This doctrine prevails in this state. Jacobus v. Jacobus, 208 Cal. 562, 282 P. 796; Anglo-Califor-

nia T. Co. v. Oakland Rys., 191 Cal. 387, 216 P. 578; 7 C.J.S., Attorney and Client, § 121, page 951.

[7] Respondent relies on Foster v. Superior Court, 26 Cal.App.2d 230, 79 P.2d 144; and Tracy v. MacIntyre, Cal.App., 84 P.2d 526. In the Foster case the petitioners expressly requested the court, as a part of the order of substitution, to determine the compensation of their attorney. Being dissatisfied with the court's order as to the fee, they thereafter urged that the 1935 amendment to section 284 was unconstitutional. In the Tracy case the client consented to determination of the attorney's fee by an affidavit suggesting a different method of computing it than that urged by the attorney. But in the instant case there is no such request or consent. Petitioner's only reference to section 284 is that the application for change of attorney would be based on "all the records, papers and pleadings on file, upon the authority of section 284 of the Code of Civil Procedure". Before attorney McCurdy had filed an affidavit as to the legal services performed by him, petitioner filed "Objections to Court Fixing Attorney's Fees under Sec. 284, C.C.P." We conclude that petitioner has not waived her right to challenge the 1935 amendment to section 284.

[8, 9] In many jurisdictions it is the rule that where the client discharges the attorney without cause, the court may make substitution conditional on the client compensating his attorney. Griffith's & Son Co. v. U. S., 7 Cir., 72 F.2d 466; Woodbury v. Andrew Jergens Co., 2 Cir., 69 F.2d 49; In re Weitling, 266 N.Y. 184, 194 N. E. 401; Kellogg v. Wayne Circuit Judge, 229 Mich. 150, 200 N.W. 976; 7 C.J.S. Attorney and Client, § 122, page 953; 5 Am.Jur. 284. The attorneys lien is often referred to in this connection. But in this state, where an attorney has no lien in the absence of an agreement therefor (City of Los Angeles v. Knapp, 7 Cal.2d 168, 173, 60 P.2d 127), it has been held from an early date that the attorney's remedy for a wrongful discharge is by an independent action. Wright v. Security First National Bank, Cal.Sup., 88 P.2d 125.

The 1935 amendment limits the right of the attorney to have his fee determined in the main action, and to have substitution made conditional on payment, to the class of cases in which the fee is "contingent upon the recovery of money".

The rule prescribed by the amendment also differs from that prevailing in other jurisdictions in that it is, in terms, mandatory. Other jurisdictions recognize a discretionary right in the court upon ordering substitution, to postpone the matter of attorney's fees to subsequent determination in the main action or in an independent suit. Marshall v. Romano, 158 A. 751, 10 N.J.Misc. 113; Yuengling v. Betz, 58 App. Div. 8, 68 N.Y.S. 574; United States v. McMurtry, D.C., 24 F.2d 145; Vosges Syndicate v. Everglades Club Co., 122 Fla. 267, 164 So. 881. This is a matter of some importance. The determination of a dispute between attorney and client may extend beyond the time when steps are required by law to be taken in the main action, especially if an appeal is taken from the trial court's determination of the fee. In some jurisdictions the attorney has been given protection where it is important that proceedings in the main action be not delayed by requiring the client to file a bond, conditioned on payment of the attorney in the event it is subsequently determined he has been wrongfully discharged. Marshall v. Romano, supra; Yuengling v. Betz, supra; United States v. McMurtry, supra. The 1935 amendment would seem not to give our courts discretion to refuse to determine the attorney's fee in a particular case upon ordering substitution.

[10] It is settled in this state that where a cause is pending on appeal, substitution is to be effected by order of the appellate court. Wright v. Security First National Bank, supra; Jacobus v. Jacobus, 208 Cal. 562, 282 P. 796. Hence the effect of the 1935 amendment is to impose on the appellate courts the burden of determining, in the first instance, disputes between attorneys and clients in cases pending on appeal.

This brings us to petitioner's main contention, that the amendment is special legislation and therefore unconstitutional in that it requires the client to submit to determination of his discharged attorney's fee in the main action in those cases only where the fee is "contingent upon the recovery of money". In Cassel v. Gregori, 28 Cal.App.2d,Supp. 769, 70 P.2d 721, 723, the appellate department superior court of Los Angeles County, upheld this contention, Judge Shaw writing the opinion, as follows: "* * * passing by the question whether contingent fee cases as a

whole would constitute a separate class justifying special provisions regarding attorney's fees, we entertain no doubt that the special classification of contingent fee cases made by this statute is arbitrary and invalid. The probable purpose of the amendment * * * is to protect attorneys who have contingent fee agreements from possible efforts of their clients to dismiss them without payment of fees. For this purpose, no substantial difference exists between a case where the contingency depends on the payment of money and many other contingency cases. The contingency may be the recovery of property other than money; and granting that in such a case, where the attorney's fee is to be a share of the property, he may have an interest in that property which he can follow (Kelly v. Smith, [1928] 204 Cal. 496, 500, 268 P. 1057), and is then not in so much need of protection, yet there are many other possible contingencies not covered by this statute. Even where recovery of property is the contingency, the fee may not be a share of that property; and the contingency may be the successful defense of an action or the establishment of the client's rights with no recovery at all. If the attorney needs protection against his client, why should he not have it in these cases, as well as in that covered by the statute?"

[11] The court concluded its discussion with the statement that there was no natural, intrinsic or constitutional distinction justifying such discrimination and that the statute was, therefore, void. We are in accord with this conclusion.

It cannot be said that contracts for an attorney fee contingent on the recovery of money are usually entered into with clients who are without funds, and hence employment under such contracts calls for special protection of the attorney through authority in the court to make substitution dependent upon payment of the reasonable value of his services to date, since one of the most common instances of employment under such contracts is in connection with claims for personal injuries, where employment is frequently under such a contract regardless of the financial status of the client.

[12, 13] An attorney discharged without cause may recover the reasonable value of his services to date in an action brought for that purpose. Kirk v. Culley, 202 Cal. 501, 261 P. 994; Neblett v. Getty, 20 Cal.App.2d 65, 66 P.2d 473; Lessing v. Gibbons, 6 Cal.App.2d 598, 45 P.2d 258. Or he may sue for the fee contracted to be paid. Zurich General Accident etc. Co. v. Kinsler, Cal.Sup., 81 P.2d 913; Webb v. Trescony, 76 Cal. 621, 18 P. 796; Countryman v. California Trona Co., 35 Cal.App. 728, 170 P. 1069. If the fee agreed to be paid is contingent on the recovery of money or other property, the right of the discharged attorney to sue for the agreed fee does not arise until recovery through the services of the substituted attorney. Bartlett v. O. F. Savings Bank, 79 Cal. 218, 21 P. 743, 12 Am.St.Rep. 139.

[14] It is unnecessary here to consider petitioner's contention that the 1935 amendment is unconstitutional for the additional reason that it denies a jury trial. Said section would seem to contemplate that the court sitting without a jury should determine the attorney's fee. Where substitution pending appeal is made in an appellate court this would necessarily be so, since a jury does not exist as an adjunct of our appellate courts. The right of trial by jury is guaranteed by our Constitution (art. I, sec. 7) only in those cases where it existed at common law. Pomeroy v. Collins, 198 Cal. 46, 70, 243 P. 657; In re Escover, 108 Cal.App. 697, 292 P. 167; Gregory v. Hecke, 73 Cal.App. 268, 283, 283 P. 787; 15 Cal.Jur. 325. The English courts exercised the right to order the client to pay his attorney as a condition of substitution. (Witt v. Amiss, 8 L.T.N.S. 425; Langley v. Stapleton, supra; Weeks on Attorneys at Law [2d ed.] 518.) Whether they recognized a right of trial by jury in such matters is a question to which counsel herein have not directed their research. It is not necessary to determine the matter here, in view of our conclusion that the 1935 amendment is unconstitutional on other grounds.

[15] It follows that petitioner is entitled to an order of substitution without determination of the compensation to which her attorney may be entitled. Let the writ of mandate issue as prayed for.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J; EDMONDS, J; HOUSER, J.

13 Cal.2d 377

HATHEWAY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.

L. A. 17063.

Supreme Court of California.

April 28, 1939.

1. Workmen's compensation ⇐939

"Serious misconduct" of an employer, within Compensation Act entitling employee to additional personal award against employer if compensable injury occurs as result of "serious and willful" misconduct of employer, means conduct which employer either knew or ought to have known to be conduct likely to jeopardize safety of employees. St.1937, p. 281, § 4553.

[Ed. Note.—For other definitions of "Serious Misconduct," see Words & Phrases.]

2. Workmen's compensation ⇐939

Conduct of employer which evinces a reckless disregard for safety of employees and willingness to inflict injury complained of is "willful" within Workmen's Compensation Act entitling an employee to additional personal award against employer if compensable injury occurs as result of "serious and willful" misconduct of employer. St. 1937, p. 281, § 4553.

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

3. Workmen's compensation ⇐939

Action of employer, in permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that a finding of industrial accident commission that the employer's conduct is "serious and willful" so as to entitle injured employee to personal award against employer, will not be disturbed. St.1937, p. 281, § 4553.

[Ed. Note.—For other definitions of "Serious and Willful Misconduct," see Words & Phrases.]

4. Workmen's compensation ⇐939

The mere fact that employer did not believe condition was dangerous did not relieve him from liability for personal award to which an employee is entitled under Workmen's Compensation Act if employee is injured as result of serious and willful misconduct of employer. St.1937, p. 281, § 4553.

5. Workmen's compensation ⇐1723

Question of whether employer is guilty of willful misconduct so that a personal award against employer may be made in favor of the employee who sustains compensable injury is essentially a question of fact for industrial accident commission. St.1937, p. 281, § 4553.

6. Workmen's compensation ⇐1939

On petition to review award of industrial accident commission, the Supreme Court has duty to indulge in all reasonable inferences to support the award.

7. Workmen's compensation ⇐939

An employer is under duty to supply employees a reasonably safe place in which to work and when employer knows or should know of dangerous condition and fails to take reasonable precaution, the industrial accident commission may properly find employer guilty of "serious and willful misconduct" and grant to employee a personal award against employer.

8. Workmen's compensation ⇐939

Where employee was injured when he fell through skylight which was concealed by dust and papers and of which employee had no knowledge, an award of compensation against employer personally based on finding of "serious and willful misconduct" of employer who had notice several days before the accident that one pane of skylight was broken and that dangerous condition existed, but who took no steps to warn employees of the dangerous condition and did not remove such condition, was justified. St.1937, p. 281, § 4553.

9. Workmen's compensation ⇐1723

Where employee was injured when he fell through skylight which was concealed by dust and papers, and of which employee had no knowledge, whether action of employer, whose attention was called to dangerous condition of skylight several days prior to accident, in telephoning contractor and ordering him to board over skylight, was sufficient precaution to relieve employer from liability for personal award of compensation based on "serious and willful misconduct," was for industrial accident commission. St. 1937, p. 281, § 4553.

In Bank.

Proceeding by writ of review by Earle M. Hatheway, employer, against the In-

dustrial Accident Commission of the State of California to review an award of the respondent granting compensation to Jack Hodgkinson, claimant, based on finding that claimant's injury was caused by serious and wilful misconduct of the employer.

Award of commission affirmed.

Webster Hazlehurst, of Laguna Beach, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

This case presents but one question: Does the finding of respondent commission that the industrial, compensable injury sustained by Jack Hodgkinson was caused by the serious and wilful misconduct of the employer, petitioner Earle M. Hatheway, find any substantial support in the record?

The record discloses that the injury was received by Hodgkinson on July 28, 1937, at petitioner's garage, where the injured employee had been working as a mechanic for a period of five or six months prior to the accident; that at this garage some twenty-five or thirty persons were employed; that located entirely within the main garage building was a paint shop with a flat roof; that in this flat roof was a glass skylight about 3 feet square; that petitioner Hatheway used the roof of this paint shop to store and display automobile tires; that employees of the petitioner were occasionally required to go to the roof to secure tires; that a stairway led to this roof; that there was no guard rail around the roof nor was there any warning of any kind to inform employees of the presence of the skylight; that about 10 days before the accident the foreman of the garage discovered that one pane of the skylight was broken and was hanging down into the paint shop; that he taped the broken pane and immediately informed his employer, petitioner, of the broken glass, and of the dangerous condition that was thus created. Both Hatheway and the foreman testified that they took no steps to inform the employees of the dangerous condition. No warning was posted, nor were any temporary means taken to protect the skylight. Hatheway testified that upon being informed of the dangerous condition he telephoned the Smith Construction Company and ordered the skylight boarded up, but that this was not done until two days after the accident.

Hodgkinson, the injured employee, testified that he had worked in the garage for five or six months prior to the accident; that his duties had taken him inside the paint shop on but one or two occasions; that he did not then, or at any other time prior to the accident, observe or know of the existence of the skylight; that he had been on the roof of the paint shop but once before; that no one had told or warned him about the skylight; that on the day in question he was ordered to go on the roof to get two tires; that he proceeded to the roof and had to search for the tires; that he was on the roof about five minutes; that he stepped on the glass skylight and fell through it to the cement floor below; that his skull was fractured and his wrist broken; that the skylight was so covered with dust and paper that it appeared no different from the surrounding roof; that he had not known of the skylight nor had he heard it discussed. The foreman testified that he knew some of the employees were required to go to the roof, and that the skylight was dusty and covered with tire wrappings.

Hodgkinson was so severely injured that at the time of the hearing—August, 1938, —he had been unable to return to work.

On this testimony the commission awarded normal compensation to the employee against the insurance carrier, and, in addition, found the employer guilty of serious and wilful misconduct, and made its additional award against him personally as provided by section 4553 of the Labor Code (St.1937, p. 281). No question is raised concerning the award of normal compensation, but the employer contends that the additional award against him personally, based on his alleged serious and wilful misconduct, as a matter of law, was not justified by the evidence.

[1, 2] What constitutes serious and wilful misconduct within the meaning of the Workmen's Compensation Act so as to entitle the employee to an increased award as therein provided, has frequently been discussed by the courts. The definition of what constitutes such conduct set forth by this court in E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 193 P. 105, 16 A.L.R. 611, has frequently been cited and relied upon by the courts. It was there stated (184 Cal. page 188, 193 P. page 108, 16 A.L.R. 611):

"The first question presented is, then, Was the commission justified in finding that the petitioner was guilty of 'serious misconduct'? There is no statutory definition of this term. In this connection we may again quote from Beven, page 401: 'To constitute "serious misconduct," it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety.' In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employé. 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employés. * * *

"Next, as to whether such serious misconduct was 'willful.' It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Lewis v. Great Western Ry. Co., L.R. 3 Q.B.D. 195; In re Burns, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787; Riley v. Standard Acc. Ins. Co., 227 Mass. 55, 116 N.E. 259; Beckles' Case, 230 Mass. 272, 119 N. E. 653. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as 'evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of.'"

[3, 4] The cases are quite uniform to the effect that permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that the commission's finding that such conduct is serious and wilful will not be disturbed. The mere fact the employer did not believe the condition was dangerous does not relieve him from liability. Thus in Blue Diamond Co. v. Industrial Acc. Comm., 188 Cal. 403, 409, 205 P. 678, 681, the employee was killed as a result of the failure of the employer to place guards on machinery. The managing agents of the employer testified that they knew of the condition, but stated that they did not consider the condition unsafe. "Their mistake in judgment upon that subject cannot be held to relieve their employer from liability." An award based on serious and wilful misconduct was affirmed. In Hoffman v. Dept. of Industrial Relations, 209 Cal. 383, 287 P. 974, 68 A. L.R. 294, it was held that where the employer violated the terms of a statute providing for a specified type of temporary flooring and its method of construction to be used when erecting a building, he was guilty of serious and wilful misconduct, even though the employer was ignorant of the provisions of the statute. In Pacific Employers Ins. Co. v. Industrial Acc. Comm., 209 Cal. 412, 288 P. 66, the employee was injured by an unguarded saw. The employer was held guilty of serious and wilful misconduct although the saw had been in operation but a week, and the employer testified that he intended to place a guard thereon. In Gordon v. Industrial Acc. Comm., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374, the employee was killed in a cave-in of a gravel pit. It was held that compelling an employee to work in a dangerous spot, without taking protective measures, where the employer knows or should have known of the danger is serious and wilful misconduct. In holding an employer guilty of serious and wilful misconduct under somewhat similar circumstances the appellate court in Johannsen v. Industrial Acc. Comm., 113 Cal.App. 162, 166, 298 P. 99, 100, stated: "Had he [the employer] turned his mind to a consideration of the subject, he must have known that a person working in the trench was in jeopardy, which danger could readily have been obviated by the necessary bracing."

[5, 6] In considering the evidence, it must be kept in mind that the question of wilful misconduct is essentially a question of fact, and that on this petition it is our duty to indulge in all reasonable inferences to support the award. As was stated in Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 704, 28 P.2d 919, 921: "At all events, the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the

safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted." See, also, Jackie Coogan Productions v. Ind. Acc. Comm., 21 Cal.App.2d 225, 68 P.2d 750.

[7, 8] It is apparent that under the rules laid down in the cases above referred to, the commission was amply justified in the instant case in finding the employer guilty of serious and wilful misconduct. Under these cases, and many others that could be cited, the employer is under a duty to supply his employees a reasonably safe place in which to work, and when he knows or should have known of a dangerous condition and fails to take reasonable precautions, the commission properly may find him guilty of serious and wilful misconduct. The following facts and circumstances support the finding of the commission:

1. A dangerous condition practically constituting a trap existed on the premises in a place where employees in the performance of their duties were required to go;

2. The dangerous condition was brought to the attention of the employer and he acknowledged and recognized its existence;

3. After being informed of the dangerous condition neither the employer nor his foreman took any steps to warn the employees, either by telling them of the condition, or by posting warnings. It should be mentioned that the dangerous condition could easily have been temporarily obviated by simply placing boards across the skylight, but this obvious precaution was not taken;

4. The employee had no knowledge of the dangerous condition.

[9] Under these circumstances the commission was amply justified in finding that the employer knowingly acted in reckless disregard of the safety of his employees. To escape this obvious conclusion, the employer urges that as soon as the dangerous condition was called to his attention he telephoned to the contractor and ordered him to board over the skylight. It is true that he so testified, but this one factor, even if the testimony were believed by the commission, would not, as a matter of law, relieve the employer from the charge of serious and wilful misconduct. This was but one factor that the commission, as the trier of the fact, was entitled to weigh in ascertaining whether the charge was well founded. Whether this was a sufficient precaution, under all the circumstances, was solely for the commission to decide. As against this one factor the commission was entitled to and apparently did weigh the facts that the skylight, located as it was, constituted a trap; that the employer should have known this upon merely seeing it even before it was cracked; that even after he had been informed of the condition and recognized its danger he took no temporary precautions to protect his employees while waiting for the contractor to board up the skylight. These factors serve to distinguish the case from Schmidt v. Pursell, 47 Cal.App. 440, 190 P. 846, so heavily relied upon by petitioner. That case was not a compensation case at all. The employee, after receiving an industrial injury, brought an action against his employer in the regular law courts, as he was then permitted to do, alleging gross negligence and wilful misconduct on the part of his employer as required by the then existing law. To support the allegation he proved that the employer had failed to equip certain machinery with a safety device after being orally ordered to do so by the commission. The evidence showed that the employer had immediately ordered such a device, but that the accident happened before the device could possibly have been secured. The trial court found that the safety appliance in question was not necessary equipment and that the employee was fully aware of the dangers incident to the use of the machine. The appellate court in affirming the trial court held that the reasonableness of the violated safety order and the reasonableness of the compliance by the employer were questions of fact, and since they had been determined adversely to the employee on competent evidence, the appellate court was bound thereby. The case is clearly distinguishable from the situation presented in the instant case.

The other points raised by petitioner are so unsubstantial as not to require comment.

The award of the commission is affirmed.

13 Cal.2d 401

JENSEN et al. v. HUGH EVANS & CO. et al.

Appeal of BOOKER et al.

L. A. 16970.

Supreme Court of California.
May 4, 1939.

1. Statutes ⇐231

The related code sections and pertinent decisions may properly be considered by the court as bearing upon the legislative intent in adoption of amendment.

2. Appeal and error ⇐458(2)

The amendment providing that trial court may require undertaking to effect stay pending appeal in all such cases not previously provided for permits trial court to order bond only where appellant is adjudged to have money or other property in his possession belonging to respondent, or is required to perform some act for benefit of respondent or in pursuance of directions of judgment or order appealed from, in view of interpretation of previously enacted statutes which permitted requiring bond to effect stay pending appeal in certain specified cases. Code Civ.Proc. §§ 942–945, 949.

3. Appeal and error ⇐458(2)

Where judgment was rendered determining title to fund in hands of sheriff awaiting final outcome of controversy before distribution, rather than granting money, trial court's requiring appellant to furnish bond to effect stay pending appeal was an abuse of discretion, and entitled appellant to writ of supersedeas. Code Civ.Proc. § 949.

4. Appeal and error ⇐460(2)

Where judgment was rendered determining title to fund in hands of sheriff awaiting final outcome of controversy before distribution, the direction for distribution of fund by sheriff was not part of judgment but was ancillary thereto, and was automatically stayed by appeal.

5. Appeal and error ⇐485(4)

Where judgment was rendered determining title to fund in hands of sheriff, a writ of supersedeas would effect stay of judgment, notwithstanding that sheriff had already drawn warrant on county treasurer for payment of fund to respondents and that county treasurer was not made party to proceeding, since fund, in legal contemplation, was in possession of sheriff as officer of court with county treasury as his depository.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by A. P. Jensen and Lillie P. Jensen against the Hugh Evans & Company and others, wherein L. H. Booker and others, as trustees of two real estate trusts, filed a third party claim. From the judgment, the third party claimants appealed, and trial court ordered that execution should be stayed only on condition that appellants file a bond. On appellants' petition for writ of supersedeas.

Writ issued.

Olson & Olson, Allen Miller, and Robert Clifton, all of Los Angeles, for appellants.

Max Lewis, A. Arnold Klein and Laurence M. Weinberg, all of Los Angeles, for respondents.

SHENK, Justice.

This application for a writ of supersedeas presents the question of the extent of discretion which may be exercised by the trial court in requiring a stay bond on appeal under the 1927 amendment to section 949 of the Code of Civil Procedure (Stats.1927, p. 874).

In 1935 the plaintiffs Jensen recovered a judgment in the superior court against Hugh Evans, Diversified Real Estate Investments Trust No. 1, Diversified Real Estate Investments Trust No. 2, and others. In May, 1938, the sheriff of Los Angeles county levied a writ of execution in aid of the enforcement of said judgment upon deposits totaling $25,000 standing to the credit of said real estate trusts in the Citizens National Trust and Savings Bank in Los Angeles. The money was delivered by the bank to the sheriff. Within due time L. H. Booker, Lillian C. Prentiss-Baker and W. G. Hargis, as trustees of both of said real estate trusts, served and filed third party claims against said funds. The plaintiffs Jensen, instead of giving an undertaking as permitted by section 689 of the Code of Civil Procedure, filed a petition to determine title as provided for by that section. A hearing was duly had, at the conclusion of which the trial court rendered judgment determining that each of

the third party claims was without merit and that the trustees were not the owners of the fund, but that the plaintiffs were entitled to the whole thereof. The third party claimants appealed from the judgment adjudicating title to the fund.

The plaintiffs moved the trial court for an order, pursuant to the 1927 amendment to section 949 of the Code of Civil Procedure, requiring the third party claimants to file an undertaking on appeal if they desired the enforcement of the judgment to be stayed pending the appeal. The court made an order requiring the appealing parties to post a surety bond in the sum of $4,000, "conditioned upon the performance of the judgment upon third party claims heretofore appealed from by third party claimants in the event that the judgment appealed from is affirmed or the appeal is dismissed".

Prior to 1927 section 949 of the Code of Civil Procedure (as amended by St.1921, p. 95) provided that the perfecting of an appeal stayed proceedings in the trial court without the filing of a bond, in all cases (of which the present is one) not covered by sections 942, 943, 944 and 945 of the same code. Certain exceptions, not here pertinent, are specified in said section 949 where a writ of supersedeas is required.

The court's order purports to be pursuant to the 1927 amendment to said section 949, which reads: "* * * but the court in its discretion may require an undertaking in an amount to be fixed by it conditioned for the performance of the judgment or order appealed from if the same is affirmed or the appeal is dismissed; * * *."

The present application for a writ of supersedeas is made on the ground that section 949 as amended does not vest discretion in the court to order the posting of an undertaking to effect a stay where the judgment appealed from does not require any performance by the appellants. It is the theory of the appellants that inasmuch as the fund, which was the subject-matter of the proceeding to determine title, presumably is in the custody of the sheriff, there is no performance required of the appellants by the judgment from which the appeal was taken; therefore that there is no "performance" which may become the basis of the condition specified by the code and the court's order.

[1] The related code sections and pertinent decisions may properly be considered as bearing upon the legislative intent and purpose in the adoption of the amendment. The language of the amendment suggests the question: Do the words, "conditioned upon the *performance* of the judgment", place a limitation on the discretion vested in the trial court; or may the trial court require a bond in every case, regardless of the fact that the judgment, if it be affirmed or the appeal dismissed, requires no performance on the part of the appellants? It is conceded that the only judgment of the trial court in the title proceeding was the adjudication of title accompanied by a direction to the sheriff to release and deliver to the plaintiffs the whole of the money on deposit in partial satisfaction of their judgment. In such a case, would there be any possible ground of recovery under the stay bond specified by the court's order, if the sheriff should fail to comply with the direction upon an affirmance of the judgment?

Commencing with the case of In re Estate of Schedel, 69 Cal. 241, 10 P. 334, 335 appealing parties, under section 942 (requiring an undertaking to stay proceedings on an appeal from a money judgment); section 943 (requiring the placing of documents or personal property in the custody of the sheriff, or an undertaking to stay proceedings where the judgment appealed from directs the assignment or delivery of documents or personal property); section 944 (requiring the execution and deposit of instruments of conveyance to effect a stay where the judgment directs the execution of a conveyance or other instrument); and section 945 (requiring the filing of an undertaking conditioned against the commission of waste, to effect a stay where the judgment appealed from directs the sale or delivery of possession of real property), have been classified as appellants who are required "to perform the directions of the judgment or order appealed from". In the Schedel case tne appeal was from a decree of distribution. The appealing legatee applied to this court for a writ of supersedeas. It was held that, since the judgment or decree did not require the appellant "to perform the directions of the judgment", the perfecting of the appeal without the filing of any additional bond stayed the effect of the decree and any further proceedings pending determination of the appeal.

The same distinction was made and similar results followed in the cases of Born v. Horstmann, 80 Cal. 452, 22 P. 169, 338, 5 L.R.A. 577, where the appeal was from an interlocutory decree in partition; Pennie v. Superior Court, 89 Cal. 31, 26 P. 617, where the appeal was by certain claimants from a decree in a proceeding to determine heirship and from an order granting family allowance, as to which the appellants were "not required to do anything"; In re Woods' Estate, 94 Cal. 566, 29 P. 1108, involving an appeal from a decree adjudging the public administrator entitled to letters of administration as against the appellants; Zappettini v. Buckles, 167 Cal. 27, 138 P. 696, where the appeal was from a judgment decreeing dissolution of a partnership, directing sale of partnership property by the receiver and deposit of the proceeds into court to abide its further order, and adjudging the manner of the application thereof. See, also, Rohrbacher v. Superior Court, 144 Cal. 631, 78 P. 22; Halsted v. First Savings Bank, 173 Cal. 605, 160 P. 1075.

The facts in the case of Fulton v. Webb, 9 Cal.2d 726, 72 P.2d 744, were similar to those shown here, but the legal question now presented was not decided. The writ of supersedeas was there issued on another ground.

The case of McCallion v. Hibernia Savings & Loan Society, 98 Cal. 442, 33 P. 329, involved conflicting claims of parties plaintiff and defendant to a fund of several thousand dollars. The judgment directed that the plaintiffs were entitled to the money and to costs of the action. The defendants appealed and furnished a stay bond in double the amount of the judgment and costs. Upon the affirmance of the judgment and the filing of the remittitur, the plaintiffs moved for judgment against the sureties. The sureties appealed from the judgment rendered against them. On consideration of the appeal the court observed that section 942 of the Code of Civil Procedure "applied only to appellants who were required to perform the directions of the judgment or order appealed from". A reversal was ordered on the ground that the judgment did not require a bond to stay execution and that the undertaking was without consideration and void.

[2–4] The foregoing well-recognized distinction may be said to have moved the legislature to frame, as it did, the amendment to section 949 of the Code of Civil Procedure permitting the trial court to require an undertaking to effect a stay pending appeal in all those cases not covered by sections 942 to 945. The use of the words, "conditioned for the performance of the judgment", indicates the intent that a bond may be ordered in such of those cases where the appellant was adjudged to have money or other property in his possession belonging to the respondent, or was required to perform some act for the benefit of the respondent or in pursuance of the directions of the judgment or order appealed from, and that in all other cases the provisions of the section should operate as a stay of proceedings without bond. Applying the intent as so manifested, it would follow that the requirement of a bond in the present proceedings would amount to an abuse of the discretion vested in the court by the language of the amendment. The judgment in this case requires nothing of the appellants. It merely adjudges the title to a fund which reposes in custodia legis, awaiting only the final outcome of the controversy before distribution to the parties entitled thereto. The direction for the distribution of that fund by the sheriff (whose performance is protected by his official bond) is not part of the judgment but is ancillary thereto, and is automatically stayed by the appeal. Fulton v. Webb, supra. The parties have not indicated what possible liability would attach to the sureties under the $4,000 undertaking if it were given. The trial court apparently was of the view that the language of the amendment permitted it to exercise a discretion to require a bond in every case merely upon the application of the respondents; but such exercise would be arbitrary where the posting of an undertaking would amount to nothing more than an empty and expensive formality.

[5] The plaintiffs contend that the issuance of the writ of supersedeas at this time would not effect a stay for the reason, so it is claimed, that the direction to the sheriff has been executed. It appears that a warrant had been drawn on the county treasurer for the payment of the fund to the plaintiffs or their attorneys. Payment of the warrant has been withheld because of a temporary stay ordered by the trial court pending the result of the present application. If the requested writ be not issued the judgment will be enforced and the money paid to the respondents unless the appellants comply with the order re-

quiring the undertaking on appeal. The fact that the county treasurer is not a party to the present proceeding will not defeat the operation of the writ for the reason that the fund, in legal contemplation, is in the possession of the sheriff as an officer of the court, with the county treasury as his depository.

We conclude that the facts justify the issuance of the writ, the effect of which will stay any further enforcement of the judgment pending the disposition of the appeal.

Let the writ of supersedeas issue accordingly.

We concur: CURTIS, J.; EDMONDS, J.; SEAWELL, J.; LANGDON, J.; HOUSER, J.



13 Cal.2d 384

GOLDEN STATE GLASS CORPORATION et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

S. F. 16071.

Supreme Court of California.

April 29, 1939.

Rehearing Denied May 29, 1939.

1. Prohibition ⇐3(5)

The Supreme Court in the exercise of its discretion occasionally will permit validity of trial court's order to be tested by writ of prohibition, even though petitioners have a remedy by appeal, if the circumstances are aggravated and justify immediate relief and delay would cause consequential damages.

2. Prohibition ⇐3(5)

Where ill feeling existed between plaintiffs and defendants who constituted board of directors of corporation and plaintiffs obtained ex parte order appointing receiver for corporation, the Supreme Court in exercise of its discretion would test validity of trial court's order by writ of prohibition even though remedy by appeal existed, in view of the circumstances.

3. Prohibition ⇐28

Where Supreme Court in exercise of its discretion allowed trial court's ex parte order appointing receiver for corporation to be tested by writ of prohibition, and entire record of the proceedings was before the Supreme Court, the Supreme Court would review all the facts shown and render such relief as might be proper.

4. Appeal and error ⇐955
Corporations ⇐553(2)

The statute authorizing appointment of receiver for corporation in cases where receivers previously had been appointed by usages of courts of equity vested large measure of discretion in trial court, and in absence of clear showing of abuse of that discretion, the trial court's action in appointing or refusing to appoint receiver will be upheld. Code Civ.Proc. § 564, subd. 7.

5. Corporations ⇐553(2)

The trial court's discretion in appointing corporate receiver is not an entirely uncontrolled one and must be exercised with due regard for the facts, especially where serious injury to name and good will of a solvent corporation may result from appointment of receiver. Code Civ.Proc. § 564, subd. 7.

6. Corporations ⇐552

Generally, court should not take corporate property out of hands of corporation and place it in hands of receiver if there is any other remedy less severe in its results which will adequately protect rights of the parties. Code Civ.Proc. § 564, subd. 7.

7. Corporations ⇐553(5)

Court of equity has power to appoint receiver of going corporation upon a showing that there are such dissensions in corporation's governing body as to create a virtual suspension of corporation's business. Code Civ.Proc. § 564, subd. 7.

8. Corporations ⇐553(5)

Court's power to appoint receiver of going corporation because of dissensions in its governing body must be exercised with caution and only for such time and to such extent as may be necessary to preserve corporation's property and protect rights and interests of its stockholders. Code Civ.Proc. § 564, subd. 7.

9. Corporations ⇐558

A court which has appointed receiver of going corporation because of dissension in its governing body creating virtual suspension of corporate business must lift its hand and retire as soon as a lawfully constituted and competent governing body comes into existence. Code Civ.Proc. § 564, subd. 7.

10. Corporations ⇐553(5)

A receiver for going corporation should not be appointed where no actual or threatened cessation or diminution of business operations is shown, even though there is dissension in the corporate management. Code Civ.Proc. § 564, subd. 7.

11. Corporations ⇐558

Trial court's confirmation of its ex parte order of appointment of receiver for going corporation based on dissension and ill feeling between corporation's directors was abuse of discretion, where complaint averred that certain of the directors had usurped and exercised control of the corporate business, and affidavit supporting motion to vacate ex parte order showed that the corporation was solvent and that its business was being conducted by certain of the directors. Code Civ.Proc. § 564, subd. 7.

12. Corporations ⇐557(5)

Strong proof is essential to justify corporate receivership where specific and detailed evidence that corporation's business is being successfully conducted at a profit is presented in opposition to receivership. Code Civ.Proc. § 564, subd. 7.

13. Corporations ⇐557(2)

A complaint based largely upon generalities and conclusions of pleader and upon information and belief is insufficient upon which to base appointment of receiver for corporation.

14. Corporations ⇐298(5)

Where corporation had four directors, only three of whom actively participated in corporate affairs, the other director having been appointed to represent interests of one director during his absence, attorney employed by two directors who owned two-thirds of the corporate stock and were in actual control of corporation's business affairs should have been recognized by trial court as attorney for corporation, entitled to represent it in opposing proposed appointment of receiver for the corporation.

SHENK and CURTIS, JJ., dissenting.

In Bank.

Original proceeding for writs of prohibition and mandamus by the Golden State Glass Corporation and others against the Superior Court of Los Angeles County and others to prevent the enforcement of any orders made by the respondent court appointing a receiver for the corporation and to compel the court to recognize Oscar C. Sattinger as attorney for the corporation in the action wherein the receiver was appointed.

Writs of prohibition and writ of mandate granted.

Rehearing denied; SHENK and CURTIS, JJ., dissenting. LANGDON, J., not participating.

Prior opinion, 82 P.2d 492.

Oscar C. Sattinger, of Los Angeles, for petitioner Golden State Glass Corporation.

Oscar C. Sattinger, of Los Angeles, in pro. per.

Mitchell, Silberberg, Roth & Knupp and Lester William Roth, all of Los Angeles, for petitioner A. Goldman.

Frank M. Gunter, of Los Angeles, for petitioner N. E. Shenberg.

John H. O'Connor, Co. Counsel for Los Angeles County, Douglas De Coster, Asst. Co. Counsel, Biby & Biby, and John E. Biby, all of Los Angeles, for respondents.

EDMONDS, Justice.

In this original proceeding, the petitioners seek a writ of prohibition directed to the respondent court for the purpose of preventing the enforcement of any orders made by it appointing a receiver. They also ask that a writ of mandate issue ordering the superior court to recognize the petitioner Sattinger as attorney for Golden State Glass Corporation, a corporation, in the action which has occasioned the present application.

By the allegations of the petition, it appears that the controversy has arisen because of difficulties between the petitioners Shenberg and Goldman, on the one hand, and G. C. DeGarmo, who is opposing them in the affairs of Golden State Glass Corporation, which was incorporated in 1933. Shenberg and Goldman own more than two-thirds of the stock of the corporation and as vice-president and secretary, respectively, have been the active operators of its business and in possession of its assets from the time of organization to May 31, 1938. Up to that date the corporation was at all times financially successful and thoroughly solvent.

According to the petitioners, on May 31, 1938, the respondent court, ex parte and solely upon the allegations of a complaint verified by DeGarmo, the president of the corporation, which names him and W. M.

Crane as plaintiffs, appointed a receiver for the corporation. By the authority of this order the receiver took possession of the corporation's property. The corporation, acting through the petitioner Sattinger, who is an attorney at law, and Shenberg and Goldman each moved to vacate the ex parte order and sought to resist a confirmation of the appointment pendente lite. Each of these motions was denied.

The petitioners again allege in the present proceedings, as they did in affidavits presented to the superior court, that the receivership has worked and will continue to work irreparable injury to petitioners by impairing the credit of the corporation and destroying its business and good will. They also allege that petitioner Sattinger was appointed by Shenberg and Goldman to appear for the corporation as its attorney to resist confirmation of the receivership; that Sattinger subpoenaed DeGarmo for the purpose of taking his deposition in connection with the proceedings but DeGarmo refused to appear; and that Sattinger attempted to appear as attorney for the corporation at the hearing on the order to show cause why the order appointing the receiver should not be confirmed, but the court refused to permit him to participate in the hearing upon the ground that he was not the duly appointed attorney for the corporation.

The petitioners contend that the averments of DeGarmo's complaint, being made up largely of conclusions and allegations upon information and belief, were insufficient to empower the trial court to make the ex parte order and that the court lacked jurisdiction to confirm the receivership pendente lite in the face of the petitioners' specific and uncontradicted showing in opposition thereto. It is also argued that the court exceeded its powers in refusing to permit petitioner Sattinger to appear as attorney for the corporation in opposition to the receivership.

By a demurrer to the petition, the respondents assert that neither prohibition nor mandamus will lie under the circumstances here presented because the petitioners have an adequate remedy by way of appeal from the orders complained of. Petitioners argue, relying upon Luckenbach v. Laer, 190 Cal. 395, 212 P. 918, that the corporation was the only party "aggrieved" by the order of appointment, and hence it was the only party entitled to appeal therefrom, and that the trial court took away its remedy by refusing to permit it to be represented by an attorney. However, it appears from the return of the trial judge that he offered to appoint a disinterested third person to act as attorney for the corporation, but Goldman and Shenberg rejected this offer, desiring that the corporation be represented only by an attorney of their own choosing. Also, Luckenbach v. Laer, supra, does not fully support the proposition contended for. There a creditor sued and recovered judgment against a defunct corporation and after a writ of execution had been returned unsatisfied, he procured the appointment of a receiver who was empowered to sue certain directors for sums alleged to have been misappropriated by them. The defendants attempted to appeal from an order denying their motion to vacate the appointment of the receiver. The court held that inasmuch as neither the appellants' personal rights nor their property interests had been affected by the action of the trial court, they were not aggrieved parties and had no standing on appeal. The petitioners in the present case are in a different position if, as they are contending, the receiver superseded them in the active management and control of a going corporation.

[1-3] This conclusion, however, is not wholly determinative of the point in question. It is established that this court will, in the exercise of its discretion, occasionally permit the validity of a trial court's order to be tested by writ of prohibition where the petitioners have a remedy by appeal if the circumstances are aggravated and justify immediate relief. Under such conditions and where because of delay there would be consequential damages the court has allowed the writ. Davis v. Superior Court, 184 Cal. 691, 195 P. 390. The question is largely one of discretion. A. G. Col Co. v. Superior Court, 196 Cal. 604, 622, 238 P. 926; Slinack v. Superior Court, 216 Cal. 99, 105, 13 P.2d 670. Furthermore, where, as here, the entire record of the proceedings is before the court, it is proper to review all the facts shown and render such relief as may be proper in the premises. A. G. Col Co. v. Superior Court, supra, 196 Cal. at page 613, 238 P. 926.

The following facts appear from the allegations of the complaint upon which the receiver was appointed:

Golden State Glass Corporation is a California corporation engaged in the business of selling glass both at wholesale and retail. Outstanding nonvoting stock is own-

ed 561 shares by the defendant Goldman, 561 shares by the defendant Shenberg, and 559 shares by the plaintiff DeGarmo. These three persons and the plaintiff Crane, who are the directors of the corporation, own two shares each of the outstanding shares of voting stock. By-laws duly adopted by the corporation provide that its business affairs shall be controlled by the board of directors; that a majority of the number of directors shall constitute a quorum; that the officers shall be elected by and hold office at the pleasure of the board of directors which shall also fix their compensation and tenure of office; that the president shall, "subject to the control of the Board of Directors, have general supervision, direction, and control of the business and officers of the corporation" and "shall have the general powers and duties of management usually vested in the office of president", and that "supervision, management and right to employ and discharge employees and fix salaries of employees shall be fixed by directors and in absence of such determination * * * may be vested in the managing and supervising agent of the corporation".

Plaintiff DeGarmo also alleges that he is president and is ready, able, and willing to perform the duties of that office. "Illfeeling, dissension, hatred, mutual hostility and distrust have arisen and now exist between the said plaintiffs and directors, G. C. DeGarmo and W. M. Crane, on the one side and the said defendants and directors, A. Goldman and N. E. Shenberg, on the other side. Because of said illfeeling, dissension, hatred, mutual hostility and distrust of said directors toward each other no business of the corporation has been transacted by said corporation since on or about the 1st day of January, 1938, and it is impossible because of said illfeeling, dissension, hatred, mutual hostility and distrust of the board of directors and the members of said board for them to transact any business of the corporation or to elect any person to act as manager or to give any person authority or power to transact business for said corporation, and because thereof said corporation is not now transacting any business and said corporation and its business, assets and property because thereof have been injured and said corporation has been greatly damaged." It is also charged that Goldman and Shenberg have violated their duties as directors and are guilty of fraudulent acts and gross abuse of authority and discretion in that they have refused to permit DeGarmo to perform his duties as president and have refused to permit him to exercise any direction or control over the business and have usurped possession, direction and control of the business affairs of the corporation without right.

It also appears that on December 5, 1936, Shenberg, Goldman and DeGarmo entered into a written agreement which provides that Shenberg and Goldman shall each receive $600 per month as salary, $500 of which is to be paid in cash and $100 credited upon the purchase of additional shares of stock, and that DeGarmo shall be paid $500 per month for his services. At a meeting of the board of directors on December 30, 1937, at which Crane was not present, a motion to pay Shenberg and Goldman each $2,000 as additional compensation "at such time or times and in such amounts as the financial condition of the company makes advisable" was unanimously carried, and a modified agreement executed by them and DeGarmo providing for this increase in compensation was read into the minutes of the meeting. This agreement also provides that the agreement of December, 1936, shall remain in full force and effect except as modified. The corporation paid DeGarmo $500 per month as agreed on to March 1, 1938, but on or about that date Goldman and Shenberg gave written instructions to the auditor of the corporation to discontinue his salary and he has received nothing since.

The plaintiffs on information and belief assert by their complaint that the corporation entered into an agreement on April 14, 1937, with Glassworks Local Union No. 636 which provides that the employees of the corporation who are members of the union shall each be paid at the rate of $1.10 per hour for a 40-hour week or a total of $44 per week; that Goldman and Shenberg without the knowledge or consent of the plaintiffs demanded a rebate of $14 per week from some of these employees under threat of discharge, and that certain of the employees have been refunding $14 per week to the corporation for some time past. They also charge that prior to July, 1935, the corporation acting through Goldman and Shenberg entered into an agreement with the Glass Glazing and Mirror Contractors of Los Angeles, an association of persons engaged in the same business and organized for the purpose of maintaining uniform and reasonable prices in the industry; that by this contract the defendant corporation agreed to pay a certain per cent of

its monthly gross sales to the association; that under instructions from defendants Goldman and Shenberg, the corporation's auditor has kept two sets of books relating to accounts and sales for the purpose of deceiving the association and that by means of this device the defendant corporation deceived the association and paid to it less money than the contract requires; and that Goldman and Shenberg also violated the corporation's contract with the association by cutting prices, all of which was done without the knowledge and consent of DeGarmo.

Other allegations made on information and belief are that after DeGarmo conversed and consulted with the employees of the corporation, Goldman told such employees that if he saw them conversing with DeGarmo again he would discharge them; that Goldman and Shenberg caused false sales tax returns to be filed by the corporation with the franchise tax commissioner of the state of California; that by the terms of the lease covering the use of the premises occupied by the corporation as its principal place of business, the amount of rental was to be based on the total amount of sales; that Goldman and Shenberg caused false statements to be made for the purpose of deceiving the lessor; and that the lessor was deceived by said statements and accepted smaller amounts than were due as full payment of rent due and owing.

The complaint also contains charges of financial mismanagement. The plaintiffs declare that Goldman and Shenberg, who are authorized by the board of directors to draw checks against corporate funds, have usurped the management and control of the business and have been drawing checks without right or power, thereby diverting and using the money of the corporation to its injury. "Because of the illfeeling, dissension, hatred, mutual hostility and distrust existing between the said two factions of directors as above alleged, it is impossible for the said defendant, Golden State Glass Corporation, to carry on its business and the business and affairs of said defendant corporation are now at a deadlock so far as corporate action by its board of directors is concerned, and said deadlock will continue so long as said defendants, Goldman and Shenberg are directors of said corporation."

A second cause of action in the complaint adopts by reference the allegations of the previous one and, in addition, charges that by reason of these facts the corporation has been injured and damaged in the sum of $10,000; that because of the illfeeling, hatred, mutual hostility and distrust existing between the directors, the corporation cannot take action to authorize the filing of an action to recover that amount and it is useless to make demand on the corporation or on its directors or stockholders to file such action; and that the court should authorize the plaintiffs, as stockholders, to file such an action on behalf of the corporation. There then follows the demand that a receiver be appointed to take possession and control of all the assets including the records of the corporation; that he be empowered and directed to manage and conduct the business of the corporation; and that judgment be rendered in favor of the corporation and against Shenberg and Goldman in the sum of $10,000.

[4-6] Section 564 of the Code of Civil Procedure vests jurisdiction in the superior court to appoint receivers under certain enumerated conditions. Authority to act, if it exists under the facts presented here, may be found only in subdivision 7 of that section which confers the power "In all other cases where receivers have heretofore been appointed by the usages of courts of equity." This is a broad provision which vests a large measure of discretion in the trial court, and in the absence of a clear showing of an abuse of that discretion, its action in either appointing or refusing to appoint a receiver will be upheld. However, because of the drastic character of the remedy, the discretion is not an entirely uncontrolled one but must be exercised with due regard for the facts in a particular case. Especially is this true where serious injury to the name and good will of a solvent going concern may result from the appointment of a receiver. Ordinarily, if there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, a court should not take property out of the hands of its owners. A. G. Col Co. v. Superior Court, supra; Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; Dabney Oil Co. v. Providence Oil Co., 22 Cal.App. 233, 133 P. 1155; 53 C.J., p. 25. "By numerous authorities, the principle is unequivocally announced that, from the standpoint of the business welfare of a defendant corporation, the ap-

pointment of a receiver on an ex parte application is so dangerous an expedient that it should be done only in cases of the greatest emergency and where, without such appointment, irreparable injury will unquestionably result." A. G. Col Co. v. Superior Court, supra, 196 Cal. at page 613, 238 P. at page 930.

[7-9] It is established, however, that a court of equity has power to appoint a receiver of a going corporation upon a showing that there are such dissensions in its governing body as to create a virtual suspension of its business. Boyle v. Superior Court, 176 Cal. 671, 674, 675, 170 P. 1140, 1141, L.R.A.1918D, 226, and cases there cited; see annotation 43 A.L.R. 242. In the Boyle case a mining corporation had ceased the operation of its mines because of a deadlock between its four directors. Certain stockholders brought suit against two of the directors seeking their removal upon the ground of fraud and mismanagement. The trial court appointed a receiver pendente lite without determining the merits of the case as between plaintiffs and defendants and upon the sole ground that because of the deadlock the business of the corporation was not being operated. On appeal it was held that although under the circumstances shown it was proper to appoint a receiver in accordance with "the usages of courts of equity", the function of such an officer is not to close up the corporation's affairs or to effect its dissolution but to preserve its business, and, if possible, to continue its functions. The rule which should govern such an appointment has been succinctly stated by Mr. Pomeroy as follows: "The power of a court of equity to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, appears to be settled; but it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire." 4 Pomeroy's Equity Jurisprudence, 4th Ed., § 1545.

[10] Under these principles even if there is dissension in corporate management a receiver should not be appointed where no actual or threatened cessation or diminution of business operations is shown. Thus in Katz v. De Wolf, 151 Wis. 337, 138 N.W. 1013, 1015, Ann.Cas.1914B, 237, the two surviving directors, each of whom owned one-half of the stock, could not agree on the management of the company but it was held that "Where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree, the courts will not, upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation and from those officers who are duly elected and who prima facie are entitled to administer the affairs of the corporation". In Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N.W. 216, 38 L.R.A. 122, 63 Am.St.Rep. 389, dissension had arisen between the plaintiff and the defendants who owned equally all the stock of the corporation. The court held that the plaintiff, who had been excluded from management, was not entitled to have a receiver appointed upon proof of these facts since it appeared that the disagreement between the parties had not resulted in a stoppage of the business and the corporation was perfectly solvent and well-managed. A case involving similar facts is Enterprise Printing & Pub. Co. v. Craig, 195 Ind. 302, 144 N.E. 542, 145 N.E. 309. It was there held that the mere fact that a minority stockholder is excluded from the management of a corporation is not a ground for the appointment of a receiver when the business is being successfully managed under the majority control.

[11] In the case at bar the allegations of the complaint show that the directors were deadlocked and that "because of said illfeeling, dissension, hatred, mutual hostility and distrust of said directors toward each other no business of the corporation has been transacted by said corporation since on or about the 1st day of January, 1938 * * *". These facts are undoubtedly

sufficient to justify the appointment of a receiver ex parte under the authority of Boyle v. Superior Court, supra. But the force of this showing is weakened by other averments of the complaint to the effect that since January 1, 1938, Goldman and Shenberg "have usurped and exercised and are now usurping and exercising the direction and control of the business and affairs" of the corporation. At the hearing on the order to show cause it was shown by numerous affidavits in support of defendants' motion to vacate the ex parte order that Goldman and Shenberg had been conducting the business of the corporation, which was clearly solvent, from 1933 to the time of the receivership. Attached to these affidavits were certified copies of monthly audits made by a firm of certified public accountants showing that during the first four months of 1938 the corporation had an average gross monthly income from sales in excess of $12,000 and in May, 1938, when the complaint was filed, had assets of more than $60,000 in excess of liabilities. This specific showing stood uncontradicted at the time of the hearing. Under these circumstances no sufficient grounds existed for continuing the receivership pendente lite and the trial court exceeded its jurisdiction in confirming its ex parte order of appointment.

[12, 13] It is true that the complaint contains averments alleging fraud and mismanagement on the part of Shenberg and Goldman, but these are stated either as conclusions or upon information and belief. Stronger proof is essential to justify a receivership where specific and detailed evidence that the corporation's business is being successfully conducted at a profit is presented in opposition thereto. A complaint based largely upon generalities and conclusions of the plaintiffs and upon information and belief is insufficient upon which to appoint a receiver. Mason v. San-Val, etc., Co., 1 Cal.2d 670, 36 P.2d 616.

Petitioners' contention that the trial court should have recognized Sattinger as attorney for the corporation must also be sustained. The commencement of the litigation by DeGarmo made necessary the appointment of an attorney for the corporation. At that time it had four directors, but only DeGarmo, Shenberg and Goldman actively participated in the direction of the corporate affairs. By the uncontradicted affidavits of Goldman and Shenberg it appears that Crane acquired his two shares of stock in 1936 for the purpose of representing DeGarmo's interest during his absence on a long vacation trip. The agreements between DeGarmo, Shenberg and Goldman which are set forth in the complaint recite that these three men are the sole owners of the stock of the corporation. Unquestionably, Crane has no interest in the defendant corporation and the record includes an affidavit quoting Crane as saying that the action was filed without his knowledge or consent.

[14] Under such circumstances the superior court should have recognized the attorney employed by the two directors owning two-thirds of the corporate stock and in actual control of the corporation's business affairs. In Streeten v. Robinson, 102 Cal. 542, 36 P. 946, 947, where the vice-president, then actually managing the business of the corporation, employed an attorney without approval of the board of directors this court held such action proper, the court saying: "The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been repeatedly recognized. (Citing cases.)"

The writ of prohibition and the writ of mandate will each issue as prayed.

It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; HOUSER, J.

SHENK, Justice.

I dissent.

In the first place, the opinion has invaded the domain of the trial court.

Contrary to the rule, the evidence favorable to the defendants in the trial court has been given controlling effect as against the decision of the court based on substantial evidence favorable to the plaintiffs in the pending action.

The ex parte character of the order appointing the receiver became of no significance, in view of the later hearing on the motion to vacate the order, at which all parties interested in the corporation, either as shareholders or directors, were present and represented. The evidence on the motion to vacate, consisted of the verified complaint, an affidavit of the president of the corporation in support thereof, and affidavits in opposition to the appointment and continuance

of the receivership. It was disclosed by the allegations of the complaint that the two plaintiffs and the two individual defendants were and had been, since September 17, 1935, the four directors of the corporation; that, under the by-laws of the corporation, all corporate powers were to be exercised by or under the authority of the board of directors, and the "business and affairs" of the corporation were to be controlled by said board; that, when the board consisted of four, three should constitute a quorum and the favorable action of three should be necessary to the transaction of business; that the president should be "the chief executive officer of the corporation and shall, subject to the control of the Board of Directors, have general supervision, direction and control of the business and affairs of the corporation * * * and shall have the general powers and duties of management usually vested in the office of president of a corporation"; that G. C. DeGarmo is and has been since September 17, 1935, president of the corporation, ready, able and willing to perform the duties of his office; that because of ill feeling and dissension existing between the two plaintiff directors and the two defendant directors "no business has been transacted by said corporation since on or about the first day of January, 1938"; and because thereof it is impossible for the board "to transact any business of the corporation or to elect any person to act as manager or to give any person authority or power to transact any business for said corporation, and because thereof the corporation is not transacting any business and said corporation and its business, assets and property have been injured and said corporation has been greatly damaged"; that the directors Goldman and Shendberg have taken possession and control of all the business, assets and property of the corporation and have usurped and "are now usurping and exercising the direction and control of the business and affairs of said defendant, Golden State Glass Corporation, without any right whatever to do so"; that Goldman and Shendberg, since March 1, 1938, have refused to permit the plaintiff president to perform any of the duties of his office or any services on behalf of the corporation, and that on March 1, 1938, the defendant Goldman, without any authority whatsoever, instructed the auditor of the corporation to discontinue the salary of the plaintiff DeGarmo, as president of the corporation.

The foregoing facts appear by direct averment of the plaintiffs' complaint. On information and belief, the plaintiffs have alleged acts of fraud and mismanagement on the part of defendants Goldman and Shendberg, as set forth in the prevailing opinion.

On the allegations of the complaint, the further affidavit of plaintiff DeGarmo in support thereof, and the affidavits of the defendants in opposition, the trial court concluded, as stated in his answer and return to the alternative writ herein, as follows: "After having considered said verified complaint and said affidavits and after having heard argument by said attorneys and having considered said argument, said respondent believed that the allegations made in said verified complaint are true and, so believing, said respondent did then and there make an order confirming the appointment of a receiver pendente lite."

The respondent judge further stated, "That upon conflicting evidence before said court at the time of said hearings last above mentioned, he determined that said defendants Shendberg and Goldman were not, prior to May 31, 1938, the day said ex parte order appointing said receiver was made, in possession of the assets of said defendant corporation as officers or otherwise of said corporation, but were personally in possession of the assets of said corporation without any rights whatsoever and were purporting to conduct the business of such corporation without any right so to do, and further on said conflicting evidence he determined that because of dissension existing between the members of the Board of Directors above mentioned said corporation was not transacting and could not transact any corporate business".

The respondent court had power to resolve the conflict presented by the complaint and the conflicting affidavits. Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Brush v. Apartment & Hotel Financing Corp., 82 Cal.App. 723, 256 P. 285. The case of Boyle v. Superior Court, 176 Cal. 671, 170 P. 1140, L.R.A.1918D, 226 is direct authority for the appointment of a receiver in case of a deadlock of the board of directors on account of which the corporate business cannot be exercised. Such a deadlock was present on the showing made by plaintiffs in the pending action. That

fact, together with other facts appearing in support of the plaintiffs' showing, was sufficient to support the order appointing the receiver. As the court had jurisdiction of the parties and the subject matter, the authority of the trial court to act was full and complete and on this collateral attack on the decision of the trial court the peremptory writ of prohibition should be denied.

Secondly, the defendants Goldman and Shendberg had an appeal from the order appointing the receiver. (Subs. 2, sec. 963, Code Civ.Proc.) Under section 943, Code of Civil Procedure, they as appellants could have filed an undertaking staying all proceedings under said order pending determination of the appeal on its merits. This procedure constitutes a plain, speedy and adequate remedy in the ordinary course of law, within the meaning of section 1103, Code of Civil Procedure. Jacobs v. Superior Court, 133 Cal. 364, 65 P. 826, 85 Am.St.Rep. 204; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 393, 50 P.2d 106; Pacific Broadcasting Co. v. Superior Court, 100 Cal.App. 649, 280 P. 991; Santa Ynez Mercury Corp. v. Superior Court, 26 Cal.App.2d 279, 79 P.2d 185.

The ruling in the Jacobs case has never been questioned. It was there said 133 Cal. at pages 365 and 366, 65 P. at page 827, 85 Am.St.Rep. 204: "Formerly—and when Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L.R.A. 627, 18 Am. St.Rep. 192, was decided—there was no appeal from an order appointing a receiver, but in 1897 (St.1897, p. 55) section 939 of the Code of Civil Procedure was amended so as to allow such appeal; and at the same time section 943 was amended so as to provide for the staying of an order appointing a receiver by an undertaking on appeal. These amendments were apparently intended to afford a remedy for prodigal, unwise, and unwarranted appointments of receivers (which seems to be a growing evil); and we think that they do afford an adequate remedy, as contemplated by said section 1103 and the decisions of this court on the subject. The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal. See Agassiz v. Superior Court, 90 Cal. 101, 27 P. 49."

This rule has been consistently followed in the later cases above cited and was relied on by the District Court of Appeal in denying the writ of prohibition in this matter. 82 P.2d 492. The case of A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926, so greatly relied on by the petitioner, did not overrule the Jacobs case, but annulled the order as if the proceeding were one in certiorari.

I see no abuse of discretion on the part of the trial court in denying to the defendant directors, who are thus prima facie usurping the functions of the corporation and wrongfully in possession of its assets, the right to appoint an attorney to represent the corporation. All the shareholders and all the directors of the corporation were parties to the action. All interested parties were, therefore, represented in the action. The points in controversy affecting the corporation and its assets can be adjudicated in this action between the parties thus appearing. Especially was this true since the trial court ordered that no default be entered against the corporation and that the court would, on the suggestion of the defendant directors, appoint an attorney to represent the corporation, but the offer was denied. Under these circumstances, the action of the trial court in refusing to permit the attorney for the defendant directors to represent the corporation was not arbitrary, did not amount to an abuse of discretion, and should not be controlled by mandamus. The peremptory writ of mandamus should also be denied.

I concur: CURTIS, J.

13 Cal.2d 354

In re BENNETT'S ESTATE.

SIEMON v. MORTGAGE INV. CO. OF LOS ANGELES.

L. A. 16454.

Supreme Court of California.

April 26, 1939.

1. Executors and administrators ⇐301

The probate court erred in refusing executor credit for advancements made to residuary legatees on hearing of his final account and petition for distribution, where all claims against estate and administration expenses had been paid in full and estate had been fully administered and was ready for final distribution.

2. Executors and administrators ⇐301

It is mandatory on probate court to credit executor or administrator with amount advanced to legatees under decedent's will, where no rights of third parties have intervened.

3. Executors and administrators ⇐301

An executor's advancements to residuary legatees without previous authorization by probate court were not unlawful as entrenching on such court's exclusive jurisdiction and infringing rights of all persons interested in case. Probate Code, § 1010.

4. Executors and administrators ⇐314(10), 507(1)

It was proper for probate court to consider and allow credits to executor for advancements to residuary legatees on his petition for distribution, if not on hearing of his final account.

5. Executors and administrators ⇐301

An executor acts at his peril in making advancements to residuary legatees without court order, but is protected if he pays right persons their proper shares, whether done with or without court sanction or before or after passing of his account. Probate Code, § 1010.

6. Attachment ⇐178
Judgment ⇐776

An attaching or judgment creditor takes only such rights or interest as his debtor had when writ of attachment was served.

7. Garnishment ⇐105

A garnishor stands in no better position than debtor.

8. Garnishment ⇐51, 114

Garnishees are liable only for debts owing when writ was served, and property and credits transferred or assigned by debtor cannot subsequently be subject to garnishment as belonging to him.

9. Garnishment ⇐105

Generally, judgment creditor stands in same attitude respecting garnished fund as judgment debtor and can enforce only such rights as debtor might enforce.

10. Executors and administrators ⇐301
Garnishment ⇐51

Money legally paid by executor to residuary legatee before service of writ of execution on deficiency judgment against such legatee was not subject to garnishment, and judgment creditor acquired no rights therein as against executor.

11. Executors and administrators ⇐301

An executor owed no duty to distributee's creditor, and no rights of creditor were infringed by executor's payment to distributee of money belonging to latter before settlement of executor's account.

12. Executors and administrators ⇐301

An executor, paying residuary legatees money in his hands after payment of all claims against estate, special bequests, and administration expenses, without waiting for final distribution of estate, was entitled to credit on final distribution for amount paid, in absence of bad faith or intention to obstruct collection of judgment against one of such legatees.

13. Execution ⇐55
Garnishment ⇐61

To reach interest of heir or legatee in personal property in executor's possession by attachment or execution proceedings, provisions of statute authorizing such proceedings must be followed. Code Civ.Proc. § 561.

14. Garnishment ⇐95

Where no copy of writ of execution, issued on judgment against residuary legatee under will, directed to sheriff of county in which executor resided and served on latter by such sheriff, or of notice served therewith that such legatee's personalty in executor's hands was attached, was filed in office of clerk of probate court of county in which administration was pending, but second writ of execution was issued to sheriff of latter

county and copy thereof served on clerk with notice that such legatee's interest in estate was attached, no legal garnishment of judgment debtor's interest in such property was effected and judgment creditor acquired no interest therein. Code Civ.Proc. § 561.

15. Executors and administrators ⇐504(2)

The probate court properly reduced amount of widow's family allowance by sum overpaid by executor in order approving latter's final account on objection by judgment creditor of residuary legatee, though such creditor had no interest in property of estate, as it is probate court's duty to scrutinize executor's final account carefully and disallow improper items without objection by any one.

In Bank.

Appeal from Superior Court, Los Angeles County; Florence Bischoff, Judge.

In the matter of the estate of Will Wallace Bennett, deceased, wherein the Mortgage Investment Company of Los Angeles filed an objection to a final account and petition for distribution filed by Alfred Siemon, executor of the estate. From an order settling the account and a final decree of distribution, the executor appeals.

Reversed, with directions.

Prior opinion, Cal.App., 81 P.2d 432.

Siemon & Claflin, Alfred Siemon, T. R. Claflin, and Bennett Siemon, all of Bakersfield, for appellant.

Earle M. Daniels and Burdette J. Daniels, both of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal by the executor of the last will and testament of W. W. Bennett, deceased, from the order settling the final account of the executor and final decree of distribution in said estate.

In the will of the deceased, a number of special bequests were made, and the residue of the estate was given to his two daughters, Inez B. Siemon and Edna M. Allen. The executor qualified on February 8, 1934. An inventory was filed showing the value of the estate to be slightly less than $10,000. The first publication of notice to creditors was on February 14, 1934. The time for presentation of claims expired on August 14, 1934. Three claims were presented against the estate which were allowed and paid by the executor. The special bequests were paid in full. The executor then paid on September 1, 1934, to the two residuary legatees, Inez B. Siemon and Edna B. Allen, the sum of $1,075. All of these payments were made by the executor without any order of court and before the filing of any account of his administration, and before the filing of his petition for distribution.

On September 26, 1934, the respondent herein, the Mortgage Investment Company, having theretofore recovered a deficiency judgment against the said Edna B. Allen, purported to garnishee the money due the said Edna B. Allen from said estate. For that purpose respondent had issued a writ of execution on said deficiency judgment to the sheriff of Kern county, the county of which said executor was a resident, and said sheriff on September 26, 1934, served a copy of said writ of execution, together with a notice that the interest of said Edna B. Allen, in said estate, was attached. A writ of execution on said deficiency judgment was also issued to the sheriff of the county of Los Angeles, and the sheriff of said county of Los Angeles on the 27th day of September, 1934, served a copy of said writ of execution upon the clerk of the superior court of the county of Los Angeles, together with a notice to said clerk that the interest of Edna M. Allen in the personal property of the estate of said deceased was attached.

Subsequently said executor filed his final account and petition for distribution. In said account and petition he set forth the payment of the sum of $1,075 to each of the two residuary legatees, the said Inez B. Siemon and Edna B. Allen. The respondent, the Mortgage Investment Company, filed its objection to said account and petition for distribution in which it set forth that it had recovered said judgment against Edna B. Allen, the issuance of said writs of execution and the service of the same upon the executor and the clerk of the superior court of the county of Los Angeles. Objection therein was made to the item of $1,075 paid to Edna B. Allen, and also to the item of $350, which was listed in the account as paid to the surviving widow of said deceased, on account of her family allowance, the objection being that the sum of $350 exceeded the amount legally due on the family allowance in the sum of $110. No objection was made to the item of $1,075 paid to Inez B. Siemon.

The final account and petition for distribution, together with said objection thereto, came on for hearing. Evidence was introduced and the matter was submitted for decision. The court made findings of fact in which it found, among other facts, that the residuary legatees, Inez B. Siemon and Edna M. Allen, had each been paid the sum of $1,075 on or about September 1, 1934, and the sum of $274.83 subsequently thereto, and as to these payments, amounting to the sum of $1,349.83 paid to each of said residuary legatees, "the court further finds that all of said payments paid to said residuary legatees were made without any order of court as provided in section 1010 of the Probate Code of the state of California and were illegal and void, and that said executor exceeded his powers and authority in making said payments, and said payments constitute a ratable distribution and that said payments were not reasonable payments to be made by said executor without obtaining order of court". The court found in favor of the respondent as to its claim that the amount due Edna B. Allen had been legally garnisheed by the proceedings in execution taken under the deficiency judgment in favor of respondent and against said Edna B. Allen. It also found that the payments on account of the family allowance had exceeded the legal amount due thereon in the sum of $110. Upon these findings of fact, following the conclusions of law made by the court, it was ordered that the executor pay to each of said residuary legatees, Inez B. Siemon and Edna B. Allen, the sum of $1,349.83, and that "said executor deliver the share of Edna B. Allen, residuary legatee in said estate, in the sum of $1,349.83 to the sheriff of the County of Los Angeles, State of California, in accordance with law and subject to the rights of the parties". In its order approving said final account the court allowed the sum of $240 only on the family allowance, thereby reducing the amount set forth in the final account by the sum of $110.

From this order settling the final account and the decree of final distribution the executor has appealed. The order settling the final account and the decree of distribution is in one instrument or document entitled, "Order and Decree of Settlement of Account and Final Distribution".

[1] It is the contention of the appellant that the probate court erred in refusing the executor credit for advancements made to residuary legatees upon the hearing of the final account and petition for distribution where all claims and expenses of administration had been paid in full and the estate had been fully administered and was ready for final distribution. This contention we think must be sustained. The question as to the duty of the probate court upon the final distribution of the estate to give credit to the executor on account of advancements prior to final distribution has frequently been before the appellate courts of this state, and so far as our research has extended, has been without an exception decided in accordance with the contentions of the appellant as set forth above.

In Re Moore's Estate, 96 Cal. 522, 31 P. 584, the administrator of the estate advanced to the widow of the deceased the sum of $6,000. The probate court upon final distribution charged the administrator with this sum, together with interest thereon from the time of said advancement, and allowed the administrator to retain the widow's distributive share of any moneys of this estate as part payment thereof, but denied the administrator any lien on the property of the widow remaining in the hands of the administrator to secure payment of money advanced to her in excess of the actual amount of money coming into his hands and due the widow. Both the widow and the administrator appealed from said decree of distribution. The appeal of the widow was denied, the court holding (96 Cal. page 528, 31 P. page 585): "She has retained the money, and upon the most obvious principles of justice this fact must be taken into account in the final distribution of the estate. In settling the accounts of the administrator, and in ascertaining the distributive shares of those entitled to succeed to the estate of a deceased person, and in adjudging what shall satisfy the decree of distribution, the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may so frame its judgments as to do exact justice in regard to all matters properly entering into the account of the administrator, and which in the application of equitable rules affect the distributive shares of the estate." On the appeal of the administrator the decree of distribu-

tion was reversed. In reversing the judgment the court held (96 Cal. 530, 31 P. page 586): "The superior court, as we have seen, held that the amount of money distributed to the widow might be applied by the administrator upon the amount found by the court to be due him on account of the advances made by him, but as to the balance due, after applying this money in his hands, the court held it had no power to give him any relief. We think that in so holding the court was in error. The administrator was entitled to a decree that the amount advanced by him to the widow was a charge against her entire distributive share of the estate, whether the same consisted of money or real estate or both. If her share of the money of said estate distributed was not sufficient to pay such advances, the court should have made the distribution of her share of the real estate as subject to the payment of the amount found to be due from her to the administrator by the decree. The court had the right to so decree, as incident to its general power to state the account between the parties in accordance with justice and equity, and in the settlement of which account on such a basis the court would necessarily have to ascertain what the widow had already received from the administrator on account of her distributive share of the estate."

In the Estate of Kennedy, 120 Cal. 458, 52 P. 820, 822, an appeal was taken from an order surcharging the final account of the executor with the sum of $4,500. The facts of this case are much involved and it is not necessary to set them forth in order to understand the final conclusion of the court modifying the order settling said final account. This conclusion was stated as follows: "Therefore against the sum of $4,500 surcharged the executor should be allowed credit for $2,250 paid as an advance to Frederick E. Kennedy and chargeable against his distributive portion of the estate."

In the Estate of Mitchell, 121 Cal. 391, 53 P. 810, the decree for partial distribution was reversed. In that estate the executor advanced to certain legatees sums of money during the administration of the estate for which the probate court refused to give him credit as against the amounts due said legatees. The court was of the view that the order of the probate court in certain particulars was "quite indefinite". But, said the court (121 Cal. page 395, 53 P. page 811): "Waiving this question, however, and the fact remains that there was positive error in ordering the whole of the legacies paid, as shown by the will, without deducting therefrom the sums of $1,166⅔ paid to each of the legatees after the original hearing and before the final hearing, and which payments were admitted on such final hearing to have been received by petitioners."

[2] It will be noted that in each of the cases cited above the order or decree of the probate court in which the executor or administrator was refused credit for advancements made to legatees was reversed by this court. It cannot be argued therefore that it is discretionary with the probate court to credit said executor or administrator with the sums advanced to legatees. On the other hand, the only reasonable construction to be placed upon these decisions is that it is mandatory upon the probate court to credit the executor or administrator with the amount thus advanced to legatees when no rights of third parties have intervened.

[3] The principal contention of respondent is that the act of the executor in making said advancements without previous authorization by the probate court as required by section 1010 of the Probate Code was unlawful and constitutes an attempt to entrench upon the exclusive jurisdiction of the probate court and was an infringement upon the rights of all persons interested in the estate. This contention of the respondent flies in the face of the three decisions of this court hereinbefore cited, and is not supported by any authority to which our attention has been called. The principal authority relied upon by the respondent is the case of Estate of Willey, 140 Cal. 238, 73 P. 998. The appeal in that case was from an order settling the final account of executors. It did not in any manner involve the decree of distribution. Advances had been made to certain devisees for which the executors sought to have credit in their final account. The probate court refused to allow credit for such advancements and in affirming the order of disallowance this court made it plain that the only matter before the probate court was the final account, and that the claim that credit should be allowed the executors for such advancements could not be considered on the hearing of the final account, but was a proper subject for consideration and determination on the hear-

ing of the petition for final distribution. This is made apparent from the following language of the opinion, 140 Cal. on page 242, 73 P. on page 999: "It must be apparent that as these matters, which may so radically affect the right of the beneficiaries under any will, can only be legally and effectively determined upon distribution, any effort to have them determined in settling an account must in the nature of things be out of place. We are satisfied that the only items which are properly to be settled in an executor's account are items relating purely to his administration of the estate—charges of administration and payments of debts of the decedent. We do not mean to hold that the executor is not entitled to be reimbursed for payments which he may make under the terms of the will, nor to be credited with distributive shares which he may have turned over. We simply hold that credits therefor are not to be given upon the settlement of accounts, but are to be retired therefrom and considered upon the distribution of the estate. And we understand this to be the law as laid down by this court. Estate of Rose, 80 Cal. [166] 179, 22 P. 86. Upon the hearing for distribution the court, in harmony with its general equitable powers, can adjust all matters between the legatees or distributees and the executors, and credit the latter against the estate distributed to the former for all advances which may have been made to either of them under the terms of the will."

[4] This language is particularly pertinent to the appeal in the instant case. As before noted, the appeal is from the "Order and Decree of Settlement of Account and Final Distribution". While the final account and petition for distribution were filed separately and at different times the two matters were consolidated and heard together, and but one set of findings and one decree was made by the court in its final determination of the two matters before it. Both in the final account and in the petition for distribution the executor asked to be credited for the amounts paid to the two residuary devisees. Conceding that it was improper to allow credit on account of the money advanced to these distributees in the hearing of the final account, it was perfectly proper to consider and allow credits for said advancements on the petition for distribution. It was so held not only in the authorities cited by the appellant but also by the decision in the Estate of Willey, supra, relied upon by the respondent.

Respondent also relies upon certain language found in the Estate of Guglielmi, 138 Cal.App. 80, 31 P.2d 1078. This case, like the case of Estate of Willey, supra, instead of supporting the position of respondent, is an authority expressly in favor of the appellant. In that case the probate court refused to allow the executor credit for advances made to three beneficiaries named in the will of the deceased. This order of the probate court was reversed and it may be stated here that the Estate of Guglielmi is another definite authority against the contention of the respondent that it is discretionary with the probate court to allow or disallow credits for advancements made to heirs or beneficiaries in the final distribution of the estate. In the Guglielmi case, as in others cited herein, the court, as we have seen, reversed the probate court for its failure to allow credit for advancements, not that the court abused its discretion, but that it committed prejudicial error in disallowing credit to the executor for advancements made to an heir or beneficiary.

That the case of Estate of Guglielmi supports the contention of appellant that credits should have been allowed for advancements made by him to the two residuary legatees clearly appears from the following statement in the opinion in said case (138 Cal.App. page 92, 31 P.2d page 1083): "Manifestly, if these three beneficiaries were entitled to the net income derived from the management of the estate as a whole, and if the advances made to them by the appellant were from that net income alone, he should not be charged to account to the estate in full for those advances or for interest as if he had defaulted or misapplied the funds to his own use. On the other hand, if, upon final distribution, it be found that the nephew is dead and that the brother and sister are then entitled under the will to the entire residue, then the amounts advanced to them by the appellant may be held to have been advanced on account of their distributive shares, and appellant would be entitled to a credit accordingly."

[5] Other authorities from this and jurisdictions out of the state might be cited, but we think those cited are sufficient to show that the probate court in the instant case erred in holding that the payments made to the two residuary legatees without

any order of the court as provided in section 1010 of the Probate Code were illegal and void and that said executor exceeded his powers in making said payments without a compliance with said provision of the Probate Code. The authorities are in perfect accord upon the subject of such payments in holding that the executor acts at his peril in making said advancements, but "if he pays the right persons their proper share, he is protected, whether it is done under sanction of the court or not, or before or after passing of his account; but not if he pays the wrong person". 3 Woerner, 3d Ed., American Law of Administration, p. 1937. There is no question in this case but that the payment of $1,349.83 to Inez B. Siemon was made to the proper person. No one else had any claim to the money paid to this legatee and it was error for the probate court not to allow the executor credit for this payment.

As to the payment of the sum of $1,075 to the residuary legatee, Edna B. Allen, a further question is involved. The court found that this payment was made to her on or about September 1, 1934, and that on or about September 27, 1934, a writ of execution, issued in pursuance of a deficiency judgment in favor of respondent in an amount in excess of $5,000 in an action in which respondent was plaintiff and said Edna B. Allen was defendant, was served upon said executor and the clerk of the court, and filed with the papers and pleadings in said court in accordance with section 561 of the Code of Civil Procedure.

Respondent claims by these proceedings under said writ of execution that there was garnisheed and attached all money and personal property in the hands of said executor belonging to said Edna B. Allen, including said sum of $1,075 which had been paid to said Edna B. Allen by said executor on or about September 1, 1934. No point is made that the court found that this money was paid and the execution was levied "on or about" the respective dates, stated in the court's findings. We assume therefore that according to the findings the money was paid out by the executor some twenty-six days before the levy of the execution.

[6-9] An attaching creditor, and the same rule applies respecting a judgment creditor, takes only such rights or interest as his debtor had at the time of the service of the writ of attachment. Walker v. Doak, 210 Cal. 30, 34, 290 P. 290. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026. A garnisher stands in no better position than does the debtor. Clecak v. Dunn, 95 Cal. App. 537, 272 P. 1104. Garnishees will only be held for debts owing at the time of service of the writ, and property and credits which have been transferred or assigned by the debtor cannot subsequently be subject to garnishment as belonging to him. Van Orden v. Anderson, 122 Cal. App. 132, 9 P.2d 572. "A creditor has no better claim to a fund than the beneficiary has, and, when the latter has no right to maintain an action for it, garnishment against the trustee * * * is unavailing." Walker v. Doak, 210 Cal. 30, 34, 290 P. 290, 292. "The general rule is that a creditor stands in exactly the same attitude in relation to a garnished fund that the judgment debtor does and can enforce only such rights as the debtor might enforce." 12 R.C.L. p. 778.

[10, 11] As the executor had made a legal payment to Edna B. Allen of said sum of $1,075 prior to the service of said writ of execution, no part of said sum could have subsequently been recovered from him by said Edna B. Allen. It follows therefore that no part of said sum was subject to said garnishment proceedings under said writ, and the judgment creditor acquired no rights therein as against said executor. The executor owed no duty to any creditor of any distributee, and no rights of creditors were infringed by the payment to the distributee of money in his hands belonging to said distributee, before the settlement of his account. "Nor are any rights of creditors of a distributee of an estate infringed by the payment by the administrator to the distributee of his distributive share without notice to creditors or before the passing of his account." 4 Am.Jur. sec. 420, p. 815. It has also been held that, "There is no duty cast upon the administrators or executors to ascertain the creditors, if any, of the distributees, or to notify them of his intention to distribute the estate, and he assumes no risk, so far as they are concerned, in paying to the distributees, before the passing of an account, the distributive shares to which they are entitled, therefore if the administrator in this case paid to the distributee the amount to which he was entitled, though paid before the passage of the administration account, no rights of attaching creditor has been infringed upon." American Agricultural Chemical Company v. Scrimger, 130 Md. 389, 393, 100 A. 774, L.R.A.1917F, 394.

[12] There is no intimation in the findings of the court that the payment of the $1,075 to Edna B. Allen was not made in perfect good faith and without any intention on the part of the executor to obstruct the respondent in the collection of its judgment against said distributee. On the other hand, the evidence in the case shows that the affairs of the estate were largely a family matter. The executor was the son-in-law of the deceased and the husband of one of the distributees, Inez B. Siemon. The two distributees were sisters, and the daughters of the deceased. After the payment of all claims against the estate and the special bequests there was sufficient money in the hands of the executor over and above the expenses of administration to pay to each of the two residuary legatees the sum of $1,075. Without waiting for the final distribution of the estate, the executor made payments to his wife and sister-in-law, and on the hearing of the petition for final distribution asked credit for the amounts thus advanced. The authorities cited hereinbefore clearly support the claim of the executor that he be given credit for such payment, and the probate court was in error in denying this claim of the executor.

Appellant makes the further contention that the garnishment proceedings were of no validity for the reason that the provisions of section 561 of the Code of Civil Procedure were not complied with on the part of respondent. The question of the validity of said proceedings becomes material notwithstanding our conclusion that the executor was entitled to credit for the advancement of $1,075 to each of the two residuary distributees, for the reason that according to the findings of the court, after the payment of said sum to Inez B. Siemon and Edna B. Allen on September 1, 1934, there came into the hands of the executor a further sum claimed by the executor to be $665.32. On November 29, 1935, the executor paid one-half of said amount, $332.66, to each of said two distributees. The court found that each of said legatees was entitled only to $274.83, and that the difference in these two amounts, or $57.83, was a voluntary payment, and charged the executor's account with this overpayment to each of said legatees. No exception is taken to this part of the order charging the executor's account with the sum of $57.83 paid to each of said distributees, but it is contended that the garnishment proceedings were of no validity and therefore the executor should be given credit for the sum of $274.83 which he paid to Edna B. Allen on November 29, 1935. This sum of $274.83 is referred to in the statement of facts hereinbefore set forth and together with said sum of $1,075 makes a total of $1,349.83 which the court found was paid by the executor to Edna B. Allen and which the court in its final decree of distribution ordered the executor to pay to the sheriff of the county of Los Angeles in pursuance of said garnishment proceedings.

[13] Section 561, Code of Civil Procedure, is the only authority under which the interest of a legatee in personal property in the custody of the executor may be reached by attachment or garnishment. Prior to its enactment in 1923, St.1923, p. 71, personal property in the hands of an executor was deemed to be in the custody of the law and as such was not subject to attachment or execution. Therefore, in order now to reach the interest of an heir or legatee in personal property in the possession of the executor by proceedings in attachment or under execution, the provisions must be followed.

[14] As was said in Estate of Troy, 1 Cal.App.2d 732, 735, 37 P.2d 471, 472: "This section provided a remedy where none had theretofore existed and it laid down the procedure for making the remedy effective." Did the garnishment proceedings in the instant case follow the procedure provided by said section? The undisputed facts show that a writ of execution was issued out of the superior court of the county of Los Angeles upon the judgment in favor of respondent and against said Edna B. Allen and directed to the sheriff of the county of Kern in which the executor resides. This execution was served on the executor by the sheriff of Kern county by delivering to the executor a copy of said execution, together with a notice that the personal property in his hands belonging to Edna B. Allen was attached. No copy of this writ of execution or a copy of this notice was ever filed in the office of the clerk of the probate court of the county of Los Angeles, as required by said section 561 of the Code of Civil Procedure. Instead of following the procedure provided in said section, the record shows that a second writ of execution was issued in said action of respondent against Edna B. Allen to the sheriff of the county of Los Angeles, which was never served upon the executor, but a copy of said writ

was served upon the clerk of the probate court, together with a notice that the interest of Edna B. Allen in the estate of W. W. Bennett was attached. These facts are undisputed and clearly show that respondent failed to follow the procedure provided by section 561 of the Code of Civil Procedure in order to effect a legal garnishment of the interest of a judgment debtor in personal property in the hands of an executor.

This was not, in our opinion, even a substantial compliance with the provisions of section 561 of the Code of Civil Procedure for under this procedure we have two officers levying upon the same property for the same judgment creditor in the same action. The question might well arise with the court when it came to make a distribution of the money levied upon as to which of the two officers it should order the money delivered, and in all probability that question did arise in the instant proceeding, for the court ordered the money to be paid to the sheriff of the county of Los Angeles when clearly it was the duty of the court to order the payment to the sheriff of the county of Kern, if the provisions of section 561 of the Code of Civil Procedure had been complied with. This section provides that "delivery of such property shall be ordered to the officer making the levy", and the officer making the levy is the officer "serving the personal representative of the decedent" [in this case the executor]. The provisions of section 561 of the Code of Civil Procedure are clear and unambiguous. No difficulty should be experienced in following the procedure therein outlined. By so doing the rights of all parties will be protected and the confusion which now exists in the present proceeding as to the officer to whom the money should be ordered paid will be avoided.

Furthermore, section 561 of the Code of Civil Procedure is a departure from the well-settled common-law rule that property in custodia legis is not subject to attachment or garnishment.

The respondent having failed to follow the procedure outlined in said section 561 of the Code of Civil Procedure cannot claim the benefit of this section, and therefore acquired no interest in the personal property in the custody of the executor and belonging to the judgment debtor in the civil action.

[15] The probate court correctly held that the executor had overpaid the family allowance in the sum of $110. While respondent has no interest in any of the property of said estate and this overpayment is of no concern to respondent, it was the duty of the probate court without objection of any person whatever to carefully scrutinize the final account of the executor and disallow any item therein which was not a proper and legal charge against the estate.

For the foregoing reasons the order and decree appealed from is reversed with directions to the probate court to allow as credit to the executor in his final account and petition for distribution the two items of $1,349.83 paid to each of the two residuary legatees, Inez B. Siemon and Edna B. Allen, as advancements made to them by said executor during the administration of said estate on account of the distributive share to which they were respectively entitled under the last will and testament of the said W. W. Bennett, deceased.

We concur: LANGDON, J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.; HOUSER, J.



32 Cal.App.2d 518

Ex parte LEYPOLDT.

Cr. 1683.

District Court of Appeal, Third District, California.

May 3, 1939.

Criminal law ⇐991(2)

Where, after a sentence of six months to county jail was adjudged void because not to the road camp, and on remand a sentence of three months to the road camp was imposed, but in the interval defendant had served some four months, the last sentence would be ineffective to the extent that the term served and the term imposed exceeded six months, the maximum term allowed for such offense. St.1921, p. 1615; p. 1621, § 14; Pen.Code, § 490.

Appeal from Superior Court, Stanislaus County.

Original proceeding by Emil F. Leypoldt for a writ of habeas corpus directing his release from the custody of the sheriff of Stanislaus County under a sentence to imprisonment in the county road camp on conviction of petty theft.

Writ discharged, and petitioner remanded to the sheriff's custody.

Margaret Gettys Hall, Arthur R. Friedman, and Ronald E. Bates, all of Modesto, for petitioner.

Leslie A. Cleary, Dist. Atty., and J. Lee Robertson, Asst. Dist. Atty., both of Modesto, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Petitioner plead guilty, in the justice's court, to a charge of petty theft, and on December 20, 1938, was sentenced to serve six months in the county jail. He was committed, and started to serve such sentence. On April 8th, he applied to the superior court of Stanislaus county for a writ of habeas corpus, alleging that his sentence was void, for the reason that it was mandatory upon the justice's court to sentence him to imprisonment in the county road camp, under the provisions of Statutes of 1921, page 1615. Such is clearly the law and both the People and petitioner take that position. Ex parte Moon Fook, 72 Cal. 10, 12 P. 803. At the hearing before the superior court, it was decided that the sentence was void. The writ was discharged, and petitioner remanded to the justice's court for resentence. He appeared before the latter court, and on April 14, 1939, was sentenced to imprisonment for three months in the county road camp, under the provisions of the statute mentioned above.

A writ of habeas corpus was issued out of this court, it now being the contention of petitioner that he is unlawfully restrained of his liberty, for the reason that both of said sentences are void. The first sentence, as we have stated, is admittedly void. As to the second, it is contended by petitioner that, while the right to resentence exists ordinarily under such circumstances, nevertheless, it cannot be exercised if there is an unreasonable delay between the time of the first sentence and the second. In this case the interval was some four months. The case of Ex parte Gilmore, 71 Cal. 624, 12 P. 800, appears to hold that the authority to resentence must be exercised within a reasonable time. We are inclined to the view that this refers to a reasonable time after the error in the first sentence was brought to the attention of the district attorney or other prosecuting officer. We believe, however, that there is another factor which should govern cases of this character. The extreme length of imprisonment for this offense is fixed by the Penal Code at six months. Pen.Code, sec. 490. The original sentence would have expired June 20, 1939, in the absence of credits for good behavior. On April 14th, the second sentence of three months was imposed, and ordinarily this would expire July 14th. Petitioner has, during all of this time, and since December 20, 1938, been imprisoned in the county jail. It is provided in section 14 of the statute cited above, that "any industrial farm or industrial road camp established under the provisions of this act shall be considered a county jail * * * for all purposes not inconsistent with the provisions and purposes hereof". St.1921, p. 1621. The effect of the second sentence is to imprison petitioner for a period of some twenty-four days in excess of the legal term of six months. The latter sentence is void as to such excess. People v. Brenta, 64 Cal.App. 91, 220 P. 447; People v. Goscinsky, 52 Cal.App. 62, 198 P. 40; People v. Ellena, 56 Cal.App. 428, 205 P. 701. Petitioner is therefore entitled to his liberty after serving a term of six months imprisonment, irrespective of whether he is confined in a county jail or a road camp, subject to his prior liberation due to any credit he may receive under the rules governing such places of confinement. To allow the second sentence here its full effect would result in the infliction of a punishment which would be in excess of the jurisdiction of the justice's court, and would be manifestly unfair and unjust. For instance, a defendant who has served five months of a void sentence, may be then resentenced to serve six months. Thus, he would actually be imprisoned for eleven months on a misdemeanor.

As petitioner is now legally detained under the second sentence, it is ordered that the writ be discharged and the petitioner remanded to the custody of the sheriff.

We concur: PULLEN, P. J.; THOMPSON, J.

PETTIGREW et al. v. O'DONNELL.

Civ. 12184.

District Court of Appeal, Second District, Division 2, California.

May 2, 1939.

Rehearing Denied May 23, 1939.

Hearing Denied June 30, 1939.

1. Appeal and error ⇐977(1)

The granting or denial of a new trial is a matter resting so largely in discretion of trial court that it will not be disturbed except upon a manifest and unmistakable abuse, especially when such discretion is used in awarding a new trial.

2. Automobiles ⇐246(9)

In automobile collision case, an instruction concerning right of way of defendant, if defendant and deceased "approached" the intersection in question under certain conditions, was erroneous in view of statute concerning the right of way when two automobiles "enter" an intersection. St.1935, p. 186, § 550(b).

3. Appeal and error ⇐978(1)

An order granting motion for new trial on ground of error in instructions would not be set aside on appeal, where trial court evidently believed there had been a miscarriage of justice, and justification for order was fairly debatable.

Appeal from Superior Court, Los Angeles County; O. O. Collins, Judge pro tem.

Action by Laura A. Pettigrew and another against James F. O'Donnell arising out of an automobile collision. From an order granting a motion for a new trial, defendant appeals.

Order affirmed.

Thomas P. Menzies, of Los Angeles (M. W. Phelan and William C. Coffill, both of Los Angeles, of counsel), for appellant.

Murchison & Clopton, and Mort L. Clopton, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from an order granting a motion for a new trial in an automobile collision case. The new trial was granted on the ground of error in instructions. Defendant contends there was no such error.

[1] We approach this case bearing in mind the rule which governs this court when such a question is presented to it and which may be stated as follows: "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter." 2 Cal.Jur. 905.

[2] The trial court gave to the jury the following erroneous instruction: "Where two vehicles enter an intersection of public highways at the same time, the vehicle approaching from the right shall have the right of way provided such vehicle is traveling at a lawful rate of speed, and you are instructed that if James F. O'Donnell and the deceased, Thomas L. Pettigrew, approached the intersection of Fries avenue and F street at the same time, and James F. O'Donnell was driving at a lawful rate of speed, the defendant James F. O'Donnell had the right of way over the deceased, Thomas L. Pettigrew, approaching from the left, and it was the duty of deceased to yield the right of way."

In 1929, St.1929, p. 541, section 131 of the California Vehicle Act was amended, and the rule now to be found in section 550 (b) of the Vehicle Code, St.1935, p. 186, was adopted: "Right of way. (a) Vehicles approaching an intersection. The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time the driver of the vehicle on the left shall yield to the driver on the right."

[3] It may be that the jury was misled by the instruction which the trial court gave and that a miscarriage of justice resulted from the giving of said instruction. The trial court was in a better position to determine that matter than we on appeal. The trial court believed that there had been a miscarriage of justice and made its order accordingly, and so long as the case presents an instance showing a reasonable or even fairly debatable justification for the order, such action will not be set aside on appeal. There were other alleged errors which we need not discuss.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

32 Cal.App.2d 489

PEOPLE v. PEARSON.

Cr. 2058.

District Court of Appeal, First District, Division 1, California.

May 2, 1939.

Criminal law ⇐1130(4)

Where defendant, upon being notified of withdrawal of attorney who conducted defense before trial court after appeal had been taken and transcript filed, stated he would obtain another attorney to draw brief, and appeal was placed on calendar twice for hearings but on neither occasion was any appearance made on behalf of defendant and no brief was ever filed, appeal was abandoned.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Eric Pearson was convicted of assault with intent to commit murder, and he appeals. On Attorney General's motion for dismissal of the appeal or the affirmance of the judgment.

Affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen. and William F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant, Eric Pearson, was charged by information with the crime of assault with intent to commit murder. Upon trial before a jury he was found guilty as charged, and was sentenced to imprisonment in the state prison. He took an appeal from the judgment of conviction, and the transcript was filed herein on January 3, 1939; but no brief has been filed by or on behalf of the defendant, and the Attorney General now moves, on that ground, for the dismissal of the appeal or the affirmance of the judgment.

It appears from a letter written by the attorney who conducted the defense before the trial court that he withdrew from the case about the time the transcript was completed; that he so notified the defendant, and that the defendant stated he would obtain other counsel to prepare the brief. The appeal was regularly placed on the term calendar for hearing for the months of March and April, but on neither of those occasions was any appearance made on behalf of the defendant, nor, as stated, has any brief ever been filed. We conclude, therefore, that the appeal has been abandoned. We have nevertheless examined the record, and are satisfied that the defendant was fairly tried and that the evidence is amply sufficient to sustain the judgment of conviction.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; WARD, J.



32 Cal.App.2d 462

PETERSEN et al. v. LANG TRANSP. CO.

Civ. 2235.

District Court of Appeal, Fourth District, California.

April 28, 1939.

Rehearing Denied May 25, 1939.

Hearing Denied June 26, 1939.

1. Automobiles ⇐245(17)

In action for death of deceased struck by an automobile while attempting to stop traffic approaching dangerous condition on highway caused by collision at night of an automobile with rear of defendant's truck and trailer, whether truck driver was negligent in failing to set up flares to warn approaching traffic of disabled vehicle standing on highway as required by statute was for jury. St.1935, p. 194, § 590.

2. Automobiles ⇐225

Generally, where the negligence of defendant has imperiled human life, person who takes such steps as are reasonably necessary to rescue or protect those imperiled is not contributorily negligent in voluntarily leaving a place of safety and incurring danger if he does not act with recklessness which would not be warranted under the circumstances in judgment of prudent man.

3. Automobiles ⇐245(89)

In action for death of deceased struck by automobile when attempting to stop traffic approaching dangerous condition on highway caused by collision at night of an automobile with rear of defendant's truck and trailer, whether deceased in stopping traffic with flashlight acted with prudence or whether he acted in reckless manner in at-

tempting to warn and stop approaching traffic was for the jury.

4. Automobiles ⇐246(37)

In action for death of deceased struck by automobile when attempting to stop traffic approaching dangerous condition on highway, it was error to refuse instruction that if deceased's acts were reasonably necessary for saving human lives and he voluntarily left place of safety and incurred danger, but did not act with recklessness which would not be warranted under circumstances in judgment of prudent man, deceased was not contributorily negligent.

5. Depositions ⇐88

In action for death of deceased struck by automobile, it was error to read into evidence deposition showing that driver of automobile which struck deceased was convicted of a felony and for negligent homicide for killing two persons at scene of collision for the purpose of showing that such driver, and not defendant, was entirely responsible for death of deceased, where deponent was not called as witness, and there was no occasion to impeach him. Code Civ. Proc. § 2022; St.1935, p. 243, § 755.

6. Trial ⇐260(8)

In automobile accident case, failure to give requested instructions on subject of prior and remote causes was not error, where such matters were properly covered by other instructions.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mary Petersen and another against Lang Transportation Company, a corporation, for the death of I. J. Petersen resulting when struck by an automobile while attempting to warn approaching traffic of danger created when another automobile collided with defendant's truck and trailer. From a judgment for the defendant, plaintiffs appeal.

Reversed.

Hearing denied; CURTIS, J., dissenting.

Claflin, Dorsey & Campbell, of Bakersfield, for appellants.

Borton, Petrini & Conron, of Bakersfield (Joe Crider, Jr., and John J. Ford, both of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

This action was brought by the surviving wife and son of one I. J. Petersen to recover damages for his death. A jury returned a verdict in favor of the defendant and the plaintiffs have appealed from the judgment.

The general circumstances out of which the action arose are as follows: Between 8:30 and 9 o'clock on the night of December 23, 1936, a loaded truck and trailer, owned by the respondent, was being driven in a northerly direction down the Grapevine grade on U. S. Highway 99 when a series of accidents occurred near the bottom or north end of this grade. At the point in question the road sloped to the north and consisted of a three-lane paved highway, with shoulders which extended on either side to a white guard rail. The truck and trailer, weighing 34,000 pounds each, were being driven by one Bridwell, an employee of respondent, on the easterly lane at a speed of about twelve miles an hour, both vehicles being fully equipped with lights which were burning.

As the truck was thus proceeding, a Plymouth automobile, containing a man and a woman, approached from the south and crashed into the rear end of the trailer. The driver of the truck heard the impact and immediately applied his air brakes, which failed to work. He stopped the truck by the use of other brakes, and, taking a flashlight, ran back to see what had happened. He discovered that the trailer had become detached from the truck and was standing on the east lane of the highway, about 200 feet to the rear of the truck. The crash had broken the connecting rod between the truck and trailer and had also broken the air brake connection between the two, the effect of which was to lock the brakes on the trailer and to make unworkable the air brake on the truck. The man and woman in the Plymouth car were killed, although the man lived for some little time. The Plymouth car was so badly damaged that people who came up were unable to open its doors in order to get the man out.

Just as the driver of the truck arrived at the wrecked Plymouth he saw another automobile approaching from the south and traveling in the same or easterly lane. He flagged this car with his flashlight and the driver thereof stopped. The driver of this car was Petersen, the deceased, who was accompanied by his wife, one of the appellants here. When they stopped, Bridwell told them "a couple of people ran into the back of my outfit" and asked them

to get out and help. Mr. Petersen parked his car on the easterly shoulder, next to the guard rail, and he and his wife got out. Bridwell asked Mr. Petersen to use the flashlight to stop approaching cars while he went to get his flares out. At Bridwell's suggestion Petersen stood in the center of the east lane, some fifteen or eighteen feet south of the wrecked Plymouth, and waved the flashlight to warn cars approaching from the south. Shortly thereafter, another car, driven by one Painter, approached from the south on the east lane of traffic. As this car approached the scene of the previous wreck it swerved to the west into the center lane, swerved suddenly back into the east lane, where it struck and killed Petersen, and then swerved to the west again, where it struck and killed another man, and then proceeded some distance where it finally landed astride of a fence.

Appellants' first contention is that the court erred in refusing to give the following instruction, requested by them: "The Court instructs the jury that if you find from the preponderance of the evidence that the defendant Lang Transportation Company, a corporation, was negligent in the operation, management and parking or caring for a disabled commercial vehicle at the time and place mentioned in the complaint in this action, and such negligence, if any, imperiled human life, and you find from the evidence that the acts, if any, of the deceased, I. J. Petersen, were reasonably necessary for the safety of human life, and you further find that the said deceased, voluntarily or otherwise left a place of safety and incurred danger, if any, and you further find that said deceased, Petersen, did not act with a recklessness which would not be warranted under the circumstances in the judgment of a prudent man, then you must find that the deceased was not contributorily negligent."

It was and is appellants' theory that the respondent was guilty of negligence; that this negligence imperiled human life, both with respect to the unconscious man in the wrecked Plymouth and persons coming down this grade in other cars, who would naturally travel in the easterly lane; and that, in leaving a place of safety and assuming a dangerous position in an effort to save lives by stopping on-coming cars, Petersen came within the principles and rules of law set forth in this instruction. Although the court gave general instructions covering contributory negligence, the rules of law set forth in the rejected instruction were not covered in any other instruction.

The respondent contends that this instruction was properly refused for the reason that there was no evidence which would have supported a finding of negligence on the part of the respondent and that, therefore, the question of contributory negligence on the part of Petersen is immaterial. There is no evidence in the record which would support a finding of negligence on the part of the respondent in so far as the first collision is concerned, when the Plymouth car crashed into the trailer and caused that vehicle to stop upon the highway. At the time in question section 590 of the California Vehicle Code, St.1935, p. 194, required that flares or warning lights of a certain type should be immediately placed approximately 200 feet in advance of and to the rear of a disabled commercial vehicle standing on the highway. The respondent contends that the evidence shows that there was no violation of this section, since the truck driver testified that when the impact occurred he stopped as soon as possible, went back to see what had happened, stopped the Petersen car, gave his flashlight to Mr. Petersen and requested him to stop approaching cars, ran back to the truck to get his flares, got them and while he was running back toward the trailer saw the Painter car approaching, and that before he could reach the rear of his trailer the Painter car struck Petersen.

[1] If this testimony is accepted there was no negligence on the part of the respondent. However, Mrs. Petersen testified that after she got out of their car she went back to where her husband and Bridwell were standing, about fifteen feet to the rear of the wrecked Plymouth; that Bridwell gave her husband a flashlight and told him to keep it waving; that Bridwell left and her husband stayed there "quite a few minutes"; that Bridwell then came back and said the man in the wrecked car was alive, asked her to take the flashlight, and showed her where to stand and how to wave it; that Bridwell and her husband then went back toward the wreck where they remained for about ten minutes, after which they came back and Bridwell took the flashlight from her and gave it to her husband again; that after Bridwell left

she went down and looked into the wrecked Plymouth; that she stayed there four or five minutes during which time other people were trying to force open the door of that car; that she then returned to where her husband was standing with the flashlight; and that she then saw the Painter car come around a bend in the road and rapidly approach. She testified that no flares were put out prior to the time her husband was struck and a traffic officer testified that there were no flares out when he arrived at 9:10. If the testimony of Mrs. Petersen is believed considerable time elapsed between the first collision and the injury to Petersen, during which time the truck driver busied himself with a number of things other than putting out the flares. The question of whether or not he was guilty of negligence in this respect was one of fact for the jury.

[2] Since it cannot be told whether the verdict of the jury was based upon a finding that the truck driver was not negligent, or upon a finding that although he was negligent Mr. Petersen was also negligent, the matter of adequate instructions is important here. In Henshaw v. Belyea, 220 Cal. 458, 31 P.2d 348, 350, the court approved the general rule followed in many jurisdictions to the effect that where the negligence of a defendant has imperiled human life, a person who takes such steps as are reasonably necessary to rescue or protect those imperiled is not contributorily negligent in voluntarily leaving a place of safety and incurring danger if he does not act with a recklessness which would not be warranted, under the circumstances in the judgment of a prudent man. The court pointed out that this principle is recognized and applied in all such cases where the question of the defendant's negligence is properly one for the jury, and then said: "The foregoing authorities also establish that in such cases it is for the jury to say whether the plaintiff has acted with prudence under the circumstances or has conducted himself in so reckless a manner as to defeat the right of recovery."

[3, 4] In the instant case there can be no question that human life was imperiled by the condition then existing at the point in question. Since the question of respondent's negligence was one for the jury it was also for the jury to say whether Mr. Petersen acted with prudence, under the circumstances, or whether he acted in a reckless manner in attempting to warn and stop approaching traffic. It seems quite clear that the rule in question is quite different from the ordinary rules of contributory negligence with respect to the degree of care required of the acting party. In the ordinary case any negligence, no matter how slight, will defeat recovery but in this exceptional case such negligence must amount to rashness or recklessness. As was said in Eckert v. Long Island R. Co., 43 N.Y. 502, 3 Am. Rep. 721: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." Although the appellants tried their case upon this theory and requested such an instruction, and although there was evidence calling for the submission of such an issue to the jury, no such instruction was given. On the other hand, the court gave the usual instructions on contributory negligence, including one which told the jury that if it found that "Mr. Petersen was guilty of some negligence which proximately contributed to the death of Mr. Petersen, in any degree, no matter how slight", its verdict must be in favor of the respondent. We think the error in failing to instruct the jury along the line requested by the appellants was prejudicial to their rights.

[5] It is next contended that the court erred in permitting the respondent, over the objection of the appellants, to read into evidence a part of the deposition of Painter which had been taken before the trial. The deposition was taken by the appellants, but was not used by them at the trial. The respondent was allowed to read not only the direct testimony in the deposition but a portion of the cross-examination in which Painter admitted that he had been convicted of a felony, and further, that he had suffered a conviction for negligent homicide for killing two people on the highway on the occasion here in question, and another for leaving the scene of the accident. The respondent contends that it had a right to read this part of the deposition because section 2022 of the Code of Civil Procedure provides that a deposition may be read in evidence by either party to an action. While the code so provides, any part of a deposition is subject to proper objections thereto, unless such objections have been waived. Painter was not a witness at the trial and

there was no occasion to impeach him. Assuming, but not holding, that the respondent had a right to read his direct testimony and sufficient of his cross-examination to show that he had been convicted of a felony, it had no right to get evidence of further facts into the record in this indirect manner which would have been inadmissible if directly presented. The purpose of reading this portion of the deposition must have been to impress upon the jury that Painter was entirely responsible for the death of Petersen and it may have had that effect. In any event, the admission of the evidence was error (sec. 755 of the Vehicle Code, St.1935, p. 243), which may have been prejudicial in view of the close questions of fact which were to be determined.

[6] Appellants' final contention is that the court erred in giving another instruction upon the subject of prior and remote cause. It is argued that this instruction omitted two elements which should have been included. The instruction in question merely stated the distinction between a cause and a condition. Other instructions properly covered the matters referred to by appellants and no error appears.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 497

CROSS WATER CO. et al. v. FERRERO et al.

Civ. 12154.

District Court of Appeal, Second District, Division 2, California.

May 2, 1939.

As Amended May 31, 1939.

Hearing Denied June 30, 1939.

1. Waters and water courses ⇐107(3)

In action to enjoin pumping or use of water well by defendant on her property, evidence sustained finding that defendant had no right to, or interest in, any of the water.

2. Courts ⇐493(2)

Action in federal court to quiet title to water rights did not preclude superior court from taking jurisdiction in subsequent action for injunction to restrain operation of a well which was constructed subsequent to entry of federal decree.

3. Judgment ⇐743(1)

Where deed reserved water rights to grantor, and in subsequent action to quiet title grantee was party to consent decree vesting water rights in grantor and third party, grantee had no right or interest in the water.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Cross Water Company and A. V. Handorf, Jr., against Teresa Ferrero and others to enjoin the pumping or use of a water well. From judgment for plaintiffs, the named defendant appeals.

Affirmed. Appeal of Bartolomeo Rauera and another dismissed.

Stoner & Gardner, of Los Angeles, and E. Marion Crawford, of Puente, for appellant Teresa Ferrero.

E. Marion Crawford, of Santa Cruz, and Joseph Harris Brewer, of Los Angeles, for appellants Bartolomeo Ravera and Pauline Ravera.

M. I. Church, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to enjoin the pumping or use of a water well by defendant Teresa Ferrero on her property she appeals.

The essential facts are:

October 11, 1911, Cross Land Company conveyed to the Cross Water Company, a mutual Water Company the exclusive right to develop one-fifth of a miners inch of water per acre (approximately 450 miner's inches of water for the entire tract conveyed) on 2066 acres of land located in the San Gabriel Water Basin known as Tract 1343 (see Book 4679, p. 306 of Deeds in the office of the county recorder of Los Angeles county, California). January 19, 1922, Cross Land Company conveyed thirty acres of land in block 15 in said tract 1343, together with thirty shares of water stock in the Cross Water Company to defendant Teresa Ferrero and her husband as joint tenants. Prior to the present action said defendant's husband died, vesting the title in the thirty acres of land and water stock just mentioned in said defendant.

Thereafter said defendant by failing to pay assessments levied on the water stock owned by her forfeited the same. May 28, 1932, the United States District Court in and for the Southern District of California, Central Division (case No. K–16–J) in a quiet title action, to which both plaintiff water company and said defendant were parties, upon the consent of the parties, entered a decree in favor of the Cross Water Company quieting its title to extract 450 miner's inches of water from tract 1343. By the same decree the Cross Land Company, also a party to said action, was given the exclusive right to extract from said tract 1343 all excess water over and above the 450 miner's inches of water, the title to which it vested in the Cross Water Company.

In 1934 defendant Teresa Ferrero drilled a water well upon her land and continued thereafter to pump said well and extract water from block 15 in tract 1343. Plaintiff A. V. Handorf, Jr., is a stockholder in the Cross Water Company. The trial court in the present action enjoined said defendant from further operating this well and awarded damages in favor of plaintiffs in the sum of $350.

Defendant Teresa Ferrero relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the trial court's finding of fact as follows:

" * * That it is true that since the said forfeiture of defendant's said stock in said Company, said defendant has had no right, title and/or interest in and to any of the said waters pumped from her said well and does not now have any right, title and/or interest in and to any waters whatsoever for irrigation or domestic purposes in, upon or under her said land, or any other land belonging to her located within said Tract No. 1343."*

Second: The Superior Court was without jurisdiction to try the present action, the exclusive jurisdiction of said action being vested in the Federal Court.

Third: The title to the excess water acquired by the Cross Land Company through the Federal decree of May 28, 1932, passed to defendant Teresa Ferrero by virtue of the grant deed from said company to her and her husband dated January 19, 1922.

[1] The first proposition is untenable. An examination of the record discloses substantial evidence in connection with the inferences which may be reasonably drawn therefrom to sustain the facts set forth above, the findings of facts questioned by defendant Teresa Ferrero, and each and every finding of fact necessary to support the trial court's judgment. For example, it is conceded by the Cross Water Company and defendant Teresa Ferrero that the Cross Water Company had the prior and exclusive right to extract 450 miner's inches of water from Tract 1343. In addition thereto the decree entered in the federal court on May 28, 1932, with the consent of defendant Teresa Ferrero vested in the Cross Land Company all water underlying said tract in excess of 450 miner's inches, the title to which was quieted by said decree in the Cross Water Company.

It is therefore evident that the right to extract the sum total of all water lying beneath Tract 1343 was vested in the Cross Water Company and the Cross Land Company.

[2] The second question must also be answered in the negative. The federal court action No. K–16–J was an action to quiet title to water rights, while the present action is for an injunction to restrain the operation of a well which defendant Teresa Ferrero constructed subsequent to entry of the federal decree. The facts and the relief asked in each action are entirely separate and distinct.

[3] Defendant Teresa Ferrero's final contention is likewise without merit. The deed from Cross Land Company to said defendant and her husband contained this reservation: "There is hereby reserved to the grantor all water found in and under the said lands and premises, except one-fifth of a miner's inch of water, measured under a four-inch pressure, for each one acre of land hereby conveyed, which the said grantee shall have the right to extract and use on said lands and premises for domestic purposes thereof, but said grantee shall not have the right to export the same, or any part thereof, from the said lands."

By the consent decree entered in the federal court on May 28, 1932, defendant Teresa Ferrero consented that the title to the water in excess of 1/5 of a miner's inch be vested in the Cross Land Company. It is obvious also that the right to extract 1/5 of a miner's inch of water referred to in the

deed above quoted from the Cross Land Company to defendant Teresa Ferrero was by said defendant through said consent decree relinquished to the Cross Water Company; and, since the deed to said defendant expressly reserved water in excess of 1/5 of a miner's inch in the grantor, said defendant's contention that the vesting of title in the Cross Land Company to the excess water in turn passed title to such excess water to her under said grant deed is without merit.

For the foregoing reasons the judgment appealed from is affirmed. The appeal of Bartolomeo Ravera and Pauline Ravera has not been perfected in this court. Therefore, it is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



32 Cal.App.2d 438

In re HEIN'S ESTATE.

Civ. 2272.

District Court of Appeal, Fourth District, California.

April 27, 1939.

1. Estoppel ⇐52

One who is in a position to assert a right or insist upon an advantage may by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive the right and he will thereafter be precluded from asserting it.

2. Evidence ⇐65

A conclusive presumption existed that, at time of execution of agreement under which decedent's wife accepted a legacy in full settlement of claim against decedent's estate, it was a known fact that wife was entitled to claim interest on the legacy since ignorance of the law is no excuse. Probate Code, § 162.

3. Wills ⇐734(11)

A legatee may waive the right to claim interest on a legacy. Probate Code, § 162.

4. Wills ⇐734(11)

Under evidence indicating existence of agreement between executor and legatee under which legatee agreed to accept legacy in full settlement of legatee's claim in connection with her deceased husband's estate and agreed to accept $300 for release of any other claim legatee might have as widow, subject to court's approval, and indicating that distribution was made in accordance with agreement which by inference received court's approval, trial court was justified in finding that legatee waived her right to claim interest on legacy, which was not mentioned in agreement. Probate Code, § 162; Civ.Code §§ 1521, 1523.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the estate of Robert Hein, also known as R. Hein, deceased, wherein Minnie Hein filed a petition and objected to the first and final account of Robert E. Hein, executor, and to the petition for distribution. From an adverse order and judgment the petitioner appeals.

Affirmed.

Siemon & Claflin, of Bakersfield, for appellant.

H. E. Schmidt, of Bakersfield, for respondent.

GRIFFIN, Justice.

Minnie Hein, legatee and appellant, filed a petition in the above-entitled estate representing that she was the widow of the deceased, and under his will, dated May 11, 1922, duly admitted to probate on May 27, 1929, she was entitled to receive $2,500; that Robert E. Hein, son of the deceased, was appointed executor of the will, and letters testamentary were issued to him on May 27, 1929; that petitioner received from the executor on September 1, 1934, the sum of $400 in part payment of her legacy; that on September 4, 1936, she received the balance of the principal sum, to-wit, $2,100, but alleges that she has not received any interest on said sums; that on November 23, 1937, the executor made his first and final account and filed a petition for distribution. Petitioner prayed that the court make its order requiring the executor to pay to petitioner interest on the legacy in accordance with section 162 of the Probate Code, i. e., "Legacies are due and deliverable one year after the testator's death, and bear interest from that time, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's death. * * *" Appellant appeared, filed her exceptions and objections to the first and final account and to the petition for distribution on the

ground that the account made no provision for payment to the widow of interest on the legacy. The first and final account, petition for distribution, petition for payment of interest on legacy, and exceptions thereto came on regularly for hearing on December 6, 1937. The following proceedings were then had. No testimony was introduced or proceedings had relative to the payment of the legacy to Minnie Hein, except as hereinafter expressly stated and set forth. Robert E. Hein testified that he had two agreements with Minnie Hein in connection with the payment of her legacy, both executed November 15, 1933, reading as follows:

"Chicago, Illinois.
"November 15, 1933.

"To Robert E. Hein, Executor of the Last will and testament of Robert Hein, deceased:

"The undersigned, Minnie Hein, widow of Robert Hein, deceased, hereby proposes to accept the legacy of $2500.00 bequeathed to her by the decedent's last will and testament *in full settlement of all claims or rights of the undersigned in connection with the estate of her said deceased husband* providing that her claim or right as a widow to a family allowance *or any other statutory claim* which she as such widow may have against said estate will be compromised, waived, and released upon the payment to her of the sum of $300.00 and you are authorized to present the petition or motion to the court having jurisdiction of said estate for authority to compromise undersigned's statutory claim as aforesaid for the said sum of $300.00.
(Italics ours.)

"(Signed) Minnie Hein.

"The undersigned Robert E. Hein, executor of said estate, agrees to the terms of the foregoing instrument subject, however, to the approval of the court having jurisdiction of said estate.

"Robert E. Hein."

This agreement was introduced in evidence as exhibit No. 1.

"Exhibit No. 2.
"Chicago, Illinois.
"November 15, 1933.

"To Robert E. Hein, Executor of the Last Will and Testament of Robert Hein, deceased:

"The undersigned, Minnie Hein, widow of Robert Hein, deceased, and legatee under said decedent's last will and testament dated May 11, 1922, heretofore admitted to probate in the court having jurisdiction of estates of decedents in the County of Kern, State of California, hereby makes the following proposal for the settlement of the bequest of $2500.00 granted her under the second paragraph of said decedent's will. The undersigned will accept the sum of $2500.00 payable $1000.00 within thirty days from the date hereof, the balance of $1500.00 to be payable as soon as you, as executor of said estate, may conveniently and without greatly sacrificing assets of said estate realize moneys out of which to pay said balance provided, however, that said balance shall be paid not later than one year from the date hereof.

"Minnie Hein.

"The undersigned Robert E. Hein, executor of said estate, agrees to the terms of the foregoing instrument, subject, however, to the approval of the court having jurisdiction of said estate.

"Robert E. Hein."

Robert E. Hein testified as follows:

"It was orally agreed in Chicago, Illinois, with Minnie Hein, that should I carry out the terms of Exhibit No. 1, I was to pay her attorneys, personally from my own individual account and not from the funds of the Estate of Robert Hein, all legal fees which she had incurred in the preparation and the filing of a petition for family allowance. While I was in Chicago, and during the making of the agreements, I ascertained from the attorney she had employed in Chicago that his charges to Minnie Hein were $125.00, and upon my arrival at Bakersfield, California, I ascertained from Brittan & Mack that their charges against Minnie Hein were $150.00. Thereupon, the petition for application for family allowance which had been filed in October, 1933, was presented to the court, at which time I explained to the court my understanding with Minnie Hein. Thereupon, the Court ordered the payment of $300.00 family allowance. While I was in Chicago, Illinois, I paid out of my own personal funds the sum of $125.00 to the attorney of Mrs. Minnie Hein, in Chicago, Illinois. I also out of my own personal funds, immediately paid Brittan & Mack, for services rendered Mrs. Minnie Hein, the sum of $150.00, and I immediately paid and forwarded out of the funds of the estate the sum of $300.00 to Minnie Hein. *It was our understanding in Chicago that she was to receive $2500.00 and no more* (italics ours) and I was to pay the ex-

penses she had incurred with the petition for family allowance, out of my own personal funds.

"In September, 1934, I paid out of the funds of the estate to Mrs. Minnie Hein $350.00. In April, 1935, I received from Mrs. Minnie Hein a letter asking for the balance of $2150.00. No interest was requested in said letter. The estate did not have sufficient funds to meet the balance due. There was certain real property in the estate which had been offered for sale and no prospective buyers made any offers.

"In addition to the $350.00, I later sent her $50.00 from the funds of said estate.

"In June, 1936, I was able to dispose of sufficient real property to take care of the balance due Minnie Hein, and in August of 1936, I issued a check payable to the order of Siemon & Claflin, attorneys for Mrs. Hein, in the sum of $2100.00, and wrote on the back of the check the following words:

"'Acknowledged payment of Specific Legacy mentioned in the last will of Robert Hein, deceased, $400.00 having been previously paid making total of $2500.00'.

"The check and endorsement introduced in evidence is in words and figures as follows:

"'* * * Bakersfield, Cal. 8–1–36. Pay to the order of Siemon & Claflin, attorneys for Mrs. Minnie Hein, $2100.00, Two thousand One Hundred and no/100 Dollars. Estate of Robert Hein, Deceased. By Robert E. Hein, Executor.' Endorsement of this check: 'Acknowledges payment *"of principal sum"* of specific legacy mentioned in last will of Robert Hein, Deceased, $400.00 having been previously paid making total $2500.00. Siemon & Claflin, Attorneys for Mrs. Minnie Hein.'

"Mr. Claflin stated that upon receipt of the check he added the words 'of principal sum' without authority and/or the knowledge of the maker. No interest on the legacy was ever paid."

On cross-examination the witness Robert E. Hein testified: "I never discussed the question of interest on the legacy of $2500.00 with Minnie Hein. I did not know that legacies bore interest until the matter was brought up here."

On February 13, 1934, and prior to said hearing, the court had duly and regularly made an order for the payment of family allowance in the total sum of $300, in accordance with the agreement. This sum was then paid to Mrs. Hein.

Appellant now claims that the evidence was insufficient to justify that part of the order settling the final account and decree of distribution wherein it is found, decided and ordered that the legacy to Minnie Hein had been paid in full and that the obligation for the payment of the legacy had been discharged and that the evidence was insufficient to support the finding that the executor and Minnie Hein entered into an agreement of accord and satisfaction for a valuable consideration paid by Robert E. Hein wherein and whereby Minnie Hein waived any or all interest on the legacy bequeathed to her.

Counsel for appellant argue that there never was any agreement between the executor and Minnie Hein regarding interest; that neither Minnie Hein nor the executor knew that there was such a law regarding interest and that none of the parties could have had interest in mind at any time prior to the acceptance of the balance of the principal, citing Weinberg v. John A. Vaughan Corporation, 137 Cal.App. 55, 29 P.2d 862; Estate of Hubbell, 216 Cal. 574, 15 P.2d 503; Berger v. Lane, 190 Cal. 443, 213 P. 45.

Respondent endeavors to support the order of the court denying interest to appellant on the theory that under the evidence above quoted there resulted an accord and satisfaction or waiver, and therefore appellant is estopped now from claiming interest. Each of the agreements above quoted is a full, complete and separate agreement. Robert E. Hein had the privilege and alternative of carrying out either one of the agreements. He decided to carry out the agreement introduced in evidence as exhibit No. 1, and complied with all its terms.

[1] It was held in Jones v. Maria, 48 Cal.App. 171, 191 P. 943, that a person who is in a position to assert a right or insist upon an advantage may by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever. The person who has waived the right will thereafter be precluded from asserting it.

[2–4] In neither a criminal nor civil cause, in any circumstance, can one justify his act by the naked showing that he did not know of the existence of the law. Ig-

norance of the law is no excuse is a rule in our jurisprudence. It was therefore conclusively presumed to be a known fact that appellant was entitled to claim interest when the agreement was executed. Rhodes v. Sargent, 17 Cal.App. 54, 118 P. 727. This right to claim interest may be waived. Dee v. J. C. Forkner Fig Gardens, Inc., 105 Cal.App. 606, 288 P. 149. In this particular agreement above quoted Minnie Hein agreed to accept the legacy of $2,500 "in full settlement of all claims or rights of the undersigned in connection with the estate of her said deceased husband" and "any other statutory claim which she as such widow may have against said estate will be compromised, waived, and released upon the payment to her of the sum of $300.00", subject to the approval of the court. The distribution was made in accordance with the above agreement. The payment of any claim of interest was denied to appellant. By inference, the court approved the settlement. The legal right to claim interest existed when the settlement was executed. Under this agreement and the uncontradicted evidence, the court was justified in finding that appellant had waived her right to claim interest. Fairchild v. Cartwright, 39 Cal.App. 118, 178 P. 333; Johnston v. Burnett, 17 Cal. App. 497, 120 P. 436; Civ.Code secs. 1523, 1521.

The order and judgment are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



KRAMER v. SANGUINETTI et al.*

Civ. 6091.

District Court of Appeal, Third District, California.

April 27, 1939.

Rehearing Granted May 27, 1939.

Subsequent Opinion June 8, 1939.

See 91 P.2d 604.

1. Mines and minerals ⇐38(16)

In suit to quiet title to a quartz mining claim, evidence supported findings and judgment that plaintiff was owner and entitled to possession of claim in question. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

2. Mines and minerals ⇐38(24, 25)

In suit to quiet title to a quartz mining claim, where defendants filed a counterclaim claiming title to a portion of land under an overlapping placer mining claim, findings and decree that plaintiff was owner and entitled to possession of claim described in complaint implied that defendants were not the owners or entitled to possession of any portion of their claim overlapping or conflicting with plaintiff's claim. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

3. Mines and minerals ⇐38(17)

In suit to quiet title to a quartz mining claim, evidence supported finding that plaintiff's grantor located the claim on a certain date by discovering thereon a vein or lode of quartz, bearing gold in sufficient quantity to warrant a prudent person in spending time and money in developing the claim. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

4. Mines and minerals ⇐17(1)

In order to locate a mineral claim, it is not necessary that gold, silver, or other mineral-bearing quartz should be discovered in sufficient quantity or value to assure the maintenance of a profitable mining enterprise. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

5. Mines and minerals ⇐17(1)

A valid location of a mineral claim is authorized when prospector discovers a genuine vein or lode on the claim which contains sufficient gold, silver, or other valuable deposit of mineral to warrant a reasonably prudent person in expending his time and money to further develop mine with a fair prospect of realizing a profit thereby. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

6. Mines and minerals ⇐14(1)

A statute specifying requirements necessary for a valid location of a mining claim, as between conflicting claimants, should receive a liberal construction. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

7. Mines and minerals ⇐19(1)

The posting of notice of location of a quartz mining claim by placing notice in a tin can deposited on a pyramid of rocks constructed in entrance to tunnel near point where quartz was discovered was sufficient as against claimant of an overlapping plac-

*For subsequent opinion see 91 P.2d 604.

er mining claim subsequently located, where such claimant had been employed to assist in locating quartz claim and was present and knew where notice was placed, notwithstanding statute requiring the posting of notice of location at point of discovery. Civ. Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

8. Mines and minerals ⇐19(1)

Under statute requiring the posting of notice of location at the point of discovery as a preliminary to locating a mining claim, the posting of notice is ordinarily for purpose of conveying to public the information contained therein. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

9. Mines and minerals ⇐19(1)

A notice of location containing the information specified in statute relating to posting of notice of location in connection with mining claims which is attached to and displayed on an artificially constructed pyramid of rocks at the point of discovery sufficiently complies with statutory requirement with respect to posting notice. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

10. Mines and minerals ⇐19(1)

The statute requiring a location notice to be given should receive a liberal construction with respect to the location thereof, as well as to its contents. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

11. Mines and minerals ⇐19(1)

Generally, a substantial compliance in good faith with requirements of a statute or regulation in the matter of posting notice of a mining claim is required and is sufficient, particularly as against one who has actual knowledge of prior location. Civ. Code, § 1426, and § 1426dc, as added by St. 1935, p. 2260, § 4.

12. Trial ⇐397(1)

Where issues tendered by cross-complaint were necessarily included in issues presented by complaint and answer which were fully determined by trial court, it was not necessary for trial court to adopt findings on issues tendered by cross-complaint.

13. Mines and minerals ⇐38(27)

Where trial court in suit to quiet title to a mining claim specifically found that plaintiff was owner and entitled to possession of claim described in complaint, on appeal defendants could not complain of failure to make findings upon issues raised by cross-complaint, where such findings would have necessarily been adverse to defendants. Civ.Code, § 1426, and § 1426dc, as added by St.1935, p. 2260, § 4.

14. Appeal and error ⇐1122(2)

Where judgment appealed from in suit to quiet title to a mining claim was proper, District Court of Appeal could adopt a further finding in order to save question of failure of trial court to adopt specific findings based on cross-complaint. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

Appeal from Superior Court, Calaveras County; K. A. Smith, Judge.

Suit by Charles W. Kramer against John L. Sanguinetti and Mrs. Theresa Sanguinetti, his wife, to quiet title to a quartz mining claim, wherein defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Affirmed, with addition to findings of facts.

Virgil M. Airola, of San Andreas, for appellants.

Joseph H. Huberty, of San Andreas, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment quieting title in plaintiff to a quartz mining claim in Calaveras county. The defendants assert title to a portion of plaintiff's claim by virtue of an overlapping placer mining claim which they subsequently located.

It is contended the plaintiff's title to his quartz claim is invalid for lack of evidence of a sufficient discovery of quartz on the property and for failure to post notice of his location as required by section 1426 of the Civil Code. A reversal of the judgment is also sought on the ground that the court failed to adopt findings upon the issues tendered by the cross-complaint.

The record discloses the following facts: Prior to the year 1928, Frederick H. Rindge located twenty-two mining claims in Mill Valley mining district, Calaveras county, including the Buckhorn Lode Mining Claim to which title was quieted in the plaintiff in this action. Rindge forfeited

his title to the claims by his failure to perform the statutory assessment work thereon from 1930 to 1935, inclusive. February 15, 1935, Harda Thelma Kramer relocated the Buckhorn Lode Mining Claim pursuant to the provisions of section 1426 of the Civil Code by discovering thereon quartz rock in place and by posting notice of her location as required by the last-mentioned section. A few days later she conveyed the Buckhorn claim to the plaintiff, Charles W. Kramer, who thereafter performed the assessment work and became and now is the owner of said claim and entitled to the possession thereof.

The procedure followed in the vesting of title to the Buckhorn claim in Charles W. Kramer is recited in the case of Kramer v. Gladding, McBean & Co., Cal.App., 85 P.2d 552, to which reference is made for a more particular statement of facts. It is the same as the evidence adduced in this case, in that regard. It was there determined from facts similar to those which appear in this record, that Frederick H. Rindge forfeited his title to the Buckhorn claim for failure to perform assessment work, and that Harda Thelma Kramer thereafter located that claim in the manner required by law and then transferred it to Charles W. Kramer. It was also held in that case that it was not necessary to follow in detail the procedure specified in section 1426dc of the Civil Code to perfect a valid relocation of the Buckhorn claim since it was relocated prior to the adoption of that section, September 15, 1935. Stats. 1935, p. 2260, § 4.

John L. Sanguinetti, one of the defendants in this suit, formerly worked on the Buckhorn claim for Frederick H. Rindge. He was personally present and assisted Mrs. Kramer in locating that claim in 1935. The corners of that claim conform exactly to those which were formerly staked by Mr. Rindge. The defendants knew all about Mrs. Kramer's relocation of that claim in 1935. John Sanguinetti was employed to assist her in doing so. Her claim was duly recorded as required by law in Calaveras county, February 15, 1935. September 26, 1935, the defendant, John L. Sanguinetti, recorded a notice of location of an adjoining placer mining claim called the Chaparral Placer Mining Claim, overlapping a small portion of the Buckhorn Lode Mining Claim. The defendants took and retained possession of their placer claim and asserted their title and right to the possession thereof, together with the Buckhorn claim.

This suit to quiet title to the Buckhorn claim was commenced by the plaintiff December 5, 1935. The complaint is couched in two counts. The first one consists of a simple action to quiet title to the claim. The second count seeks to eject the defendants from wrongful possession of a portion of the Buckhorn claim. The defendants answered the complaint, denying the essential allegations thereof, and affirmatively asserting they are in lawful possession and entitled to that portion of the claim which conflicts with their own property. There is attached to the answer a cross-complaint in which it is alleged the defendants are the owners and entitled to the possession of the Chaparral Placer Mining Claim, particularly described therein, which overlaps a small portion of the Buckhorn claim. It is also alleged the plaintiff asserts some interest in the Chaparral claim. The prayer then asks for a determination that plaintiff has no right, title or interest in or to the Chaparral claim, and that he take nothing by his action.

The court adopted findings to the effect that all of the allegations of plaintiff's first and second causes of action are true; that plaintiff is the owner and entitled to the possession of the Buckhorn Lode Mining Claim described in the complaint, and that the defendants had no right, title or interest therein. Judgment was rendered accordingly.

It is true the court failed to adopt specific findings upon the defendants' affirmative allegations contained in their cross-complaint with respect to their alleged ownership and right of possession of the Chaparral Placer Mining Claim.

[1,2] There is adequate evidence to support the findings and judgment that plaintiff is the owner and entitled to the possession of the Buckhorn Lode Mining Claim described in the complaint. Those findings and the decree necessarily imply that defendants are not the owners or entitled to the possession of any portion of their Chaparral claim which overlaps or conflicts with the description of the Buckhorn claim. Any further findings in that regard upon the issues presented by the cross-complaint would necessarily be adverse to the defendants.

[3] The evidence sufficiently supports the finding that Harda Thelma Kramer located the Buckhorn claim in February, 1935, by discovering thereon a "vein or lode of quartz", bearing gold in sufficient quantity to warrant a prudent person in spending time and money in developing the claim. Sec. 1426, Civ.Code; Kramer v. Gladding, McBean & Co., supra; 17 Cal. Jur. 354, sec. 48. Mr. Wyllie, a graduate mining and civil engineer, who assisted her in locating the claim, testified in that regard:

"Q. Are those the original corners that you established in 1929? A. Yes.

"Q. What did you find at the point of discovery? A. It is just on the upper side of the road, there is about a ten foot tunnel running into the hill, and there is a showing of quartz vein in this tunnel.

"Q. Describe the quartz vein that you saw. A. There is a quartz vein in there that apparently has been tipped over. I can't say as to its dip, but there is a vein there approximately a foot wide, in this tunnel, of quartz and some vein material. * * * I would say that a man would be justified in looking further into the Buckhorn to see whether it wouldn't develop into a paying mine or not."

Adam Kramer, husband of Harda Kramer, who is a practical miner with ten or twelve years of experience, testified regarding the presence of gold-bearing quartz on that claim at the time of the location, as follows:

"We went up to the Buckhorn (February 13, 1935) * * * Up there is a quartz ledge which has been dug back on the side of the bank. * * * We located the mine (there) * * * At the point of discovery on the Buckhorn there is a quartz vein which lies on about a fifteen per cent of a grade, about a foot thick in places and in some places not quite so thick, and right at the lower end in the tunnel, it dips, there is over a foot there with a solid ledge.

"Q. Have you had any assay made of that vein exposed at the point of discovery? A. I did * * *

"Q. Do you know whether or not the quartz vein at the point of discovery is gold bearing? A. It is. * * * I think that a paying mine could be developed there."

Mr. Coulter the Calaveras county surveyor, also testified in that regard:

"I never examined the Buckhorn very closely until last Wednesday. * * * I found a quartz ledge on the Buckhorn * * * in a tunnel about five or six hundred feet from the south end of the line. * * * It is a quartz vein about ten inches or a foot thick."

Mrs. Kramer testified that the defendant, John Sanguinetti, was with them on February 13th, when they made the discovery and located the Buckhorn claim. At that time a written notice of location of the claim, signed by her, was enclosed in a tobacco can and placed on a small pyramid of rocks which they constructed near the entrance to the tunnel where the gold-bearing quartz was found. A copy of that notice was duly recorded as required by law.

[4, 5] It is not necessary that gold, silver or other mineral-bearing quartz shall be discovered in sufficient quantity or value to assure the maintenance of a profitable mining enterprise. A valid location is authorized when the prospector discovers a genuine vein or lode on the claim which contains sufficient "gold, silver, cinnabar, lead, tin, copper or other valuable deposit" of mineral to warrant a reasonably prudent person in expending his time and money to further develop the mine with a fair prospect of realizing a profit thereby. Kramer v. Gladding, McBean & Co., supra; Stinchfield v. Gillis, 96 Cal. 33, 37, 30 P. 839; Jupiter Mining Co. v. Bodie Cons. Min. Co., C.C., 11 F. 666, 675; Book v. Justice Min. Co., C.C., 58 F. 106; Stockton v. Santa Paula Oil Co., 64 Cal.App. 384, 221 P. 661; 2 Lindley on Mines, [3d ed.], p. 774, sec. 403; 17 Cal.Jur., p. 318, sec. 26; 18 R.C.L., p. 1121, sec. 32.

[6] A statute specifying the requirements necessary for a valid location of a mining claim, as between conflicting claimants, should receive a liberal construction. Nevada Sierra Oil Co. v. Home Oil Co., C.C., 98 F. 673, 677.

[7] Under the circumstances of this case, the defendants may not complain of an insufficient posting of the notice of location, by placing it in a tin can which was deposited on a pyramid of rocks constructed in the entrance to the tunnel near the point where the gold-bearing quartz was discovered. The defendant, John Sanguinetti, was employed to assist Harda Thelma Kramer to locate the mine. He had worked for the former owner of the mine and knew its exact location and what work had

been performed in developing the mine. He was present and knew all about the discovery of the gold-bearing quartz in the tunnel, and that the notice was placed in the tin box and deposited on the pyramid of rocks as a formal notice of location of that particular claim. He may therefore not complain that the notice was not actually posted in a conspicuous place within clear view at the point of discovery. In the case of Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 1098, 22 Am.St.Rep. 283, it was held that a notice of location of a mine written on a sheet of paper which was folded and placed on a mound of rocks three feet in height constructed on the lode line and nearly concealed by another rock which covered the notice was a sufficient compliance with the law which required it to be posted "in a conspicuous place upon the claim located, at or near the lode line of said claim". In the case of Gird v. California Oil Co., C.C., 60 F. 531, 543, it was held that the depositing of a notice of location of a mine in a tin box which was placed on a mound of rocks near the point of discovery, under circumstances almost exactly like those in the present case, constituted a sufficient compliance with the law. In 1 Lindley on Mines, second edition, page 642, section 356, it is said: "An artificial mound of rocks on the line of a lode is a conspicuous object which would naturally attract the attention of one seeking information as to a former location of a lode, and the slightest examination of the mound would result in the discovery of a written notice."

[8-11] It is true that section 1426 of the Civil Code requires as one of the necessary preliminaries to locating a mining claim the "posting [of] a notice of such location, at the point of discovery". The posting of notice is ordinarily for the purpose of conveying to the public the information contained therein. It has been said the term "posting a notice" means that the written information shall be placed "upon a wall or post, a bulletin board or some other convenient object" so that its contents may be displayed to the public. Iowa Missouri Grain Co. v. Powers, 198 Iowa 208, 196 N.W. 979, 981, 33 A.L.R. 1268. We are of the opinion a notice of location containing the information specified in section 1426 of the Civil Code, which is attached to and displayed on an artificially constructed pyramid of rocks at the point of discovery sufficiently complies with the requirement with respect to posting the notice. The statute requiring a location notice to be given should receive a liberal construction with respect to the location thereof as well as to its contents. Stock v. Plunkett, 181 Cal. 193, 197, 183 P. 657; Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 22 Am.St.Rep. 283; Allen v. Laudahn, Idaho, 81 P.2d 734, 739; Yosemite Gold Min. Co. v. Emerson, 208 U.S. 25, 28 S. Ct. 196, 52 L.Ed. 374. In 40 Corpus Juris, page 795, section 199, it is said: "As a general rule a substantial compliance in good faith with the requirements of the statute or regulation in the matter of posting notice is required and is sufficient, particularly as against one who has actual knowledge of the prior location."

It is not necessary to determine in this case whether such a notice of location enclosed in a tin can and thereby concealed from view, even though the can be placed on an artificially constructed pile of rocks at the point of discovery, would be a sufficient compliance with the law, for the reason that the defendants had personal knowledge of the prior location of Mrs. Kramer, and the actual placing of the notice thereof in the tin can. John Sanguinetti actually assisted her in locating the claim. He was personally present when the notice was placed in the can and deposited on the pyramid of rocks. If he did not know exactly what the notice contained, he knew where to find it and how to further inform himself regarding its contents. The manner of posting the notice was therefore adequate as between the locator of the Buckhorn claim and the defendants.

[12] It was not necessary for the court to adopt findings on the issues tendered by the cross-complaint for the reason that they were necessarily included in the issues presented by the complaint and the answer which were fully determined by the court. Sormano v. Wood, 179 Cal. 102, 175 P. 451; Brooks v. White, 22 Cal.App. 719, 136 P. 500; 22 Cal.Jur. 162, sec. 37. The complaint alleges that the plaintiff is the owner and entitled to the possession of a specifically described quartz mining claim. The answer denies those allegations and affirmatively asserts that the defendants are entitled to the possession of that property. The cross-complaint reiterates the affirmative allegations of the answer in that regard. It describes eighty acres of land which it is alleged belongs to the defend-

ants. The defendants claimed that a portion of the land described in their cross-complaint overlaps a part of the mining claim to which the plaintiff asserts title. The real issue was whether plaintiff or defendants own that portion of the mining claim described in the complaint which is overlapped by a part of the defendants' property which is described in the cross-complaint. The court specifically found all of the allegations of the complaint to be true. The court further found that the plaintiff is the owner and entitled to possession of all of the mining claim which is described in the complaint, and that defendants had no right, title or interest in any portion of the property described in the complaint. A judgment was rendered accordingly. This disposes of every essential issue in the suit to quiet title to that particular mining claim. No other property was necessarily involved therein. The plaintiff claims no title to any portion of defendants' land beyond the specifically described boundaries of his own mining claim. The judgment of the court merely quiets title in plaintiff to the mining claim described in the complaint.

[13] Since the court specifically found that the plaintiff is the owner and entitled to possession of the entire mining claim described in the complaint, it is evident that further findings upon the issues raised by the cross-complaint would necessarily be adverse to the defendants. A multitude of authorities have determined that an appellant is not prejudiced by a failure to find upon issues which, in support of the judgment, would necessarily be adverse to him. Phillips v. Stark, 65 Cal.App. 136, 223 P. 443; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737; 24 Cal.Jur. 944, sec. 188; 10 Cal. Jur. 10 Year Supp., p. 741.

[14] However, to save the question of the failure of the court to adopt specific findings based on the cross-complaint regarding the affirmative allegations of defendants' asserted title and right of possession to their Chaparral Placer Mining Claim as against the plaintiff, this court hereby adopts the further finding under the authorities of article VI, section 4¾ of the California Constitution, section 956a of the Code of Civil Procedure, and Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970, that: "Defendants are the owners and entitled to the possession of all that portion of their Chaparral Placer Mining Claim in Calaveras County, California, described in the cross-complaint, which does not overlap or conflict with the description of plaintiff's Buckhorn Lode Mining Claim, as it is described in the complaint."

With the preceding addition to the findings of facts, the judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 537

McKAIG et al. v. MOUTREY et al.

SAME v. CLARK et al.

Civ. 5867, 5869.

District Court of Appeal, Third District, California.

May 4, 1939.

1. Appeal and error ⇐195

While, ordinarily, sustaining of demurrer, without leave to amend, does not constitute reversible error in absence of application for permission to amend, plaintiffs could not be charged with failure to make application, where judgment was entered by clerk the day after decision was filed, thus giving plaintiffs no opportunity to obtain such permission.

2. Waters and water courses ⇐231

In action by bondholders to compel board of directors of irrigation district to demand of collector that she execute deeds to district of certain lands which had been sold to district for delinquent 1930 and 1931 assessments, sustaining demurrer to complaint, because record showed that sale for 1930 assessment, having been based on defective notice, was ineffectual to convey title, was error, where record showed that complaint fully set forth that same property was legally advertised for sale and sold to district for 1931 assessment. St.1929, p. 161, § 42.

3. Waters and water courses ⇐231

An assessment to pay bond principal and interest of irrigation district levied on land in district became property of district to be held in trust for its bondholders when levied, and directors of district became trus-

tees for district and its bondholders from such time. St.1909, p. 1075, § 29.

4. Waters and water courses ⇐231

Failure to sell land in irrigation district for a delinquent assessment does not extinguish the assessment, but sale thereunder is merely postponed and assessment still exists until legally foreclosed or paid.

5. Waters and water courses ⇐231

Where land in irrigation district subject to delinquent assessments was transferred to directors of district, directors held land in trust for district and its bondholders, and, if they used land for their own profit, they must account to beneficiaries for profits. St.1909, p. 1075, § 29.

6. Waters and water courses ⇐231

Where record showed that sale of land in irrigation district for delinquent assessments was noticed for August 11, 1932, and that on August 12, 1932, collector of district sold all of property to district, it would be presumed, in absence of testimony to contrary, that property was offered for sale on August 11, that sale was adjourned until August 12, and that there being no purchaser in good faith collector sold land to district. St.1929, p. 1171, § 44; Code Civ.Proc. § 1963, subd. 15.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Action by George H. McKaig, Fred G. Stevenot, and C. Elmquist, as constituting and being the Bondholders' Protective Committee of the Provident Irrigation District, against A. E. Moutrey, individually, and as surviving partner of the copartnership of Benoit & Moutrey, and others, consolidated with action by George H. McKaig, Fred G. Stevenot, and C. Elmquist, as constituting and being the Bondholders' Protective Committee of the Provident Irrigation District, against Charles Clark, individually, and as copartner and surviving partner of the copartnership of Benoit & Clark, and others, to compel the Board of Directors of the Provident Irrigation District to demand of the collector of the district that she execute deeds to the district of certain lands which had been sold to the district for delinquent 1930 and 1931 assessments, and to compel an accounting by the defendant copartnerships for alleged profits made by them from the operation of a portion of such lands. From judgments sustaining demurrers to the complaints without leave to amend, the plaintiffs appeal.

Reversed.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellants.

George R. Freeman, of Willows, for respondents.

Elmer Laine, of Willows, for inter-respondents.

PER CURIAM.

These cases have been consolidated on appeal and involve the same questions of law. The complaints are practically identical, the only difference being in the tracts of land involved.

These actions are brought for the following purposes: To compel the board of directors of the district to demand of the collector that she execute deeds to the district of certain lands which had been sold to the district for delinquent 1930 and 1931 assessments. Also, to compel an accounting by the defendant copartnerships of Moutrey & Benoit and Clark & Benoit for alleged profits made by them from the operation of a portion of said lands during the years 1934, 1935, and up to the filing of the complaints in July, 1936.

The complaints first alleged that the plaintiffs are owners of matured and unpaid bonds of the district; that the Provident Irrigation District is now existing, and was organized as such in 1918. The names of the officers of the district are set out, and that they were such officers, either directors, secretaries or collectors at the time of the commencement of these actions. The issuance of bonds by the district are alleged, the bonds held by the plaintiffs, and the amount of due and unpaid principal, and also the amount of due and unpaid interest coupons issued by the district, and the amount thereof held by the plaintiffs. The complaints further allege that the district has not, since the 1st day of July, 1930, made any payments upon interest coupons, nor has it paid anything upon the principal or matured bonds, and that the district has been in default in payment of matured bonds and matured coupons since said date.

The complaints also allege the adoption in 1920 by the directors of a resolution providing for the payment of assessments in two instalments, one-half to be paid on or

before the last Monday in December, and the remaining one-half to be paid on or before the last Monday in June thereafter.

The complaints further allege the levying of assessments every year, and the failure of the land-owners to pay the assessments upon the lands involved in this action. The complaints also allege delinquent sales have been made for nonpayment of assessments.

Following the foregoing allegations it is set forth that Moutrey, Benoit and Clark leased the lands mentioned in the respective complaints, during the years 1934, 1935 and 1936, and obtained profits therefrom.

The complaints also allege that the directors have failed to obtain a collector's deed to the lands involved, alleging also that demand has been made by the plaintiffs, of the directors, that they require execution of deeds by the collector, of the lands involved herein on account of delinquent sales and purchases of the lands by the district. It is also alleged in the complaints that the plaintiffs demanded of the collector of the district that such deeds be executed.

The plaintiffs further allege the obtaining of large profits by the defendants Moutrey, Benoit and Clark, and ask an accounting thereof, and that they be required to turn the same over to the district, and also to execute deeds to the district conveying title to the lands involved herein.

In 1930, 1931 and 1932, and until the 24th of August, 1933, the title to a large portion of the lands involved in the two actions was held by the Central Bank of Oakland. On that date the lands involved were conveyed to Moutrey an undivided one-half interest therein. It further appears from the record that Benoit and Clark were copartners in the ownership and management of a portion of the lands involved in this action, and so continued until the death of Benoit.

The defendants filed both general and special demurrers to the complaints.

As grounds of demurrer the defendants, among other things, allege that the complaints do not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united; that several causes of action are set out but not separately stated; that an action for a writ of mandate is joined with an action on an implied contract and the claim against an alleged trustee by operation of law; also, that the complaints are uncertain in several particulars. Other grounds are alleged which need not be considered. The demurrers were sustained without leave to amend. From the judgments entered thereon the plaintiff appeals.

[1] Respondents first urge that inasmuch as appellants failed to ask leave of the court for permission to amend their complaints after the demurrers were so sustained that they cannot now be heard to contend that there was an abuse of discretion on the part of the trial court. It is true that the sustaining of a demurrer, without leave to amend, does not constitute reversible error in the absence of an application for permission to amend. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268. Here, however, no opportunity was given the plaintiff to obtain such permission, as the judgment was entered by the clerk the day after the decision was filed. Plaintiff had no knowledge, nor notice, nor opportunity to apply for such leave. Inasmuch as appellants had no opportunity to present this request to the trial court, they cannot now be charged with omission for failure so to do.

[2] In our former opinion we pointed out the error made in the proceedings relative to the sale for the unpaid and delinquent instalment of 1930 assessment. The record shows that the sale was set for August 12, 1931, and the notice thereof was first published on July 23d, which was less than twenty-one days prior to the day of sale, as required by section 42 of the Irrigation District Act. St.1929, p. 161. We overlooked the fact, however, that the complaint fully and in detail set forth that the same property was legally advertised for sale and sold on August 12, 1932, for the 1931 assessment, which had also become delinquent, which left no discretion in the directors but to deed to the district three years later, all interest in the lands affected including that formerly owned by the Central Bank.

[3-5] It is true that the tax sale in 1931, for the 1930 delinquent assessment, having been based upon defective notice, was ineffectual to convey title, but nevertheless, a trust was imposed upon defendants, not upon the divestiture of title but arose when the district acquired a lien on the land by virtue of the assessment. The officers and directors became trustees for the district and its bondholders when the assessment to

pay bond principal and interest was levied, and the assessment when so levied, became the property of the district and was held in trust for the bondholders under section 29 of the Irrigation District Act. St.1909, p. 1075. If an error was made in any of the steps leading up to the sale, such error was caused by the carelessness or negligence of defendants in failing to take the necessary jurisdictional steps required in the fulfillment of their trust. Failure to sell for a delinquent assessment does not extinguish the assessment, but the sale thereunder is merely postponed and still exists until legally foreclosed or the assessment paid. This situation affected the lands then belonging to the Central Bank of Oakland, and after the transfer of the title of the bank to the officers of the district they were accountable to the beneficiaries for the proceeds of the trust, and as such trustees, the directors cannot use the land for their own profit. If they did so, under the general rules of equity they must be held to account to their beneficiaries for such profit.

[6] Respondents claim that the proceedings on the day of the 1932 sale were erroneous on the ground they were not held in accordance with section 44 of the California Irrigation District Act, which requires that in case there is no purchaser in good faith for the property when offered for sale on the first day, then when the property is offered thereafter for sale if there is no purchaser in good faith, the whole amount of the property assessed shall be struck off to the irrigation district. Stats. 1929, p. 1171. This sale was noticed for August 11, 1932. The record then recites: "Thereafter, pursuant to postponement duly made * * * and on the 12th day of August 1932 * * * the Collector sold to the Provident Irrigation District * * * all of the property * * *."

As the property was sold on the 12th day of August, 1932, it is claimed that the district purchased the property on the first day of the sale. There is no testimony to that effect, and among disputable presumptions which may be controverted by other evidence is: "15. That official duty has been regularly performed." Sec. 1963, Code Civ.Proc.

The collector of the Provident Irrigation District issued his certificate of sale to the district, and the presumption is that his official duty was regularly performed; that he held the same on August 11th; offered the property for sale, and that no purchaser in good faith for the same, and that the sale was adjourned until August 12th, and there still being no purchaser in good faith for the same, he sold it to the irrigation district and issued a certificate of sale therefor.

In the instant case a single cause of action for an accounting and recovery of the proceeds of the trust property appears to have been set forth. The assessments levied created liens on the land and a trust in favor of the bondholders. It is for the breach of such trust that this action is brought.

Each complaint states a cause of action, and the demurrers thereto should have been overruled. The judgments are reversed.



32 Cal.App.2d 436

BATTAGLIA v. WINCHESTER DRIED FRUIT CO. et al.

Civ. 10975.

District Court of Appeal, First District, Division 2, California.

April 27, 1939.

1. Contracts ⇐238(2)

Under statute relating to alteration of a written contract, an unexecuted oral agreement to extend time of delivery of prunes under written contract was void. Civ.Code, § 1698.

2. Appeal and error ⇐173(9)

Unexecuted oral agreement to extend time of delivery of prunes under written contract could not be sustained under statute on ground that provision for delivery was inserted for sole benefit of buyer, where issue was not presented by pleading or proof and no finding was made thereon and to so hold would require Court of Appeal to hold as a matter of law that provision fixing time of delivery was inserted for the sole benefit of buyer. Civ.Code, § 1698.

3. Novation ⇐1

An unexecuted oral agreement to extend time of delivery of prunes sold under a written contract could not be sustained on ground of novation. Civ.Code, §§ 1530, 1531, 1698.

Appeal from Superior Court, Santa Clara County; A. F. Bray, Judge.

Action by William Battaglia against the Winchester Dried Fruit Company, a corporation, and others, upon two written contracts for the sale and purchase of prunes. From a judgment for the plaintiff, named defendant appeals.

Reversed.

Jensen & Holstein, of San Jose, and Robert M. Holstein, of Sacramento, for appellant.

Louis Oneal and Duncan Oneal, both of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued upon two written contracts for the sale and purchase of prunes. Both contracts called for the delivery by plaintiff to defendant of specified quantities and qualities of prunes—the one expiring October 31, 1936, the other December 31, 1936. Portions of the items specified were delivered and accepted within the life of the respective contracts, but other portions were not tendered until March 5, 1937. The defendant then refused to accept delivery, and plaintiff sold on the open market. He had judgment for the difference between the contract price and the price received at the sale.

The cause was dismissed as to the individual defendants, and the corporation defendant appeals on the judgment roll. The single question presented is whether the time for performance of a written contract can be extended by an unexecuted oral agreement. The trial court's judgment was based upon this finding: "That said items were not delivered or accepted during the time specified in said contracts due to a mutual oral understanding between the said plaintiff and the said defendant that the time for performance would be extended until after the expiration of the dock strike at San Francisco, which dock strike expired on or about the 5th day of February, 1937, and that after the expiration of said strike the defendant refused to accept said goods and items above specified."

[1] Section 1698 of the Civil Code, as amended in 1874 reads: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." In a case based upon almost identical facts it was held that this section rendered void an oral agreement to extend the time of delivery under such a written contract. Morton v. Albers Bros. Milling Co., 66 Cal.App. 391, 397, 226 P. 809. In support of the ruling Henehan v. Hart, 127 Cal. 656, 658, 60 P. 426, 427, was cited. In that case the Supreme Court said: "In the original section of the Civil Code, in effect January 1, 1873, it contained the words: 'Except as to the time of performance, which may be extended by any form of agreement.' The section was amended March 30, 1874, by dropping the quoted clause, and after the amendment went into effect, July 1, 1874, the section has continued as at present. We think the amendment was a necessary and wise one. It prevents the solemn written contracts which the parties have made certain, from being tampered with, annulled, set aside, or extended by the oral evidence of interested parties. The section, as amended, lays down a valuable and salutary rule in regard to written instruments."

[2] Respondent asks for an exception to this settled rule on the theory that the oral extension was a waiver of the express terms of the contract which were inserted for the sole benefit of the appellant. This issue was not presented by pleading or proof and for that reason no finding was made on it. To sustain the judgment on this ground it would be necessary to hold, as a matter of law, that a provision in a written contract fixing the time of delivery of farm produce, where payment is to be made on delivery, is a provision inserted for the sole benefit of the purchaser. This we cannot do.

[3] It is suggested in support of the judgment that the oral contract might have been a novation, but sections 1530 and 1531 of the Civil Code demonstrate that none of the essential features of a novation are present.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

McKAY et al. v. RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067 et al.*

Civ. 11034.

District Court of Appeal, First District, Division 2, California.

May 5, 1939.

1. Appeal and error ⇐763

Questions concerning constitutionality of statutes prohibiting "yellow dog" contracts could not be raised for first time in a brief filed by special permission after cause was fully argued and ordered submitted, since opposing counsel had no opportunity to reply. St.Cal.1937, p. 208, § 921.

2. Constitutional law ⇐276

Under due process provision, "liberty" is subject to the restraint of due process, and regulation which is reasonable in relation to a subject and is adopted in the interests of the community is "due process," and such essential limitation of liberty in general governs freedom of contract in particular.

[Ed. Note.—For other definitions of "Due Process of Law" and "Liberty," see Words & Phrases.]

3. Master and servant ⇐10

In dealing with relation of employer and employee, Legislature has wide field of discretion in order that there may be suitable protection of health and safety, and that peace and order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

4. Constitutional law ⇐255

Constitutional limitations, such as provision prohibiting the deprivation of life, liberty, or property without due process of law, are designed for protection of minorities against oppression and encroachment of majorities.

5. Constitutional law ⇐81

Police regulations operating reasonably for protection of health, safety, morals, and welfare of public at large are not rendered invalid by fact that they may affect incidentally the exercise of some right of the individual guaranteed by Constitution.

6. Constitutional law ⇐275(2)
Master and servant ⇐15

The statute declaring public policy prohibiting "yellow dog" contracts and permitting employees to voluntarily organize for their own protection is applicable to all employees, and hence is not discriminatory or a denial of due process of law. St.Cal.1937, p. 208, § 921.

7. Master and servant ⇐15

That contracts requiring employer to agree to force employees to join trade unions as condition of employment were proposed to be signed by employer and an outside labor union did not exclude such contracts from provisions of statutes denouncing "yellow dog" contracts between employer and employee or prospective employee, since if contracting union was an authorized bargaining agency of employees its contract was contract of employees and if contracting union was not bargaining agency of employees its contract was contrary to public policy. St.Cal.1937, p. 208, §§ 921–923; National Labor Relations Act § 2(5), 29 U.S.C.A. § 152(5).

8. Principal and agent ⇐132(1)

The contract of the agent is the contract of the principal.

9. Statutes ⇐231

Sections of Labor Code relating to "yellow dog" contracts were designed for the same purpose and were to be read together in determining whether proposed contracts between labor union and employer were prohibited. St.Cal.1937, p. 208, §§ 921–923.

10. Master and servant ⇐15

Under section of statute declaring public policy of the state in relation to "yellow dog" contracts, the right of self-organization accorded employees runs to all bona fide labor organizations and associations, whether local or national in scope. St.Cal. 1937, p. 208, § 921; National Labor Relations Act § 2(5), 29 U.S.C.A. § 152(5).

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

On petition for rehearing.

Petition denied. Prior opinion, 89 P.2d 426.

I. M. Peckham and Sol A. Abrams, both of San Francisco, for appellants.

Cullinan, Hickey & Sweigert, Rogers & Clark, and Webster V. Clark, all of San Francisco, amici curiæ.

John Francis Neylan, of San Francisco, for respondent Howard Automobile Co.

*For subsequent opinion see 106 P.2d 373.

Mathew O. Tobriner, of San Francisco, for respondent Retail Automobile Salesmen's Local Union No. 1067, and others.

Clarence E. Todd, of San Francisco, amici curiæ in support of California State Federation of Labor.

NOURSE, Presiding Justice.

[1-3] In a brief filed by special permission, after the cause was fully argued and ordered submitted, counsel for the respondent local union raised for the first time the question of the constitutionality of section 921 of the Labor Code, St.Cal. 1937, p. 208. It is a settled rule that a new question cannot be raised in this manner as opposing counsel have no opportunity to reply, and we accordingly treated the issue as not properly raised. In their petition for rehearing it is again contended that this section is unconstitutional because it denies liberty of contract without due process. Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 960; Montgomery v. Pacific Electric Ry. Co., 9 Cir., 293 F. 680, and similar cases are cited holding that the constitutional guarantee against deprivation of life, liberty or property without due process of law, includes the "liberty" of the citizen to contract as he may desire without abridgment or interference by any legislative authority. We do not deem it pertinent to analyse or discuss the reasoning of these cases. It should be sufficient to say that in the later case of West Coast Hotel Company v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, Chief Justice Hughes, in an opinion sustaining the Washington statute regulating minimum hours and wages for women, clears this question of due process in relation to freedom of contract in the following language (300 U.S. 379, 57 S.Ct. page 581, 81 L.Ed. page 708, 709, 108 A. L.R. 1330): "In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

"This essential limitation of liberty in general governs freedom of contract in particular. * * * In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." See also National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 916, 108 A.L.R. 1352.

[4, 5] We entertain no doubt that the United States Supreme Court, if called upon to rule on the provisions of our Labor Code, would, in view of this clear exposition of the subject matter involved, hold that its declared policy of voluntary and unhampered collective bargaining was a reasonable regulation "designed to insure wholesome conditions of work and freedom from oppression." This principle is based squarely upon the settled doctrine that constitutional limitations of this character are designed for the protection of the minorities against the oppression and encroachment of the majorities, but that police regulations operating reasonably for the protection of the health, safety, morals and welfare of the public at large are not rendered invalid by the fact that they may affect incidentally the exercise of some right of the individual guaranteed by the Constitution.

[6] In all these cases we attach less importance to the provisions of section 921 than to those of section 923. If 921 be unconstitutional in its attempt to ban the particular contracts specified therein the same point cannot be urged with equal vigor against 923. This section establishes and stabilizes the principle of collective bargaining upon the principle that, since "governmental authority has permitted and encouraged employers to organize" in the field of capital control, the individual employee should be protected in his rights to freely and voluntarily organize for his protection, and for the general welfare of the

public at large. This section applies to all employees. There is no discrimination, no special privilege, and no denial of the due processes of law. There is no suggestion here that it is unreasonable or oppressive in its operation. There is no contention that it is not a general regulation "designed to insure wholesome conditions of work and freedom from oppression."

Petitioners urge us to clarify the opinion in so far as the mooted question of "closed shop" is concerned. This also is a question which was not raised in any of the three appeals. We did not hold, and there is nothing in the Labor Code which would call for a holding, that a contract between an employer and a labor union would be illegal if the employer agreed to employ union men only. What we did hold is that the right of existing employees to collective bargaining would ban such a contract if it obligated the employer to discharge such employees unless they joined involuntarily the contracting labor organization. This is so because such a contract would be contrary to the declared public policy—not of section 921 of the Labor Code, but of section 923, which undertakes to protect the existing employee in his right to bargain collectively, and without coercion upon the part of the employer, or any one else. In the opinion we emphasized that the meat of the declared state policy was the employee's privilege of "freedom of association, self-organization, and designation of representatives of his own choosing." The issue which was presented and decided in each of the three cases was whether these employees who sought to exercise this privilege were entitled to the protection of the law against the acts of those who would coerce them to forego that privilege. But there is nothing in the Labor Code which would prohibit such employees, through their own voluntary organization or bargaining agency, executing a contract with their employer under which he should agree to employ members of that organization only.

[7-9] It is further argued that since the contracts here involved were proposed to be signed by the employer and an outside labor union, they were not within the terms of section 921 which denounces contracts between the employer and an "employee or prospective employee". There are several answers to the argument. First, if the contracting labor union is the duly authorized bargaining agency of the employees, its contract is the contract of the employees. This follows from the settled rule that the contract of the agent is the contract of the principal. Second, if the labor union is not the chosen bargaining agency of the employees, its contract is contrary to the public policy declared in section 923. This is so because such a contract deprives these employees of the right to bargain collectively through agencies of their own choosing. These sections of the Code are all designed for the same purpose and all must be read together. If the contract is expressly denounced by section 921, it is void; if it is not expressly mentioned in section 921, but is contrary to the public policy of section 923, it is equally void.

[10] So much is said in the briefs about "regular" labor unions that we must again refer to the definition of "labor organization" found in the National Labor Relations Act of 1935, § 2(5), 29 U.S.C.A. § 152 (5), as "any agency or employee representation committee or plan, in which employees participate * * * for the purpose * * of dealing with employers concerning grievances * * *". The right of "self-organization" accorded the employees in section 923 runs to all bona fide "labor organizations" and associations, whether local or national in their scope. But it should be noted that these sections of the Labor Code do not refer to labor "unions", though that expression is used frequently in other statutes. They refer to labor "organizations", and section 923 emphasizes the necessity of voluntary "self-organization". These provisions do not justify the assumption of super-legal powers by any organization or group of individuals to determine how the constitutional or statutory rights of any other organization, or group of individuals, shall be exercised. They expressly demand the protection of the right of every individual employee of "freedom of association, self-organization, and designation of representatives of his own choosing." Therein lies the fundamental difference between the argument of the petitioners and the rule of the former opinion. The petitioners are most emphatic in their demands of the constitutional rights of all members of "regular" labor unions. At the same time they are the most persistent in the denial of the constitutional rights of all others. The rule of the opinion is that the Labor Code undertakes to protect the rights of all employees irrespective of their class or organization, and that it specifically seeks to protect them in their right to bargain collectively with the employer, free from coer-

cion or oppression by any individual or group. Accordingly we held that, where there is no labor dispute between the employer and his employees, and a picket or boycott is maintained, advertising the employer to be "unfair to organized labor," and the sole purpose of these activities is to compel the employer to make a contract denounced by the Labor Code as contrary to public policy, such picket, or boycott, is maintained for an unlawful purpose, and is a proper subject for equitable relief, either upon the petition of the employer, or upon the petition of those employees whose collective bargaining rights are thus infringed.

The petition for a rehearing is denied.



32 Cal.App.2d 479

HEALY et al. v. YELLOW CAB CO. OF CALIFORNIA et al.

Civ. 12096.

District Court of Appeal, Second District, Division 2, California.

May 1, 1939.

1. Carriers ⇐320(27)

In passenger's action against owner and operator of taxicab for injuries received when passenger stepped from cab, at night, assuming cab was parked parallel with curb, whether defendants were negligent in stopping cab otherwise than parallel with curb was for determination of trier of facts.

2. Appeal and error ⇐996, 1008(1)

It is province of trial court to resolve questions of fact and draw reasonable inferences from facts established.

3. Appeal and error ⇐996

On appeal in negligence cases, District Court of Appeal cannot interfere with trial court's findings unless evidence discloses that the only reasonable conclusion to be drawn is that no negligence has been established by defendant or that, on issue of contributory negligence, no reasonable conclusion can be reached except that pointing to negligence of person injured.

4. Carriers ⇐347(9)

A passenger alighting from a public vehicle is not guilty of contributory negligence as a matter of law in not looking down carefully at moment of alighting from vehicle.

5. Carriers ⇐347(9)

In passenger's action against owner and operator of taxicab for injuries received when passenger stepped from cab, at night, assuming it was parked parallel with curb, whether passenger was guilty of contributory negligence was for trier of facts, where on former occasions cab had been driven parallel with and close to curb and operator gave no warning of position of cab and did not assist passenger in alighting and apparently nothing prevented operator from parking in usual manner.

Appeal from Superior Court, Los Angeles County; L. N. Turrentine, Judge.

Action by Francis J. Healy and another against the Yellow Cab Company of California and another for injuries received by the unnamed plaintiff when she stepped from a taxicab operated by the unnamed defendant and owned by the named defendant. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Harry B. Ellison and J. L. Ronnow, both of Los Angeles, for appellants.

Nat C. Recht and Alexander H. Schullman, both of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff Esther Healy was injured when she stepped from a taxicab operated by defendant John Crosson and owned by the corporation defendant. Plaintiffs recovered a judgment for the injuries suffered at a trial before the court without a jury, from which judgment this appeal is prosecuted.

At about 2 o'clock in the morning of February 2, 1937, the plaintiffs, Mr. and Mrs. Healy, and two friends were passengers in defendants' taxicab, when they were driven to plaintiffs' residence on Kingsley drive in the city of Los Angeles. In stopping to discharge passengers from the taxicab the driver did not place his car parallel with the curb but stopped it in such manner that the right front wheel was flush with the curb and the rear end of the car was four or five feet distant from the curb. The street was not marked for oblique parking. In the act of alighting, Mrs. Healy assumed that the

car was parallel with the curb and as a result fell and suffered injuries. The trial court found negligence on the part of defendants and also found that Mrs. Healy was free from contributory negligence. Defendants now contend that these findings are not supported by the evidence.

[1-3] We are not called upon to decide whether in our view of the evidence the defendants were negligent in stopping the car otherwise than parallel with the curb or whether Mrs. Healy was negligent in not looking more carefully as she stepped from the car, but rather we must bear in mind that these questions were for the determination of the lower court as a trier of fact and that the court's findings on these points must be sustained if its conclusions could reasonably be drawn from the facts in evidence. Maxwell v. Fresno City Ry. Co., 4 Cal.App. 745, 89 P. 367. There is no accurate standard for defining negligence. The question of negligence or freedom from negligence depends upon the particular facts and circumstances of the case under review. It is the province of the trial court to resolve questions of fact and draw reasonable inferences from facts established. We may not interfere with the court's findings unless the evidence discloses that the only reasonable conclusion to be reached is that no negligence has been established on the part of the defendant or that, on the issue of contributory negligence, no reasonable conclusion can be reached except that pointing to the negligence of the person injured. Wikberg v. Olson Company, 139 Cal. 479, 71 P. 511.

[4] Defendants, in arguing that Mrs. Healy was guilty of contributory negligence as a matter of law, stress the fact that she did not look carefully before she stepped from the running board of the taxicab onto the pavement. It cannot be held as a matter of law that a passenger alighting from a public vehicle is guilty of contributory negligence under all circumstances in not looking down carefully at the moment of alighting. In Maxwell v. Fresno City Ry. Co., supra [4 Cal. App. 745, 89 P. 369], defendant's street car stopped at a point other than its usual stopping place and plaintiff in alighting "did not take special notice of the ground onto which she stepped". In affirming a judgment in her favor the reviewing court said that the question was whether "fair-minded men might say that, with her knowledge and in her situation, she acted with reasonable prudence, without further investigating the condition of the ground she was to alight upon". In Bass v. Concord St. Ry. Co., 70 N.H. 170, 46 A. 1056, the plaintiff recovered a judgment for injuries suffered when she alighted from a street car which stopped at an improper place. The plaintiff testified that she "did not take any pains whatever to see where she was stepping as she stepped to the ground". The judgment was upheld on the ground that the issue of contributory negligence was for the jury and that the verdict was sustained by the evidence. Defendants rely upon Fordyce v. White Star Bus Lines, 304 Pa. 106, 155 A. 98, a case in which it was held that the plaintiff was guilty of contributory negligence as a matter of law in stepping from a bus which had stopped in the street about two feet from the curb. The case may be distinguished from the case under review in that the bus in the Fordyce case was not stopped at its usual place for discharging passengers and the plaintiff in alighting did not make use of a hand rail which had been provided.

[5] It is pointed out by plaintiffs that Mrs. Healy had on other occasions been driven to her home by taxicabs of defendant company and on the other occasions the taxicab had been driven parallel with and close to the curb; that on the occasion in question she was not informed and did not know that the cab had stopped on an angle to the curb but, on the contrary, believed that it had stopped so that the running board was flush with the curb; that the driver gave her no warning of the situation and did not assist her in alighting; that there were no other vehicles in the vicinity to prevent the driver from properly parking his car in the usual manner; and that she had the right to assume that she could step with safety from the running board to the curb. Under these circumstances it cannot be held that the case presented is one where fair-minded men could come to only one reasonable conclusion. We cannot hold as a matter of law that Mrs. Healy was guilty of contributory negligence. The findings, being supported by substantial evidence, may not be disturbed by the reviewing court.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

32 Cal.App.2d 490

CONGREGATION MUKUOM ISRAEL et al. v. CONGREGATION AHABOT ISRAEL (WEINBERG et al., Interveners).

Civ. 11019.

District Court of Appeal, First District, Division 2, California.

May 2, 1939.

Hearing Denied June 30, 1939.

1. Appeal and error ⇐714(5)

Facts stated in briefs on appeal, but not appearing from record consisting solely of judgment roll, cannot be accepted for purpose of defeating judgment, but every intendment and presumption, not contradicted by or inconsistent with record, must be indulged in favor of judgment.

2. Appeal and error ⇐907(3)

Where appeal is taken on judgment roll alone, trial court's findings are conclusively presumed to be supported by evidence.

3. Appeal and error ⇐907(3)

Where appeal is taken on judgment roll alone, trial court's findings must be so construed as to uphold, rather than defeat, judgment thereon, if possible.

4. Appeal and error ⇐907(3)

Where appeal is taken on judgment roll alone, trial court's findings must be liberally construed, and any ambiguity or inconsistency therein will be resolved in favor of sustaining judgment, if possible.

5. Appeal and error ⇐907(3)

Where appeal is taken on judgment roll alone, judgment may be reversed only for fatal error appearing on face of judgment roll.

6. Trial ⇐395(1)

In action between religious corporations to set aside deed from plaintiff to defendant, trial court's findings that grant was conditioned on proposed merger or consolidation of such corporations and that no such merger or consolidation was ever effected supported judgment for plaintiff. Civ.Code, § 361.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action in the nature of an action to quiet title by the Congregation Mukuom Israel, a corporation, against the Congregation Ahabot Israel, a corporation, to set aside a deed from plaintiff to defendant, in which Yetta Weinberg and others intervened as parties plaintiff and defendant filed a cross-complaint in intervention against intervening plaintiffs and others. Judgment for plaintiff corporation, and defendant corporation appeals.

Affirmed.

William Steinberg, of San Francisco, for appellant.

John D. Harloe, of San Francisco, for respondents.

Wayne M. Collins, of San Francisco, amicus curiæ for Congregation Ahabot Achim.

SPENCE, Justice.

This action was in the nature of an action to quiet title in which it was sought to set aside a deed from plaintiff to defendant Congregation Ahabot Israel, a corporation. From a judgment in favor of plaintiff, defendant appeals upon the judgment roll.

This controversy arose out of the proceedings relating to the proposed merger and consolidation of two religious corporations, namely, plaintiff Congregation Mukuom Israel and one of the original defendants, Congregation Ahabot Achim. During those proceedings the defendant Congregation Ahabot Israel was organized as a corporation and plaintiff deeded the real property in question to said defendant. This action was dismissed as to defendant Congregation Ahabot Achim. The plaintiff corporation and the defendant corporation, Congregation Ahabot Israel, may therefore be referred to as plaintiff and defendant.

[1-5] Some facts, stated in the briefs, do not appear from the record before us which consists solely of the judgment roll. Such facts cannot be accepted for the purpose of defeating the judgment but on the contrary, every intendment and presumption, not contradicted by or inconsistent with the record on appeal, must be indulged in favor of the judgment. 2 Cal.Jur. 852, sec. 499. Where the appeal is taken on the judgment roll alone, "the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judg-

ment". Ochoa v. McCush, 213 Cal. 426, 430, 2 P.2d 357, 359. Furthermore, "the judgment may be reversed only upon some fatal error appearing on the face of the judgment roll". Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.2d 5, 7; see, also, Estate of Woods, 23 Cal. App.2d 187, 72 P.2d 258.

[6] The trial court found that both plaintiff and Congregation Ahabot Achim were religious corporations organized under the laws of this state; that plaintiff was the owner of the real property in question; that in 1933, said two corporations entered into negotiations for the merger or consolidation of said two corporations; that committees were appointed and resolutions were passed by said corporations for that purpose; that the defendant was organized as a corporation and said real property was conveyed to defendant; that the grant of said real property was conditional; that no proceedings were had under section 361 of the Civil Code for the merger or consolidation of the two original corporations and that said corporations were never merged or consolidated; that there was no consideration of any kind for the deed from plaintiff to defendant and that said deed was ultra vires, invalid, void and ineffectual for any purpose; that plaintiff was never dissolved; that the proceedings for merger and consolidation were abandoned, rescinded and annulled by plaintiff and due notice thereof was given to defendant; that demand had been made upon defendant for the return of said property and that plaintiff was entitled to have said property reconveyed to it. There is nothing in the record before us to show the terms and conditions of said deed, the terms and conditions of the resolutions passed by said corporations or the terms and conditions of any agreement that may have been entered into between said corporations or their committees for the purposes of merging or consolidating said corporations.

A fair construction of the findings shows that the grant from plaintiff to defendant was conditioned upon the proposed merger or consolidation of the two original corporations and that no merger or consolidation was ever effected as agreed. We are of the opinion that the findings to that effect constituted the material findings and that said findings support the judgment entered. We find no irreconcilable conflict in the findings as claimed by defendant and a review of the judgment roll discloses no error warranting a reversal of the judgment.

Defendant discusses at length the powers of religious corporations under our amended statutes, the merger and consolidation of corporations and the subjects of consideration, ultra vires, and failure of consideration. We find nothing in said discussion which justifies the claim that the record before us discloses error. Under the discussion of the last-mentioned subject, defendant cites and relies upon Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976. The opinion in that case makes it entirely clear that the rule there enunciated has no application to a case involving a conditional grant.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



32 Cal.App.2d 511

PEERS et ux. v. STOLL et ux.

Civ. 11043.

District Court of Appeal, First District, Division 2, California.

May 3, 1939.

Hearing Denied June 29, 1939.

1. Appeal and error ⇐225

Where notice of motion to direct execution to issue was not objected to in the trial court, objection that notice of motion was fatally defective because it did not state grounds on which motion would be made, could not be considered for the first time on appeal. Code Civ.Proc. § 1010.

2. Appeal and error ⇐935(3)

Where no objection was made to notice of motion to direct execution to issue, Court of Appeal would assume, in absence of anything to the contrary in record, that objection, if any, to the form of the notice served upon defendants was waived. Code Civ. Proc. § 1010.

3. Execution ⇐73

Affidavit in support of motion for an order directing execution to issue on a judgment 19 years after it was entered was not defective in failing to set forth excuse for not taking out execution within 5 years aft-

er entry of the judgment. Code Civ.Proc. §§ 681, 685; St.1933, p. 2499.

4. Execution ⇐75

Where 19 years elapsed after entry of judgment before motion for order directing execution to issue was filed, lapse of time did not indicate abuse of discretion on part of trial court in granting motion. Code Civ.Proc. § 685; St.1933, p. 2499.

5. Execution ⇐72

In passing on motion for order directing execution to issue, trial court had right to give little or no weight to those allegations in supporting affidavits made by parties on information and belief. Code Civ.Proc. § 685; St.1933, p. 2499.

6. Execution ⇐75

Where 19 years elapsed after entry of judgment and delay was not prejudicial to rights of defendants, granting of motion for order directing execution to issue was not an abuse of discretion; it being immaterial that defendants had little or no property subject to execution. Code Civ.Proc. § 685; St.1933, p. 2499.

7. Execution ⇐72

A motion for an order directing execution to issue is a step in an action already commenced and not an action to revive a judgment. Code Civ.Proc. § 685; St.1933, p. 2499.

8. Execution ⇐75

The statute relating to enforcement of judgment after lapse of 5 years from date of its entry by leave of court upon motion, in view of legislative history, does not set a time limit within which execution to enforce a judgment must issue, and hence right to execution on motion filed 19 years after judgment was entered, was not barred. Code Civ.Proc. § 685; St.1933, p. 2499.

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Action to foreclose a mortgage by Alexander Peers and wife against A. G. Stoll and wife, wherein a decree in favor of plaintiffs was entered, sale had, and a deficiency judgment entered. From an order directing execution to issue, defendants appeal.

Affirmed.

Owen D. Richardson, of San Jose, for appellants.

Rea, Free & Jacka and Irvin A. Frasse, all of San Jose, and Robert E. Hatch, of San Francisco, for respondents.

STURTEVANT, Justice.

In an action brought to foreclose a mortgage the defendants defaulted, a decree in favor of the plaintiffs was entered, a sale was had, and a deficiency judgment for $3,149.50 was entered April 5, 1918. No other proceedings were had until August 4, 1937, when the above-named plaintiffs applied to the court for an order directing execution to issue. Code Civ.Proc. sec. 685. They served and filed a written notice of their motion and at the same time served and filed an affidavit by G. R. Soule, the assignee of the judgment, in support of their motion. Thereafter the defendants served and filed an affidavit by A. G. Stoll, one of the defendants, in opposition to the motion. A hearing was had on the motion and the trial court caused an order to be entered granting said motion. From that order the defendants have appealed.

[1-6] At this time the defendants contend the trial court abused its discretion in granting said motion. In the first place they contend the notice of motion was fatally defective because it did not state the grounds on which the motion would be made. Code Civ.Proc. sec. 1010. The record does not disclose that any objection to the form of the notice was made in the trial court. Such an objection may not be made in a court of review for the first time. Nothing to the contrary appearing in the record this court will assume that the defendants waived any objection, if they had any, to the form of the notice served upon them. Hecq v. Conner, 203 Cal. 504, 506, 265 P. 180. In the next place the defendants contend that the affidavit served on them was insufficient in not "* * * setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code". Code Civ.Proc. sec. 685. That is, they complain because the plaintiffs did not set forth any excuse for not taking out execution within five years after the entry of the judgment. The omission of the plaintiffs of which the defendants complain was not fatal. The effect of such omission is stated in the next sentence in section 685, "The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion." But the motion was not

denied— it was granted—therefore the defendants may not complain. The third contention made under this point is that under the facts alleged in the affidavit of A. G. Stoll, and in view of the lapse of over nineteen years after the entry of judgment, the revivor of the judgment was an abuse of discretion. Before proceeding it should be kept in mind that properly speaking the record does not present a question of "revivor of the judgment". 34 C.J. 658; 15 Cal.Jur. 256, 257. As addressed to the motion made by the plaintiffs the mere matter of delay is not necessarily material. In Harlan v. Harlan, 154 Cal. 341, at page 343, 98 P. 32, at page 34, the court said: "And the mere fact that plaintiff had allowed 10 years to elapse without making any effort to compel payment affords no ground for the contention that the court abused its discretion in ordering execution to issue. Doehla v. Phillips, 151 Cal. 488, 91 P. 330." Nor do the other facts shown by the evidence indicate an abuse of discretion on the part of the trial court. It had the right to give, and in support of its order we must presume that it gave, little or no weight to those allegations in the affidavits made by the parties on information and belief. Gay v. Torrance, 145 Cal. 144, 150, 78 P. 540; Pelegrinelli v. McCloud River Lumber Co., 1 Cal.App. 593, 597, 82 P. 695. The evidence showed the judgment was final, that payment thereof was long overdue, and that nothing whatever had been paid on it. The evidence also showed the delay was in no manner prejudicial to the rights of the defendants. The facts that the defendants are sixty-five years of age and are possessed of little property do not constitute valid reasons why the order complained of should not be made. Those reasons could with equal propriety be set up against the issuance of any execution. But no one would make that contention. The defendants also call attention to the enactment of moratorium acts and they ask us to rule accordingly. But it is sufficient to state no moratorium statute has been passed covering this case.

[7, 8] The second point made by the defendants is that the right to an execution is barred by the limitation expressed in Code of Civil Procedure, section 685, as amended in 1933, St.1933, p. 2499. The last clause in that section is, "but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act". Said amendment took effect August 21, 1933. As of that date the defendants contend the rights of the parties should be measured and therefore the plaintiffs were barred. We think they misconstrue the statute. As shown above, we are not in the instant case concerned with actions "to revive a judgment * * *". We are concerned with a step in an action already commenced. Saunders v. Simms, 183 Cal. 167, 190 P. 806. Section 685 was incorporated in the Practice Act of 1861 and was then numbered section 214. On the adoption of the codes it was codified as section 685 of the Code of Civil Procedure. At that time the privilege mentioned was limited to actions "other than for the recovery of money." The law so stood until March 9, 1895, St.1895, p. 38, when the section was amended to read as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the Court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this Act." The law so stood until 1933 when the section was again amended. The amendment, in effect, consisted of inserting the words which we have italicized, and the entire amended section is as follows: "685. Execution of judgment after five years: Enforcement by judgment on supplemental proceedings. In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, *and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.* Judgment in all cases may also be enforced or carried into execution after the lapse of five years from the date of its entry, by judgment for that purpose founded upon supplemental proceedings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act." The portion not

italicized should be construed as the law since 1895 and the portion italicized should be construed as stating the law since August 21, 1933. Pol.Code, sec. 325. But under the statute as enacted in 1895 there is a long line of decisions to the effect that said statute did not provide a time limit. 15 Cal.Jur. 257. A comparison of the enactment in 1933 with the enactment in 1895 shows no change of intention on the part of the legislature.

The foregoing expressions are, we think, in accord with other recent decisions construing said statute. In Mohr v. Riccomi, 14 Cal.App.2d 416, at page 418, 58 P.2d 659, at page 660, the court said: "Failure to give reasons for delay justifies the court in denying the motion, but where, as here, reasons are given for failure to have execution issued, which reasons are satisfactory to the court, the power of the exercise of discretion still exists as it did prior to the amendment; a more formal presentation of the motion only being required." See, also, Corcoran v. Duffy, 18 Cal.App.2d 658, 64 P.2d 735, and Passow v. Bell, 27 Cal.App.2d 360, 81 P.2d 224.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



32 Cal.App.2d 516

BECHTEL v. CAKE et al.

CAKE et al. v. CORPORATION OF AMERICA et al.

Civ. 5941.

District Court of Appeal, Third District, California.

May 3, 1939.

1. Mortgages ⇐360

Evidence justified trial court's findings that all necessary requirements were met for a valid sale under a deed of trust.

2. Appeal and error ⇐717

District Court of Appeal could not consider written opinions of the trial judge, filed and in the bill of exceptions, to determine whether his findings were supported by the evidence.

3. Mortgages ⇐375

Evidence justified trial court's finding as to amount of deficiency judgment after a sale under a trust deed.

4. Mortgages ⇐319(1)

In suit for deficiency judgment after sale under a trust deed, burden was on defendants to prove payments made on secured notes.

5. Appeal and error ⇐1073(7)

Where assignee of trustee under a trust deed waived part of claim for deficiency judgment, failure of trial court to credit debtors with alleged payments on trust notes was not prejudicial error when total of such payments was less than amount waived.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action for deficiency judgment by H. H. Bechtel, assignee, against C. M. Cake and others in which defendants cross-complained against the Corporation of America and others. From judgment for plaintiff and cross-defendants, defendant appeals.

Judgment affirmed.

L. G. Hitchcock, of Santa Rosa, for appellants.

Louis Ferrari, G. D. Schilling, and C. H. White, all of San Francisco, Barrett & McConnell, of Santa Rosa, and Keyes & Erskine, of San Francisco, for respondents.

TUTTLE, Justice.

This is an action brought by respondent, as assignee of Bank of America, to recover a deficiency after a sale under a deed of trust. Judgment was entered against appellants in the sum of $11,878.85. The appeal is taken from the judgment.

[1] The sole ground urged for reversal in the opening brief is the asserted invalidity of the sale. The trial court found all necessary facts to constitute a valid and legal sale, and we find that there is ample evidence in the record to support such findings. Notwithstanding this, appellants rely upon the opinion of the trial court, which admittedly disposes of the case upon the ground that the trust deed contains a recital that it "shall be conclusive of all matters and facts affecting the regularity and validity of the sale". The entire opening brief of appellants is devoted to the effect of such recital. The precise

position taken by appellants is indicated clearly in the following excerpt from their opening brief: "In the instant case, in the first instance, a suit was filed for a deficiency judgment after a purported sale under a deed of trust. The court, in its opinion, stated that proof of the absence of a sale preponderated in favor of defendants, but, nevertheless, gave judgment to the plaintiff for the deficiency, holding, as heretofore pointed out in the discussion of the court, that the defendants precluded themselves from relying upon such a defense by reason of the provisions contained in the trust deed as to the conclusiveness of the recitals of the trustee's deed. Therefore, the crux of the entire appeal is whether or not the defendants in this action are conclusively bound by the recitals in the trustee's deed."

[2] No attempt whatever is made in that brief to point out wherein the evidence is insufficient to support the judgment. In other words, an attempt is made to use the opinion of the trial court for the purpose of impeaching the findings. Numerous cases hold that this cannot be done. Typical of these is Goldner v. Spencer, 163 Cal. 317, 125 P. 347, 348, where the following language is used: "But, as has often been said, we cannot consider these written opinions in determining whether or not the findings are sufficiently supported by the evidence. Although, in fact, in the bill of exceptions, *they constitute no proper part of the record for any such purpose.* The findings of fact filed October 20, 1910, must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. The *only question* for us is whether these findings have sufficient legal support in the evidence and such inferences as may reasonably be drawn therefrom. [Italics ours.]"

[3–5] In their closing brief appellants claim for the first time that the trial court's finding as to the *amount of the judgment* is not supported by the evidence. The testimony upon the part of plaintiff showed that the total indebtedness due upon several notes secured by the deed of trust amounted to $20,423.51, together with interest at seven per cent per annum from June 16, 1933, the date of the sale. It appears from the findings that plaintiff at the trial waived $11,000 of such amount. The burden of proving payment was upon appellants (20 Cal.Jur., p. 952, sec. 30), but they offered no evidence whatever upon the matter. The record contains ample evidence to support the amount of the judgment as found by the trial court. Furthermore, the aggregate of the credits which appellants claim are due is considerably less than the amount which was waived, so that the asserted error was not prejudicial to appellants.

The appeal is without merit, and the judgment is, therefore, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



32 Cal.App.2d 504

HANDSCHY v. HANDSCHY.

Civ. 6040.

District Court of Appeal, Third District, California.

May 2, 1939.

1. Appeal and error ⇐949

Determination of trial court that case is not a proper one for declaratory relief will not be disturbed unless an abuse of discretion is shown.

2. Action ⇐6

In action for amount unpaid on Illinois judgment for separate maintenance, wherein at time of trial no sufficient pleading on part of defendant seeking declaratory relief had been filed, trial court's refusal to grant defendant declaratory relief was not an abuse of discretion.

3. Judgment ⇐815

Wife had "vested right" in installments due from husband under Illinois judgment for separate maintenance, and could maintain action in California for the amount accrued, under full faith and credit clause of Federal Constitution. U.S.C.A.Const. art. 4, § 1.

[Ed. Note.—For other definitions of "Vested Right," see Words & Phrases.]

4. Parent and child ⇐3(1)

Although obligation of father to support his child ordinarily terminates with termination of child's minority, to require father to

support adult child is not against public policy. Civ.Code, § 206.

5. Judgment ⇐946

In wife's action for amount unpaid on Illinois judgment for separate maintenance, California court was not authorized to allow credit to husband for amount accruing after children, for whom support was allowed, became of age, which would in effect modify terms of the Illinois judgment.

6. Judgment ⇐946

A California judgment for amount unpaid on Illinois judgment for separate maintenance was a mere money judgment enforceable in manner similar to judgment ex contractu and was not enforceable as judgment in alimony, as the original Illinois judgment could be enforced.

7. Judgment ⇐822(3)

An Illinois judgment for separate maintenance for wife would remain effective until Illinois court should determine that circumstances were so altered that modification of judgment was proper.

8. Divorce ⇐331

Every decree for alimony is subject to be varied at a subsequent time by the court entering the decree, but no other court can disturb the decree and, until the court entering it does so, the decree remains final.

9. Judgment ⇐946

Wife who brought action in California for amount unpaid on Illinois judgment for separate maintenance was entitled to recover according to terms of Illinois judgment which had not been modified, notwithstanding that, subsequent to rendition of Illinois judgment, children of parties for whom support was allowed reached their majority. U.S.C.A.Const. art. 4, § 1.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Alice Wild Handschy against Frederick W. Handschy for amount unpaid on an Illinois judgment for separate maintenance. From an adverse judgment, defendant appeals.

Affirmed.

Charles F. Adams, of Los Angeles, for appellant.

Paul A. Tschirgi, of Los Angeles, for respondent.

HELD, Justice pro tem., delivered the opinion of the court.

Defendant appeals from a judgment rendered against him in this action, wherein plaintiff seeks to recover the amount unpaid at the time of the commencement of the action on a judgment for separate maintenance rendered by the circuit court of Cook county, state of Illinois, on the 9th day of January, 1926. That judgment required that defendant pay to plaintiff for the support and maintenance of herself and Frederick Wild Handschy and Dorothy Ann Handschy, the minor children of the parties, the sum of $3,000 per annum, commencing December 29, 1925, said sum to be paid in semi-monthly instalments of $125 each, in advance, on the first and fifteenth days of each month. Said minor children became of age in September, 1927, and in June, 1933, respectively.

The pleadings herein on the part of defendant are somewhat involved. The answer originally filed admits the allegations of the complaint that an action was instituted in Illinois, and that defendant had personally submitted himself to the jurisdiction of that court. That answer also admits certain portions of the complaint by reference to page and line, but without reference to the original files the portions so admitted cannot be identified. In the original answer defendant denies the allegations of the complaint that the Illinois judgment had not been modified, and denies also that defendant owes plaintiff any sum whatever on said judgment. Several special defenses are also set up in the answer. One alleges that defendant was granted a decree of divorce from plaintiff on the 20th day of January, 1930, by the civil court of the Bravo district, city of Juarez, state of Chihuahua, United Mexican States, in the Republic of Mexico. A further special defense alleges that by agreement of the parties, the Illinois judgment was modified in respect to the sums to be paid thereunder. The bar of the statute of limitations is also invoked, and finally, defendant alleges facts which, if presented to the proper forum, and established, might justify a modification of the original judgment.

On January 20, 1936, the day of trial, defendant filed certain amendments to his answer, the principal effect of which was to eliminate the reference made in the original answer to the Mexican divorce, and to add as a further defense, an af-

firmative cause of action designated as one for declaratory relief. The allegations, however, were entirely insufficient to warrant a declaratory judgment.

The action was thereupon tried on January 20, 1936, and the trial court at the conclusion of the trial announced its decision in favor of plaintiff. On January 27, 1936, plaintiff served upon defendant, and on February 1, 1936, defendant served upon plaintiff, findings proposed by the respective parties. The settlement of findings came before the court on February 20, 1936, and on that day defendant filed an amended answer, seeking a declaratory judgment, denying that any sum was owing under the Illinois judgment, and otherwise admitting all the allegations of the complaint. On February 25, 1936, another answer was filed, identical in language with the answer of February 20, 1936. On February 27, 1936, the court filed its findings, and on the same day judgment was entered in accordance therewith, in favor of plaintiff for $7,434 and interest.

[1, 2] Appellant complains of the refusal of the court to grant him declaratory relief. Unless an abuse of discretion is shown, the determination of the trial court that the case is not a proper one for such relief, will not be disturbed upon appeal. 5 Cal.Jur.Ten Year Supp., p. 109; Sunset Scavenger Corp. v. Oddou, 11 Cal. App.2d 92, 53 P.2d 188. We see no such abuse of discretion here.

At the time of trial, no sufficient pleading on the part of defendant, seeking declaratory relief, had been filed, and the issues before the court then were, first, whether there had been a modification of the Illinois judgment by agreement of the parties, the extent to which the judgment remained unpaid, and whether enforcement of the judgment was barred by the statute of limitations. On the trial, no evidence was presented to establish that the parties ever agreed to a modification of the Illinois judgment, and on this appeal the plea of the statute of limitations is not urged.

[3] It is well settled that an action such as this will lie in this state. In the recent case of Dreesen v. Dreesen, Cal.App., 88 P.2d 223, plaintiff sought to recover in California on a judgment rendered in her favor and against defendant by the court of common pleas of Alleghany county, Pennsylvania, for accrued alimony, following an award pendente lite in an action brought by plaintiff, in which action she sought a divorce a mensa et thoro. The defendant contended that because the Pennsylvania court, in the final disposition of the divorce action, which was still pending, might modify the judgment for alimony, that judgment was not such a final judgment as to entitle plaintiff to sue upon it in California under the full faith and credit clause of the Constitution of the United States. U.S.C.A.Const. art. 4, § 1. In answer to this contention, the court here recognized a divergence of opinion in the various jurisdictions, but held that in California is followed the majority rule, as it is stated by the Supreme Court of the United States in Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 686, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann.Cas. 1061. There the court said: "Generally speaking, where a decree is rendered for alimony and is made payable in future instalments, the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments, since, as declared in the Barber Case [Barber v. Barber, 21 How. 582, 16 L.Ed. 226], 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due."

The Sistare case was a suit brought in Connecticut for the recovery of matured and unpaid instalments of alimony under a decree of the Supreme Court of the State of New York. The New York statute provided that a decree for alimony could be modified by the court at any time on the application of either party, on notice. The United States Supreme Court construed this provision as not authorizing the modification of the decree as to instalments of

alimony which had accrued prior to the application to have it varied or modified. The court said "every reasonable implication must be resorted to against the existence of such power, in the absence of clear language manifesting an intention to confer it." It was held there also that the implication which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed, and that a provision that instalments as they accrue might be enforced by execution, indicated that the right to alimony became vested as the instalments matured. In the case now before the court, the Illinois judgment provides that "in case of default in the payment of said installments of money as the same becomes due, or the costs herein, that execution issue therefor." This language would in itself indicate that the right to each instalment of alimony became vested at the time such instalment fell due. The decree of the Illinois court contains no language manifesting an intention to retain in the court there the power to modify or change the allowance after it became due. In Craig v. Craig, 163 Ill. 176, 45 N.E. 153, 155, the Supreme Court of Illinois, holding it error to set aside and cancel alimony already accrued, said: "The amount of such alimony was a debt due from the defendant James R. Craig to the beneficiary in the decree, and the latter had had a vested property right therein, which the court was not authorized to take away from her."

To the same effect is Britton v. Chamberlain, 234 Ill. 246, 84 N.E. 895.

It follows that the law of Illinois, as well as the decree in this case, gave to plaintiff herein a vested right in the instalments of alimony as the same became due. To enforce that vested right, plaintiff may sue herein. Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245; Rinkenberger v. Rinkenberger, 99 Cal.App. 45, 277 P. 1096; Barns v. Barns, 9 Cal. App.2d 427, 50 P.2d 463; Wallace v. Wallace, 111 Cal.App. 500, 295 P. 1061; Parker v. Parker, 203 Cal. 787, 266 P. 283; Keck v. Keck, 219 Cal. 316, 26 P.2d 300; Barber v. Barber, 21 How. 582, 16 L.Ed. 226.

[4] Appellant contends also that as the children became of age the amount of the alimony award was ipso facto reduced to the extent that the same provided for their maintenance and support, and that the trial court erred in refusing to allow him credit accordingly, although no modification had been made of the decree by the Illinois court. No authority is cited by appellant in support of his contention, nor have we found any. There are cases wherein accrued instalments of an award for support and maintenance for wife and minor children were canceled, the wife having remarried and the children become of age, but in those cases it is clear that the remarriage of the wife was the principal factor considered by the court, it being held that to require a husband to pay for the support and maintenance of his divorced wife, following her remarriage to another, would in the absence of extraordinary conditions, violate a sound principle of law and be against a recognized public policy. Hale v. Hale, 6 Cal. App.2d 661, 45 P.2d 246; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53. While it is true that the obligations of a father to support his child ordinarily terminates with minority (Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868), it is not against public policy to require him to support an adult child. Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Paxton v. Paxton, 150 Cal. 667, 89 P. 1083. Indeed our statute provides for such support in a proper case. Civ. Code, sec. 206.

[5, 6] Appellant's contention that he should be allowed credit for amounts accruing after the children became of age assumes jurisdiction in the courts of this state in effect to modify the terms of the Illinois judgment. This cannot be done. This action is not one to establish a foreign judgment in this state for the purpose of enforcing it as a continuing judgment in this jurisdiction, as was the case in Creager v. Superior Court, 126 Cal.App. 280, 14 P.2d 552, and in Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228. Plaintiff herein merely uses the Illinois decree as the basis for obtaining an ordinary judgment for accrued instalments of alimony in an action at law against defendant. The judgment here obtained is a mere money judgment, and enforceable not as a judgment in alimony as the original judgment in Illinois could be enforced, but simply as a money judgment, similar to a judgment ex contractu. Creager v. Superior Court, supra.

[7, 8] The judgment rendered by the Illinois court was based upon the circumstances as they appeared to the court at

that time, and its terms remain effective until that court determines that those circumstances are so altered that a modification of the decree is proper. As was said in Paulin v. Paulin, 195 Ill.App. 350, and quoted with approval in Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463, 465: "True it is that every decree for alimony is subject to be varied at a subsequent time by the court entering the decree yet no other court can disturb it, and until such court does so, it remains fast, firm, and final."

This is so, because as was said by the Supreme Court of Illinois in Barclay v. Barclay, 184 Ill. 375, 56 N.E. 636, 637, 51 L.R.A. 351: "An attempt to do so by such other court would bring about a conflict of authority, and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such change in conditions and as to such original right of the parties."

In Little v. Little, 146 Misc. 231, 262 N. Y.S. 654, 656, the court in refusing to change an alimony decree said: "The proper remedy of the defendant would seem to be to obtain a modification in the courts of the state in which the judgment of divorce was originally rendered."

[9] It follows that, there having been no modification of the Illinois court of its decree, the plaintiff is entitled to recover according to its terms the amount that had accrued at the time of the commencement of this action, and that remained unpaid.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 477

STEURI v. JUNKIN et al.

Civ. 12105.

District Court of Appeal, Second District, Division 2, California.

May 1, 1939.

Costs ⇐264

Litigant awarded costs on appeal did not waive his right to file cost bill by execution of an assignment of his claim for costs on appeal prior to filing of the remittitur. Code Civ.Proc. § 385.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by R. E. Steuri against John R. Junkin and William H. Brawner, assignee of John R. Junkin, wherein costs on appeal were awarded to Frazier McIntosh. From an order denying motion to strike the cost bill, William H. Brawner appeals.

Affirmed.

Caryl Warner, of Los Angeles, for appellant.

Irving B. Drachlis and Edwin H. Casey, both of Los Angeles, for respondent.

WOOD, Justice.

The District Court of Appeal on July 26, 1938, affirmed an order of the superior court by which Frazier McIntosh became entitled to costs on appeal. 27 Cal.App.2d 758, 82 P.2d 34. Thereafter, but before the remittitur came down, McIntosh executed an assignment of his claim for costs on appeal in favor of Edwin H. Casey, the assignment being filed on July 28, 1938. On September 15, 1938, the Supreme Court denied a petition for a hearing in the matter then on appeal and on September 22, 1938, McIntosh executed a new and distinct assignment of his claim for costs on appeal in favor of Casey. The remittitur from the District Court of Appeal awarding costs on appeal to McIntosh and against William H. Brawner was filed in the superior court on September 30, 1938. A memorandum of costs claiming only the expense of printing the briefs on appeal, the sum of $51.10, was filed in the superior court and thereafter Brawner moved in the superior court to strike the cost bill. He now appeals from the order denying his motion to strike.

It is the contention of appellant that McIntosh waived his right to file the cost bill by the execution of the assignment prior to the filing of the remittitur. There is no merit in this contention. The matter is covered by section 385 of the Code of Civil Procedure in which it is provided that an action or proceeding does not abate by the death or disability of a party or by the transfer of any interest therein. The section provides in part: "In case of any other transfer of interest, the action or pro-

ceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." The court did not err in denying the motion to strike the cost bill.

The order from which the appeal is taken is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



32 Cal.App.2d 469

TSIRLIS v. STANDARD OIL CO. OF CALIFORNIA.

Civ. 10913.

District Court of Appeal, First District, Division 2, California.

May 1, 1939.

Rehearing Denied May 31, 1939.

Hearing Denied June 29, 1939.

1. Automobiles ⇐246(42)

Evidence of operation of defendant's company automobile by its salesman at time of collision with plaintiff's automobile justified trial court in its instructions designating defendant's automobile as the automobile operated by salesman.

2. Automobiles ⇐243(12)

Statement by salesman just prior to taking a motor trip that he was leaving on business of employer was admissible to prove that at time automobile driven by salesman collided with plaintiff's automobile, salesman was within scope of employment.

3. Principal and agent ⇐22(1), 122(1), 190(2)

Although statements of agent are not admissible to prove fact of his agency nor extent of authority they are admissible to prove that his acts were done on behalf of principal and not in his individual capacity.

4. Automobiles ⇐244(26)

Evidence that salesman was in employ of defendant company and was driving a company automobile at time of collision authorized jury to infer that salesman was acting within the scope of his employment at time of accident.

5. Automobiles ⇐244(26)

An inference that salesman was acting within scope of employment drawn from evidence that he was in employ of defendant company and was driving company automobile at time of collision with plaintiff's automobile could be dispelled only by clear, positive and uncontradicted evidence to the contrary.

6. Automobiles ⇐245(30)

Whether salesman was acting within scope of employment at time automobile owned by salesman's employer and driven by salesman collided with plaintiff's automobile so as to impose liability on employer was for jury where evidence showed that salesman was assigned to a particular area and that accident occurred outside of assigned area but that his duties required him to drive outside of territory, that he had been given authority to drive outside of area, and that employer had paid bridge tolls while salesman was driving outside area.

7. Automobiles ⇐244(31)

Evidence justified finding of jury that driver of automobile which collided with car driven by plaintiff was not intoxicated.

8. Automobiles ⇐246(42)

In suit against employer for negligent operation of automobile by employee, refusal to instruct upon effect of limitation upon permission to use an automobile was not error where the uncontradicted testimony showed that employee had permission to use automobile.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by John Tsirlis against Standard Oil Company of California for damages for personal injuries. From judgment for plaintiff, defendant appeals.

Judgment affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellant.

James F. Brennan, George L. Lang, and Saul Perlis, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained when a Ford automobile of the defendant company collided with the automobile of plaintiff. Upon a trial by jury, plaintiff had judgment and, from said judgment, defendant appeals.

The accident occurred at about 5 o'clock on the morning of August 1, 1937, on the main highway between Sausalito and Richardson's bay bridge. Plaintiff was driving in a general northerly direction and defendant's automobile was being driven in a general southerly direction on said highway. It appears unnecessary to set forth all the facts concerning the happening of the accident. We so state as defendant apparently concedes that the accident occurred by reason of negligence in the operation of defendant's automobile and without any negligence on the part of plaintiff. Nor does it appear necessary to describe the injuries sustained by plaintiff as it is claimed that the judgment is excessive. We need only state here that plaintiff sustained serious injuries and that Mr. Mahoney, the employee of the defendant company, died immediately as a result of the injuries which he sustained.

The main contention of defendant on this appeal is that Mr. Mahoney was not acting within the scope of his employment at the time of the accident. Other points raised by defendant are that the trial court committed prejudicial error in admitting certain evidence over defendant's objection and in giving and refusing certain instructions. Before proceeding to the discussion of the main contention, we will first dispose of certain other points raised.

[1] The trial court gave certain instructions in which the automobile of defendant was referred to as the automobile operated by Mr. Mahoney. Defendant contends that there was a conflict in the evidence as to who was driving defendant's automobile and that the giving of said instructions therefore constituted prejudicial error. We find no merit in this contention, as the evidence showed that Mr. Mahoney was driving said automobile and there was no substantial evidence to the contrary. Mr. Mahoney was accompanied on the trip by Mr. Brooks, a friend of Mr. Mahoney. They left Guerneville at about 3 o'clock in the morning. They took defendant's car from the garage and left Mr. Brooks' car there. The direct evidence showed that Mr. Mahoney was driving the defendant's car when these men left Guerneville; that they did not stop at any time between the time of their departure and the time of the accident; and that Mr. Mahoney was driving when the accident occurred. After the accident, the men were removed from defendant's car by Sergeant Norich and others. The testimony showed that Mr. Mahoney was a large man while Mr. Brooks was a small man. As a result of the collision, the steering wheel "was pushed forward to the windshield". Mr. Mahoney "died as a result of the fracture of the 4th and 5th ribs on the left side, and a rupture of the lower part of the liver about three inches long". These injuries were occasioned "by direct force" and "a very severe blow". He "could not have hit the dashboard with the edge of his liver" as the interior of a Ford coupe "is such that it would be almost impossible for a man to strike the dashboard with his trunk". When Sergeant Norich arrived, both men were slumped on the floor of the car with Mr. Mahoney on the bottom and Mr. Brooks partly on top of him. Mr. Mahoney's feet were on the left side, or driver's side of the car, and Mr. Brooks' feet were on the right side of the car. Mr. Mahoney's head was on the right side and Mr. Brooks' head was on the left side. Mr. Brooks was removed first as he was "on top". Sergeant Norich testified on the trial that he was not sure which side of the car either man was removed from. During the trial, the entire testimony of Sergeant Norich, given in another proceeding, was admitted in evidence. At one point in that proceeding, certain leading questions were propounded to the witness and he replied in the affirmative indicating that Mr. Brooks was taken out of the left side of the car and that Mr. Mahoney was taken out of the right side of the car.

The parties are not agreed on the question of whether the testimony on the former proceeding was admitted for all purposes or solely for the purpose of impeachment. We believe this to be immaterial. The only claimed conflict in the testimony of the witness is that he testified on the first occasion that Mr. Mahoney had been taken from the right side and Mr. Brooks from the left side of the car, while on the second occasion, he testified that he was not sure on this point. There is no conflict whatever in the testimony regarding the position of the feet and bodies of the two men nor in the testimony regarding the damage to the steering wheel and the injuries to Mr. Mahoney. All of the testimony shows that it was entirely probable that the men were removed from the car from the sides indicated by the witness on the first occasion but under the circumstances, that fact, if it be a fact, would not create a substantial

conflict with all the other evidence, direct and indirect, which showed that Mr. Mahoney was driving defendant's automobile at the time. We therefore conclude that there was no prejudicial error in the giving of said instructions referring to the automobile of defendant as the automobile operated by Mr. Mahoney.

The consideration of the remaining contentions of defendant requires some further statement of the facts disclosed by the evidence. Mr. Mahoney had been an employee of the defendant company for approximately 25 years. His position at the time was that of Flamo salesman and inspector. His home was in San Francisco and his regular place of employment was in that city. On May 17, 1937, he was temporarily assigned to what was known as the Guerneville area for the purpose of selling, inspecting and servicing Flamo equipment in that area. He was given a company car for transportation, was given a $50 advance for expense money, and was allowed an expense account for hotel bills, meals, garage hire, bridge tolls and the like. Mr. Shannon was the immediate superior of Mr. Mahoney and of all Flamo salesmen. He testified "that in Mahoney's case this was a special temporary assignment and his home was not moved".

Mr. Mahoney's duties were not specified in writing and the testimony regarding those duties is not as definite as it might be. A reading of the testimony on this subject leads to the conclusion that Mr. Mahoney's duties were what may be termed field duties rather than office duties; that he was allowed a large amount of discretion in determining the time and manner of handling his work; that he did not work under the constant supervision of any other person; and that his employment was quite irregular as to the days and hours that he worked. Defendant introduced evidence by which it sought to show that Mr. Mahoney's duties were confined to fixed hours in a fixed area but that testimony fell far short of showing a situation similar to that involved in those cases where all of the employee's duties were strictly limited to those performed during fixed hours at a fixed place. In fact, the testimony tends to show that his duties were not confined to fixed hours, fixed days or fixed places. His duties were described by Mr. Shannon as follows: "Well, his duties were the inspection of Flamo installations, those inspections which cover both certain regular inspections that are performed at the option of the Standard Oil Company, particularly in cases where our fuel is installed or our Flamo is installed in connection with public places, also to answer any requests for service that might come from a customer, and to take care of any sales problem or sales solicitation in the Guerneville field." He further testified that Mr. Mahoney was paid by the month; that he was on a forty-hour week with two days off in each week; that he reported at the area station in Guerneville each morning; that "the normal time for reporting would be eight or eight-thirty in the morning"; and that Mr. Mahoney reported in later, "about 9:30", on the mornings when he came from San Francisco. The witness had no knowledge, however, of the actual time of reporting as he was not there and he saw Mr. Mahoney only about once a week. It appears that Mr. Mahoney had authority to answer calls at any time and did actually perform his work at irregular hours. The nature of his work was such that most of his duties in selling, inspecting and servicing was done on the premises of the customers or prospective customers at times which suited their needs and convenience rather than on the premises of his employer during fixed hours. It further appears that Mr. Mahoney could determine which days of the week he would take off, but as the week-ends were the busiest times for him in that area, he would never take off both Saturday and Sunday. At times, he worked both Saturday and Sunday and took his two days off in the middle of the week.

After his assignment to the Guerneville area, Mr. Mahoney left San Francisco each week for that area and remained there until he returned to his home in San Francisco for his two-day weekly lay-off He kept at his home a box of various parts used by him in servicing the Flamo equipment and he took some of these parts with him at times on his trips back to Guerneville. Later, he decided to take his family temporarily to the Guerneville area and they were living in a rented house in that area at the time that the accident occurred. Mr. Shannon was advised of this move, but Mr. Mahoney still maintained his home in San Francisco and was permitted to enter all of the usual charges in his expense account in the same manner as he had entered them while his family remained in San Francisco. In all cases, both before and after moving his family, the expenses of the trips to and from Guerneville, including bridge tolls, were entered and paid by

the defendant, but not his living expenses while in San Francisco.

Mr. Sullivan, another employee of the defendant company, having duties similar to those of Mr. Mahoney in an adjoining area, was leaving on his vacation trip on the week-end when the accident occurred. In 1936, Mr. Mahoney had taken over all of Mr. Sullivan's territory while Mr. Sullivan was on his vacation and Mr. Mahoney had been directed to take over a portion of Mr. Sullivan's territory while Mr. Sullivan was on his vacation in 1937. We now come to the testimony which was admitted over defendant's objection.

Both Mrs. Mahoney and Mr. Brooks testified that when Mr. Mahoney prepared to leave Guerneville at about 3 o'clock on the Sunday morning in question, he stated that he was going to San Francisco and would be back to start on the job at Guerneville at 9 o'clock that morning. He further told them that he had to leave for San Francisco to get some data from Mr. Sullivan regarding Mr. Sullivan's territory and to get some parts from his home in San Francisco.

[2, 3] Defendant contends that the trial court committed prejudicial error in admitting the last-mentioned testimony but we are of the opinion that said evidence was properly admitted. It appeared from other uncontradicted evidence that Mr. Mahoney was an employee of the defendant company and that he had authority to drive the automobile of the defendant company between San Francisco and Guerneville. The foregoing declarations of Mr. Mahoney were not admitted for the purpose of proving the status of Mr. Mahoney as an employee of the defendant company or of proving Mr. Mahoney's authority to drive the automobile but said declarations were admitted to show that the trip in question was taken by Mr. Mahoney in pursuance of his employer's business rather than for purposes of his own. The rule is stated in 1 California Jurisprudence 865, section 139, as follows: "It is a rule of long standing in California that the declarations of an agent are not admissible to prove the fact of his agency, nor the extent of his authority. They are admissible, however, to prove that his acts were done on behalf of his principal and not in his individual capacity * * *." See, also, Swinnerton v. Argonaut L. & D. Co. 112 Cal. 375, 44 P. 719; Smith v. Firestone Tire & Rubber Co., 119 Conn. 483, 177 A. 524; 2 Am.Jur. 352, sec. 445; Restatement of the Law of Agency, sec. 289; 2 Mechem on Agency, 2d ed., p. 1367, sec. 1790.

[4-6] We now come to defendant's main contention. Defendant claims that Mr. Mahoney "was not acting within the scope of his employment" but as the jury found to the contrary, we must necessarily assume that it is defendant's contention on this appeal that the evidence was insufficient to sustain said finding of the jury. We find no merit in this contention. We may disregard for the moment the declarations of Mr. Mahoney regarding the purpose of the trip. When evidence was introduced showing that Mr. Mahoney was the employee of the defendant company and was driving the automobile of the defendant company, the jury was entitled to draw the inference that he was acting within the scope of his employment. Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; Barton v. McDermott, 108 Cal.App. 372, 291 P. 591. An inference may be dispelled as a matter of law but only by clear, positive and uncontradicted evidence to the contrary. Engstrom v. Auburn Auto. Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059. We find no such clear, positive and uncontradicted evidence to the contrary in this case. Defendant's evidence showed that Mr. Mahoney's main duties were confined to the Guerneville area, but there was ample evidence in the record to show that Mr. Mahoney's incidental duties required him to drive and that he was authorized to drive the defendant's automobile outside of that area. In fact, it appears that his bridge tolls on his trips between Guerneville and San Francisco were entered on his expense account and paid by the defendant. Considering all of the evidence, other than the declarations of the deceased regarding the purpose of the trip, it cannot be said that it so clearly and positively showed that Mr. Mahoney was not acting within the scope of his employment, that the above-mentioned inference was dispelled as a matter of law. There was still a question of fact for the determination of the jury. The inference thus remained and was strengthened by the evidence of the declarations of the deceased regarding the purpose of the trip. We have heretofore expressed the view that said declarations were properly admitted in evidence. We therefore conclude that the jury's implied finding to the effect that Mr. Mahoney was

acting within the scope of his employment was amply sustained.

[7] Before proceeding to defendant's final contention, it may be stated that defendant has laid some stress upon the evidence showing that Mr. Mahoney had a cocktail before dinner on Saturday evening and had some beer between that time and the time of his departure. It is apparently conceded that there was no evidence of heavy drinking and no evidence of intoxication. All of the direct evidence on the subject showed that both Mr. Mahoney and Mr. Brooks were entirely sober. Before undertaking the trip to San Francisco, Mr. Mahoney changed to his business clothes, prepared some food and coffee for himself and Mr. Brooks and left after declaring the purpose of his trip to Mrs. Mahoney and Mr. Brooks. The jury no doubt believed that it was highly improbable that Mr. Mahoney would have undertaken the trip at that time unless he had felt that the journey was required in furtherance of the business of his employer.

[8] Defendant's final contention is that the trial court erred in refusing a requested instruction "upon effect of limitation upon permission to use an automobile". This contention requires no extended consideration. It related only to the subject of permissive use of the automobile and the uncontradicted evidence showed that Mr. Mahoney had permission to use the automobile to travel between Guerneville and San Francisco.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



PACIFIC INDEMNITY CO. v. HARPER et al.*

Civ. 11763.

District Court of Appeal, Second District, Division 1, California.

April 28, 1939.

Hearing Granted June 26, 1939.

1. Principal and surety ⇐185

A surety who satisfies in whole or in part the obligation of his principal has a right of action against the principal for reimbursement of expenditures made by reason of the contract of suretyship. Civ.Code, § 2847.

2. Principal and surety ⇐185

The implied right of a surety who has satisfied an obligation of his principal to reimbursement from the principal is founded on the equitable doctrine that where one extinguishes the debt of another who is in fact the principal debtor, he is entitled to relief against the other. Civ.Code, § 2847.

3. Principal and surety ⇐185

A surety, particularly one in business as such, may not recover expenses from principal when litigation out of which expenses accrued resulted in determination that principal had not defaulted. Civ.Code, § 2847.

4. Principal and surety ⇐185

The liability of principal to reimburse surety on fidelity bond is predicated on damage suffered by surety because of default, neglect, or wrongdoing of principal. Civ. Code, § 2847.

5. Statutes ⇐181(2)

Statutes should not be so construed as to lead inevitably to mischief and injustice when any other reasonable interpretation is possible.

6. Insurance ⇐601

A complaint alleging that surety on fidelity bond of corporate director incurred expenses in successfully defending action against it by corporation was sufficient as against general demurrer, where it appeared by reference to decision of the District Court of Appeal in that action that surety was successful in its defense, not because director was not guilty of fraud, but because director and corporation were guilty of collusive fraud in obtaining the bond. Civ.Code, § 2847.

7. Appeal and error ⇐103

An attempted appeal from order denying motion to file an amended complaint was subject to dismissal.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by the Pacific Indemnity Company against W. A. Moses, R. T. Harper, and J. C. Hadley to recover an amount expended by plaintiff in defending an action against it by the first-named defendant's

*For subsequent opinion see 94 P.2d 586.

employer, wherein employer sought to recover damages for losses allegedly caused by the fraudulent acts of the first-named defendant. From a judgment in favor of the first-named defendant and from an order denying plaintiff's motion to file an amended complaint, plaintiff appeals.

Attempted appeal from order denying motion to file an amended complaint dismissed; judgment reversed and cause remanded.

Charles E. R. Fulcher, of Los Angeles, for appellant.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff surety company prosecutes this appeal from a judgment entered in favor of defendant W. A. Moses after the latter's demurrer to the complaint had been sustained without leave to amend, and also from an order denying plaintiff's motion to file an amended complaint. Leave to amend having been requested and an amended complaint proffered, there is squarely presented to us the question as to whether the original complaint is sufficient as against a general demurrer thereto.

From the complaint it appears that plaintiff, a surety company, at the request of defendant Moses and the latter's employer, West American Finance Company, issued its bond under the terms of which the surety company agreed to pay any financial loss sustained by defendant's employer, not exceeding ten thousand dollars, resulting by reason of any act of larceny, embezzlement, theft, or any other fraudulent or dishonest act, wrongful abstraction, or wilful misapplication of funds, committed by the employee, who is the defendant herein. Thereafter an action was commenced by the employer, West American Finance Company, against the surety company, plaintiff herein, alleging a damage of ten thousand dollars by reason of financial losses caused by the fraudulent acts and perfidy of defendant Moses. The complaint then sets forth that it became necessary for plaintiff to, and that it did, expend sums of money totaling $4,015.11 for investigations, court costs, attorney's fees, printing briefs, transcripts, etc., in the defense of said action, at the trial thereof in the superior court, and upon appeal in the District Court of Appeal. Lastly, the complaint alleges that final judgment was in favor of the surety company. West American Finance Company v. Pacific Indemnity Company, 17 Cal.App. 2d 225, 61 P.2d 963.

[1] It is conceded on this appeal that where a surety satisfies in whole or in part the obligation of his principal the former has a right of action against the latter for reimbursement of any expenses or expenditures made or suffered by reason of the contract of suretyship; but it is the contention of respondent that in the absence of a contract therefor, no such right exists either by reason of the common-law rule or statute (Civ.Code, sec. 2847), where, as here, the surety company was not required to satisfy any part of the principal's obligation.

[2-4] The implied right of the surety to reimbursement from a principal when he has satisfied an obligation of the latter is founded on the equitable doctrine that where one pays or is compelled to pay a debt which in justice the other ought to have paid, or if he extinguishes it so that it is no longer a debt against the other, he is entitled to relief against the other who was in fact the principal debtor. In accord with the principle just enunciated, section 2847 of the Civil Code provides, so far as pertinent hereto, as follows: "If a surety *satisfies* the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; * * *." (Italics added.) By the same equitable doctrine, it would seem meet and proper that where a surety, and particularly when, as here, the surety was in the business of furnishing bonds and issuing its obligations for a price, that no recovery of expenses should be had against the principal when the litigation out of which the expenses accrued resulted in a determination that there was no default upon the part of the principal. The liability of the principal to the surety is predicated upon the damage suffered by the surety because of the default, neglect or wrongdoing of the principal. In other words, where the condition against which the surety had contracted does not arise and the surety sustains no damage and incurs no liability on account of the acts, default or neglect of the principal, then the latter should not be burdened with any expenses incurred by the surety in successfully defending against an unfounded claim asserted by a third party against the princi-

pal. It is the default of the principal and the resultant damage to the surety that gives rise to an implied contract on the part of the former to reimburse the latter for all losses sustained by reason of such default on the part of the principal.

[5, 6] The record before us, however, does not present a situation where the surety successfully defended against an unfounded claim urged against the principal by a third party. Reference by us to the hereinbefore mentioned decision of the District Court of Appeal in the litigation in connection with which the surety incurred the expenses recovery of which is sought in this action, reveals that the surety company was absolved of liability under its undertaking for the sole and single reason that respondent here, who was an officer of the corporation which employed him, was guilty, with other officers of the employer corporation, of fraud, knowledge of which was imputed to the corporation at the time the corporation obtained from appellant the fidelity bond insuring the corporate employer against loss from dishonest acts of its officers, clerks and other employees, including respondent herein. Evidencing the fraud practiced upon appellant surety company by the corporation and its officers in obtaining the surety bonds from the former, we quote the following from the opinion of the District Court of Appeal, supra [17 Cal.App.2d 225, 61 P.2d 968]:

"Manifestly, therefore, in the present case, the nondisclosure of the fraudulent practices which were being carried on by the majority members of the board of directors under their corporate powers at the time of the application for the issuance of these successive fidelity bonds, and which resulted in the enormous losses the corporation now seeks to compel the surety to make good, constituted concealment from the surety of the material facts upon which it was clearly entitled to be informed before it could intelligently decide whether under the existing conditions it would assume the risk to be imposed upon it by the fidelity bonds. In fact, it would appear from the allegations of the complaints that such concealment was not unintentional. Respondent in its brief puts it this way, that 'the stage was set for the making of the very claims' now sued upon. And appellant in its brief chooses to sum up the situation as follows: 'A small group of men functioning under a corporate screen had by the acquisition of voting stock control of successive corporations finally acquired control of the management of a financial institution of large assets, whereupon by various devices they proceeded to use these assets in private ventures for the personal enrichment of the directors and officers. If these private ventures turned out to be unprofitable they were immediately turned back to the West American Finance Company, thereby relieving the officers and directors of the obligations and thereby causing the West American Finance Company to shoulder the losses.' *And to the foregoing may be added that while this group of men were thus proceeding to fasten these losses on the corporation's shoulders they were at the same time, as the governing board of directors of the corporation, obtaining from respondent fidelity bonds insuring their own honesty for the very purpose of placing the corporation, and incidentally themselves as the owners of the majority of the vote controlling stock therein, in a position to recoup from the surety the losses which they were bringing about by their own wrongful acts.*" (Italics added.)

An interesting sidelight on the participation of this respondent, who was a director of the employer corporation, in the activities referred to in the foregoing quotation is found in 17 Cal.App.2d at page 230, 61 P.2d 963 in the case just cited.

The odor surrounding respondent's activities as a director of the corporation which obtained the fidelity bond insuring respondent's honesty is barren of that cleanliness of behavior and conduct which must attach to him who invokes the protection of equity. Were we to construe section 2847 of the Civil Code, under the facts of this case, as a barrier to the recovery by appellant of its necessary expenses in "satisfying" the obligation under its bond, we should be giving to the statute a construction leading inevitably to mischief and injustice. Statutes should never be so construed when any other reasonable interpretation is possible. When we contemplate the object intended to be accomplished by this statute, we have no hesitancy in saying that its framers intended that in a case such as the one at bar, teeming as it is with fraud and replete with deception and intrigue, the surety should have the right to recover its costs and expenses in defending itself in good faith against liability under the bond. The

surety "satisfied" the obligation by extinguishing it by reason of the fraud of both the principal and the indemnified employer. Assuming the complaint is vulnerable to a special demurrer, it was nevertheless sufficient as against a general demurrer.

[7] The attempted appeal from the order denying the motion to file an amended complaint is dismissed.

For the foregoing reasons, the judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.



32 Cal.App.2d 455

HAYWARD LUMBER & INVESTMENT CO. v. ROSS et al.

Civ. 2268.

District Court of Appeal, Fourth District, California.

April 27, 1939.

1. Mechanics' liens ⇐5

An act by which owner of property upon which improvements are made may relieve himself from or escape liability for a mechanic's lien must be strictly construed. Code Civ.Proc. § 1192.

2. Mechanics' liens ⇐78

Where owner of real estate had knowledge of intended improvements by tenant and posted and recorded notice of nonresponsibility therefor and approximately five months thereafter work of improvement was actually commenced and owner had knowledge thereof but posted or filed no other notice of nonresponsibility, owner's property was not relieved of a materialman's lien for materials used in alteration of building on leased premises. Code Civ.Proc. § 1192.

3. Mechanics' liens ⇐50

Generally, reasonable charges for cartage by seller of material to place of construction are properly allowable as part of reasonable value of materials used in construction work, when such charges are included in the recorded claim of lien as part of the value of materials furnished; an exception being recognized where persons are merely engaged by contractor to haul materials. Code Civ.Proc. § 1192.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Suit by the Hayward Lumber & Investment Company against W. P. Ross, also known as Warren P. Ross, and others, to foreclose a lien for materials used in alteration work on a building. From an unsatisfactory judgment, plaintiff appeals.

Reversed, with instructions.

Philip T. Lyons, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

Siemon & Claflin, of Bakersfield, for respondents Malcolm Brock and Food City Market Corporation.

GRIFFIN, Justice.

This is an action to foreclose a lien for materials used in alteration work on a building in Bakersfield, Kern county, California. At the trial it was conceded by all parties that materials of the approximate value alleged in the complaint were furnished by the plaintiff and were actually used in the work of construction, with the exception of $26.60, representing the charges for cartage of approximately $900 worth of materials. It was further conceded at the trial and the court found that the plaintiff was entitled to a lien against the right, title and interest of the defendant and respondent Bank of America National Trust & Savings Association, except in so far as that right might be affected by the posting of notice of nonresponsibility by the bank on March 18, 1936, and its recordation on March 20, 1936.

The actual work of construction was commenced on August 26, 1936, and actually completed about November 1, 1936. Appellant filed its claim of lien in due and legal time, filed its suit of foreclosure within the time allowed by law, and in all other respects complied with all requirements of the law concerning such liens.

The respondent Bank of America National Trust & Savings Association knew on February 3, 1936, by the terms of its

lease of the property in question, that the alteration and construction work was intended by its lessee. This lease by its terms became effective May 15, 1936. Respondent bank knew, through its officers, of the progress of the work as it was being done, but did not cause to be posted nor recorded any notice of nonresponsibility after the commencement of the actual work of improvement, and posted and filed no notice of nonresponsibility except the one of March 18, 1936, herein referred to.

The defendant W. P. Ross, having defaulted, the court found that appellant was entitled to judgment against him as prayed for. The court further found that appellant was entitled to a lien against the leasehold interest of respondent Food City Market Corporation to the extent of $429.44.

The court found that the improvements in question were made by respondent Food City Market Corporation and defendant W. P. Ross with the knowledge of all defendants having any proprietary interest in the premises. The court also found that the respondent bank had knowledge of the work of improvement at the time the work was being done, viz., between August 15, 1936, and November 1, 1936. The court also found that on March 18, 1936, the respondent bank caused a notice of nonresponsibility to be posted on the real property (therein described) and thereafter on March 20, 1936, caused said notice of nonresponsibility, together with affidavit of posting, to be recorded in the office of the county recorder of Kern county.

As conclusions of law the court found that the judgment should be a lien to the extent of $429.44, plus costs against the respondent Food City Market Corporation, and that appellant is not entitled to a lien against the right, title and interest of respondent Bank of America National Trust & Savings Association in and to the property described in the complaint.

One of the questions presented is this: Where an owner has knowledge of intended improvements by a tenant on his property and he posts and records a notice of nonresponsibility for such intended improvements, and approximately 5 months thereafter work of improvement is actually commenced and the owner had knowledge of the actual improvements at the time they were commenced and files no other notice of nonresponsibility, does the notice of nonresponsibility posted and recorded approximately 5 months before actual commencement of the work of improvement relieve him of liability for a materialman's lien under section 1192 of the Code of Civil Procedure in effect in 1936?

[1] The courts have adopted the general rule of strict construction of any act or provision by which the owner of property upon which improvements are made may relieve himself from or escape liability therefor. Hammond Lumber Company v. Goldberg, 125 Cal.App. 120, 13 P.2d 814. The amendment of section 1192 of the Code of Civil Procedure in 1873 (Stats. 1873–1874, chap. CCCCX, [Volume of Amendments to Codes, pp. 108–109]) provided for the posting and recording of notice of nonresponsibility *"within three days after* he [the owner] shall have obtained knowledge of the construction, alteration, or repair, *or the intended construction, alteration, or repair* * * *." In 1907 (Stats. 1907, p. 577) this section was amended, providing that the owner should file notice of nonresponsibility within ten days *"after he shall obtain knowledge of the construction, alteration, repair, or work or labor* * * *." The phrase "or the intended construction, alteration, or repair" was eliminated.

In John R. Gentle & Co. v. Britton, 1910, 158 Cal. 328, 332, 111 P. 9, 11, our Supreme Court stated:

"The statute as originally enacted did not contain the clause, 'intended construction,' and the time for posting the notice was fixed at three days after knowledge of the construction, alteration, or repair. This must then be construed to mean of the progress of the work, which could not have been earlier than the commencement of the work, and it has been held that where an owner had knowledge of the 'intended construction' and did not give the notice within three days thereafter, but gave such notice within three days after the commencement of the work, he was entitled to the protection of the statute. * * *

"The law does not say that upon the posting of the notice, the owner will not be liable for any labor performed or material furnished thereafter, but that, if he fails to post such notice within the statutory time after knowledge that the improvement was being made, it shall be held to have been constructed at his instance. There is no limitation in respect to the stage of the work at the time at which the notice must be posted. The statutory provision would be complied with by a post-

ing on the same day the improvement was begun, if this were within three days after knowledge was obtained, either of the construction or intended construction. And, if done within three days after knowledge received, we see no reason why it would not be timely upon any day when the work on the improvement was in progress. * * *"

In Whiting-Mead Commercial Co. v. Brown, 1919, 44 Cal.App. 371, 374, 186 P. 386, 388, it was related: "This leaves for our consideration the question of the personal responsibility of the defendant. The only point made by the appellant in its attack upon this portion of the judgment is that, because the defendant had notice at the time of the contract with Alex Brown for the sale of the premises that the said Alex Brown intended to make certain improvements to the premises, the defendant was charged with notice of the making of said improvements, irrespective of whether he had actual knowledge or not, at the time he entered into said agreement with said Alex Brown. As pointed out by the respondent, prior to 1911 (1907), it was provided by section 1192, Code of Civil Procedure, that the owner should file such notice within ten days 'after he shall have obtained knowledge of such construction, alteration *or repair or intended construction,' etc.* But that section has been amended by elimination of the italicized words. Such definite change indicates an intention that the owner should be relieved of responsibility by filing said notice within the time limited *after knowledge of the actual improvements.*" (Italics ours).

To the same effect is the case of Birch & Co. v. Magic Transit Co., 1903, 139 Cal. 496, 73 P. 238. In discussing this feature, the court said, 139 Cal. at pages 499, 500, 73 P. at page 239: "Contracts for the sale as well as leasing of land, conditional on its improvement by the purchaser or lessee at some future time, are quite common. This contemplated improvement may be for a short period * * * or it may be for one or more years, the work not to be begun for many months, or even years, in the indefinite future; and the contract or its terms may be unknown to the laborer or materialman who in this distant future is to furnish labor or material for the improvement. The owner would be charged with knowledge of the intended work as soon as he signs the contract, and, under the construction contended for by the appellant, he must within three days post his notice, or lose his protection against the lien. On the other hand, if he post such notice, it is not at all likely that it would remain posted and be conspicuous when in the future the laborers and materialmen would be called upon to furnish labor and material, and yet the owner would be protected. If, however, the owner posted his notice within three days after the actual construction began, the persons interested could not fail to observe it, and would govern themselves accordingly. It would, it seems to us, be a much better protection to the laborer and materialmen, and equally subserve the protection of the owner, to hold the notice posted by the owner 'within three days after he shall have obtained knowledge of the construction' (i. e., the actual beginning of the work) to be in time, and that such is the notice referred to in the statute."

See, also Santa Monica Lumber & Mill Co. v. Hege, 119 Cal. 376, 51 P. 555; Evans v. Judson, 120 Cal. 282, 52 P. 585; Hines v. Miller, 122 Cal. 517, 55 P. 401.

In the recent case of English v. Olympic Auditorium Corp., 217 Cal. 631, at page 636, 20 P.2d 946, 87 A.L.R. 1281, our Supreme Court considered this point where appellants contended that the court erred in adjudging that the land upon which the building was erected was not subject to the plaintiff's lien, because the owners of the land had protected their title thereto against the liens by giving proper notice of nonresponsibility to lien claimants as provided in section 1192 of the Code of Civil Procedure. They claimed that the notice was posted before the commencement of work on the building and was therefore ineffective for any purpose. The court held the facts upon which it based its finding established that the construction was actually begun before the notice was posted and therefore proper notice was given.

[2] The notice of nonresponsibility relied upon by respondent Bank of America National Trust & Savings Association was posted approximately five months before the actual commencement of the work. The notice of nonresponsibility was, as a matter of fact, not posted and recorded within ten days after the bank had knowledge *of intended construction.* The trial court found that the bank had knowledge of the actual commencement of the work and its progress to completion upon competent evidence. It was also found by

the court that the work of improvement, as a whole, was commenced on or about August 15, 1936. Had the notice of nonresponsibility been posted in a conspicuous place upon the premises within ten days after the bank's knowledge of actual construction in accordance with section 1192 of the Code of Civil Procedure, it would very likely have come to the attention of appellant. The notice, posted on an outside door of a building on the premises about to be demolished or reconstructed, five months before the building was demolished or reconstructed and five months before the delivery of material for new construction or alteration, would not be a sufficient compliance with section 1192 of the Code of Civil Procedure under the cases above cited, and is not sufficient notice of nonresponsibility to relieve the owner's property of the lien. Coombs v. Green Mill, Inc., 107 Cal.App. 204, 290 P. 620.

[3] The remaining question presented is this: Are reasonable charges for cartage by the seller of material to the place of construction properly allowable as a part of the reasonable value of the materials used in the construction work, when such charges are included in the recorded claim of lien as part of the value of the materials furnished? The trial court deducted a total of various small items for cartage, amounting to $26.60. These items were included in invoices as part of the reasonable value of materials furnished. The transportation of material by the seller to the places where it is to be put into a structure is not any part of the labor of erecting the building, but is as much an item of the reasonable value of the material as the surfacing of lumber at the mill or the construction of sash, doors, or other assembled articles of materials. The value of lumber on the job, under the circumstances here related, would fix the reasonable retail value.

In West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 280, 22 P. 231, 232, it was said: "The cartage complained of was a portion of the cost of the materials furnished, and, if allowed at all, was allowed as a part of the value of the materials." This same case was cited in support of a similar holding in Consolidated L. Co. v. Bosworth, Inc., 40 Cal.App. 80, 180 P. 60. See, also, Wood, Curtis & Co. v. El Dorado Lumber Co., 153 Cal. 230, 94 P. 877, 16 L.R.A.,N.S., 585, 126 Am.St.Rep. 80, 15 Ann.Cas. 382, and cases cited; Adams v. Burbank, 103 Cal. 646, 37 P. 640. An exception to this general rule is noted in Wilson v. Nugent, 125 Cal. 280, 57 P. 1008, where it was held that persons who did not furnish materials to be used on the building in question nor perform any labor thereon, but who were merely engaged by the contractor to haul materials to the building and deliver it to the contractor for his use upon the building, were not within the terms of the lien law nor entitled to a lien upon the building for their labor. Respondent also cites First National Bank v. Perris Irr. Dist., 107 Cal. 55, 40 P. 45; Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 P. 378, and Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 P. 357. We are of the opinion that the rule stated in West Coast Lumber Co. v. Newkirk, supra, is applicable to the facts in this case.

The judgment is reversed with instructions to the trial court to amend its findings of fact in accordance with the views herein expressed, and to enter judgment for plaintiff in accordance with the facts so found.

We concur: BARNARD, P. J., MARKS, J.



PROVIDENT LAND CORPORATION v. PROVIDENT IRR. DIST. et al. (MOUTREY et al., Interveners).

Civ. 5858.

District Court of Appeal, Third District, California.

May 4, 1939.

Rehearing Granted June 3, 1939.

1. Waters and water courses ⇐231

Irrigation district's "publication" of delinquent list and notice of sale of land for nonpayment of assessments once each week for three successive weeks, the last time being on August 3d, was effective "publication" within statute requiring that "publication" shall not be before 1st of July but must be made on or before 1st of August. St.1927, p. 614, § 41c.

[Ed. Note.—For other definitions of "Publication," see Words & Phrases.]

2. Waters and water courses ⇐216

Statutory amendment requiring that the first publication of delinquent list by irrigation district must be made on or before the 1st day of August did not change meaning of prior provision that publication shall not be made before 1st of July but must be made on or before 1st of August, but was merely intended to remove any uncertainty due to obscurity in language. St.1927, p. 614, § 41c, as amended by St.1935, p. 361.

3. Waters and water courses ⇐231

A delayed publication of irrigation district's tax list does not of itself invalidate tax sale or deed based thereon.

4. Waters and water courses ⇐231

Where law required that "lawful money" was to be medium of payment of irrigation district's bonds, attempt to redeem property sold for nonpayment of irrigation district's assessments with matured bonds and coupons of the district under provision of act later held unconstitutional was not a valid redemption since payment of bonds was not made in medium specified by law. St.1933, p. 532, § 52a.

[Ed. Note.—For other definitions of "Lawful Money," see Words & Phrases.]

5. Mandamus ⇐97

Where property was sold for nonpayment of assessments by irrigation district and attempted redemption was invalid, no discretion remained in directors of district and mandamus would issue to compel them to execute and deliver to the district a collector's deed to the property.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Proceedings by the Provident Land Corporation against the Provident Irrigation District and others, for writ of mandate to compel execution and delivery of a collector's deed to certain land, wherein A. E. Moutrey and others intervened. From judgment refusing to issue a writ, plaintiff appeals.

Reversed.

Louis Bartlett, of San Francisco, for appellant.

George R. Freeman and Elmer Laine, both of Willows, for respondents.

PER CURIAM.

This action was instituted by Provident Land Corporation to compel, by mandate, the collector of the Provident Irrigation District to execute and deliver to the district a deed of conveyance of some 900 acres of land. Originally some 5400 acres were involved but by order of the superior court a writ of mandate was directed to issue as to some 4500 acres, but excepted the 900 acres herein involved, upon which there had been an attempt to pay the irrigation district assessment with bonds and coupons under section 52a of the Irrigation District Act as amended in 1933, St.1933, p. 532, before this section had been declared unconstitutional, in the case of Shouse v. Quinley, 3 Cal.2d 357, 45 P.2d 701.

Upon a prior hearing upon this matter, this court, basing its holding upon the invalid sale in 1931 that the petition for the writ of mandate upon its face showed want of jurisdiction on the part of the court to issue any such writ. This rehearing was granted when it was called to our attention that a subsequent sale had been made to the district for nonpayment of assessments in 1932.

An examination of the sale held in 1932 convinces us that the publication therein was in compliance with the statute and that the sale was valid. Respondents contend that the 1932 sale was invalid for two reasons, first, that the publication of the delinquent list and notice of sale was not made as provided by section 41c of the California Irrigation District Laws in that said publication was not made on or before the first day of August; and secondly, that the alleged sale to the district was contrary to the provisions of section 44 of the Irrigation District Laws, St.1929, p. 1170, in that said sale was made on the first day that the property was offered for sale.

[1-3] In regard to the publication of the delinquent notice, the court found in substance that the notice was published three times, to-wit: once a week for three successive weeks in certain newspapers on the 20th and 27th days of July, and on the 3d day of August, 1932. Section 41c of the Irrigation District Act as it read at the time in question provided as follows: "* * * the publication of the delinquent list provided for in this act, shall not be made before the first day of July, but must be made on or before the first day of August * * *." Stats.1927, p. 614. By

"publication", according to the theory of respondents, is meant the appearance of the notice the required number of times, and therefore the publication of the delinquent list was not complete until the 3d of August, 1932, three days later than required by the statute, thus rendering the sale void. With this construction we are not in accord. Publication is here used in its ordinary sense. In 1935, St.1935, p. 361, section 41c of the Irrigation District Act was amended to read: "* * * the first publication thereof must be made on or before the first day of August". This change in phraseology does not indicate necessarily an intention to change the meaning of the provision, but was "to remove just such uncertainty and ambiguity * * * by expressing the point involved in obscurity in language that cannot be misunderstood". McNutt v. City of Los Angeles, 187 Cal. 245, 201 P. 592, 595. Furthermore, a delayed publication of a tax list does not of itself invalidate the tax sale or a deed based thereon. Adams v. Slee, 92 Cal.App. 708, 268 P. 959.

We believe that the foregoing disposes of the objection to the validity of the 1932 sale. The 1932 sale being valid, the next question for determination is whether or not redemptions from tax sales with matured bonds and coupons of the district, under section 52a of the Irrigation District Act, constitute a valid redemption. In 1935 the Supreme Court, in Shouse v. Quinley, supra, held that the attempt to abrogate the order of payment of irrigation bonds (sec. 52a of the act) was unconstitutional, and that it impaired the constitutional rights of bondholders.

[4, 5] In Islais v. Matheson, 3 Cal.2d 657, 45 P.2d 326, a statute which amended section 3480 of the Political Code, by reducing the penalties in effect at the time the district's bonds were issued, was held unconstitutional. It was there determined that the law in effect at the time the contract was made fixed the rights of all parties thereto. When these irrigation district bonds were issued in 1918 and 1921, the Irrigation District Act provided gold and silver coin as the mode of payment, which medium was by later amendment fixed as lawful money. The attempt therefore to redeem the property here in question from the 1931 and 1932 assessments with matured bonds and coupons of the district, under section 52a of the act did not constitute a valid redemption from said sales, as payment was not made in the medium specified in the act creating the bonds. No discretion remained in the directors of the district and it was their duty to execute the deed.

From the foregoing it is apparent that the order of the trial court refusing to issue a writ of mandate to compel the board of directors of the district or the collector thereof, to issue and deliver to the district a collector's deed to the approximately 900 acres here involved, be denied, was erroneous.

The judgment is therefore reversed.



32 Cal.App.2d 444

DUCLOS et al. v. TASHJIAN et al.

Civ. 2252.

District Court of Appeal, Fourth District, California.

April 27, 1939.

Hearing Denied June 26, 1939.

1. Automobiles ⇐181(2)

"Without giving compensation therefor," within statute defining automobile "guest" as one who accepts ride "without giving compensation therefor," indicates intention to exclude application of "guest" designation not only to one who has paid cash or equivalent for his transportation but also to one who pays such recompense as makes it worth the other's while to furnish the ride. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Guest" and "Without Giving Compensation Therefor," see Words & Phrases.]

2. Automobiles ⇐181(2)

An expert mechanic being transported with his tools by rancher to ranch to look at defective pump was "passenger" rather than "guest" within statute relieving motorist from liability for mere negligence. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

3. Automobiles ⇐181(2)

An actual contract of employment between machinist and rancher, by whom machinist was transported to ranch to look at defective pump, was not necessary to con-

stitute "compensation" for the ride within statute defining automobile "guest" as one who accepts ride without giving "compensation" therefor. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Compensation," see Words & Phrases.]

4. Automobiles ⇐181(2)

One who accepts a ride and gives compensation to the driver therefor is a "passenger" rather than a "guest" within statute relieving motorist from liability for mere negligence, notwithstanding prospective benefits inuring to the rider. St.1935, p. 154, § 403.

5. Automobiles ⇐246(2)

In action for death of automobile occupant, instructions, defining "guest" within statute relieving motorist from liability for mere negligence as one who accepts ride without giving compensation therefor, were not objectionable as failing to state that compensation given must be for the ride. St.1935, p. 154, § 403.

6. Automobiles ⇐181(2)

A benefit conferred by rider on driver of automobile, to constitute "compensation" within statute defining "guest" as one who accepts ride without giving "compensation" therefor, must be not only for the ride but also must be tangible or material benefit, rather than merely incidental benefit. St. 1935, p. 154, § 403.

7. Appeal and error ⇐1064(1)

In action for death of automobile occupant, where only reasonable inference from pertinent evidence was that occupant had paid consideration for ride, instruction, incorrectly defining "compensation" as used in statute defining automobile "guest" as one who accepts ride without giving "compensation" therefor, was not prejudicial. St. 1935, p. 154, § 403.

8. Appeal and error ⇐1067
Trial ⇐260(3)

In action for death of automobile occupant, where court instructed that plaintiffs' contention was that occupant was riding as passenger for compensation, and also instructed that burden rested on plaintiffs of proving their case by preponderance of evidence, refusal to specifically instruct that plaintiffs were required to prove by preponderance of evidence that occupant was passenger and not guest was not error, but, if instructions thereon were insufficient, defect was not prejudicial where all evidence was to effect that occupant was passenger and not guest. St.1935, p. 154, § 403.

9. Death ⇐85, 88

Damages recoverable for death are limited to the pecuniary loss suffered, but such "pecuniary loss" includes loss of comfort, protection, and society of deceased. Code Civ.Proc. § 377.

[Ed. Note.—For other definitions of "Pecuniary Loss," see Words & Phrases.]

10. Death ⇐97

The damages to be awarded for loss of comfort, protection, and society of deceased is in jury's sound discretion, to be exercised in light of circumstances. Code Civ.Proc. § 377.

11. Appeal and error ⇐1004(1)

The power of appellate courts to control amount of damages awarded for death may be exercised only when facts suggest passion, prejudice or corruption on jury's part. Code Civ.Proc. § 377.

12. Death ⇐88

Married daughters of accident victim were not deprived of right to recover actual value of loss of comfort, protection, and society of victim, by reason of fact that, since marriage, they had not received and had no reasonable expectation of receiving monetary assistance from victim. Code Civ. Proc. § 377.

13. Death ⇐95(1)

The loss of comfort, protection, and society of a deceased has an actual value which cannot be compensated by nominal damages. Code Civ.Proc. § 377.

14. Death ⇐99(4)

$150 a year, assumed to be the value which jury in awarding damages for death had placed on loss to each daughter of comfort, protection, and society of father, was not excessive.

15. Death ⇐88

Widow of automobile accident victim was entitled to be compensated for pecuniary value of the loss of her husband's comfort, protection, and society.

16. Death ⇐99(4)

$300 a year, assumed to be the monetary value placed by jury in awarding damages for death of husband, on loss of husband's

comfort, protection, and society, was not excessive.

17. Death ⇐99(4)

$781.35 a year plus interest as pecuniary value of loss of support by husband who at time of death was making about $1,800 a year was not excessive.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Daisy A. Duclos and others against S. Tashjian and another to recover damages for the death of Cuprien Duclos in an automobile collision. Judgment for the plaintiffs, and defendants appeal, separately.

Affirmed.

Chester O. Hansen, W. H. Stammer, and Galen McKnight, all of Fresno, for appellants.

Irvine P. Aten, Richard V. Aten, Frank Curran, and Douglas A. May, all of Fresno, for respondents.

MARKS, Justice.

A judgment was rendered against defendants in the sum of $15,330.69 as damages for the death of Cuprien Duclos in a collision between two automobiles being driven by defendants. Duclos was the husband of Daisy A. Duclos and the father of Rose A. Brim and Edith J. Hurlbert. The defendants took separate appeals.

Defendant S. Tashjian presents the following grounds for reversal of the judgment against him: That Duclos was a guest and not a passenger in Tashjian's automobile at the time of the fatal accident; prejudicial error in instructions given the jury; prejudicial error in refusing an instruction which he requested. Both defendants urge that the verdict and judgment for $15,330.69 is excessive.

The record contains ample evidence of concurrent negligence of both defendants. The implied findings of the jury that Duclos was not guilty of contributory negligence finds sufficient evidentiary support. There is no evidence showing wilful misconduct or intoxication on the part of Tashjian. The case is factually similar to Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194. Therefore it will only be necessary for us to concern ourselves with the factual situation showing whether Duclos was a passenger or a guest while riding with Tashjian.

[1, 2] Duclos was an expert machinist and had his place of business adjoining his residence in the city of Fresno. Tashjian owned a farm a short distance from that city.

On September 18, 1937, Duclos was riding in Tashjian's car when it came into collision with a car being driven by Myrtie Jaquish in the intersection of Willow and Jensen avenues near Fresno.

As to the object of this ride with Tashjian, Mrs. Duclos testified as follows:

"Q. Now, Mrs. Duclos, you have seen this man testify who is one of the defendants in this case, S. Tashjian, have you not? A. Yes, sir.

"Q. I will ask you if he came to your home on Church Avenue September 18? A. He did.

"Q. Did you see him? A. I did.

"Q. Did you have a conversation with him? A. I did.

"Q. Did he say anything to you then about hiring Mr. Duclos? A. Yes. He said, 'Where is the boss?' I says, 'He is out here in the shop.' And I says—he says, 'Well, I want to hire him to fix my engine, my pump.' I says, 'Well, he is in the shop there'. He got out and went in the shop.

"Q. He went in the shop? A. Yes.

"Q. Did you see your husband afterwards? A. Not until I saw him in the hospital.

"Q. I mean, did you see your husband leave? A. Oh, yes, he came out of the shop.

"Q. Did he have his tools with him? A. Yes, he had them on his shoulder.

"* * * A. Well, he drove in and stopped between the house and the shop, right at the entrance of the drive, and he was headed, and he says, 'Is the boss in?' I says, 'Yes, what do you want?' 'Well,' he says, 'I want him to go out and fix my pump, hire him to fix my pump.' 'Well', I says, 'he is in the shop.' That is what I says, 'He is in the shop'."

On the same subject Tashjian testified as follows:

"Q. You have a ranch on Minnewawa Avenue, have you not? A. Yes, sir.

"Q. On the 18th day of September of last year you went to the home of Mr. C. Duclos to employ him to go to the Min-

newawa ranch—the Minnewawa Avenue ranch of yours to fix or repair a pump of yours that had gotten out of order, did you not? A. I did not.

"Q. What is that? A. I did not employ him.

"Q. You did not? Well what did you go there for? A. I went to ask him if he could come and look at a pump, if he can take the job and fix it or not.

"Q. Oh, so you got him to see if he could repair the pump? A. Or not.

"Q. Yes. A. Take the job.

"Q. What is that? A. Take the job.

"Q. If he could do the job, is that the idea? A. Take the job or not."

The most frequently cited case on the question of what compensation must be given by the rider for the ride, to constitute him a passenger and not a guest, is Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, 842. In that case the defendant, an automobile dealer, was demonstrating an automobile to the plaintiff, a prospective buyer, at the time of the accident and injury of the plaintiff. In holding that Mrs. Crawford gave compensation for her ride and was therefore a passenger and not a guest, this court said: "Automobile dealers and salesmen are not only willing but anxious to exchange their time and the use of a car for the time and attention of a person who is in the market for such a car. There can be no question that in actual business, the one is regarded as an equivalent or recompense for the other. It will be noted that the definition in the statute does not say 'without paying therefor,' but rather says 'without giving compensation therefor.' This indicates an intention not to limit the same to a person definitely and specifically paying for his transportation in cash or its equivalent, but to include in its scope a person who gives such a recompense for the ride as may be regarded as a compensation therefor; that is, a return which may make it worth the other's while to furnish the ride. * * * In Searcy v. Grow, 15 Cal. [117] 118, the word 'compensation' is defined as 'that return which is given for something else; in other words, a consideration.' A consideration may be any benefit conferred or any prejudice suffered. Civ.Code, § 1605. The taking of a demonstration of an automobile, with its accompanying possibilities of profit, would not only seem to be a benefit to the dealer, but a return fully proportionate to any benefit conferred on the prospect. * * * It is significant that in such cases heretofore, the prospective purchaser, when referred to, has usually, if not always been designated as a passenger, or a buyer, rather than as a guest. We feel that this designation has not been accidental. The words 'passenger' or 'buyer,' as used in such cases, better convey the meaning intended than would the word 'guest,' because such a demonstration partakes more of the nature of a contractual relationship than of the entertainment of an invited guest, or the conferring of a favor by a host, with no hope of return and no profit in view. It is not undertaken by the dealer as an act of hospitality, or a favor, but as a real and vital part of his business, with an eye to his own profit. It is participated in by the customer, not as a means of obtaining free transportation, but as an integral part of a business transaction. It may be considered as a distinct benefit to the dealer."

We think, that under the foregoing rule, Duclos was a passenger and not a guest of Tashjian on the fatal ride. Tashjian had a defective pump on his ranch. Duclos was an expert mechanic. Tashjian wanted his pump fixed. He was transporting Duclos, with his tools, to his ranch to look at the pump. It is significant that Duclos' tools were taken on the trip. This would indicate an intention to fix the pump immediately if it could be done. To paraphrase a portion of a quoted paragraph of the opinion in Crawford v. Foster, supra: The journey was not undertaken by Tashjian as an act of hospitality nor as a favor, but as a real and vital part of his own business with an eye to his own benefit. It was participated in by Duclos, not as a means of obtaining free transportation, but as an integral part of a business transaction. It may be considered as a distinct benefit to Tashjian as a step towards getting his pump repaired and put in operation.

The object of the journey was inspection of the defective pump, with the purpose of its repair, a distinct benefit to Tashjian. This clearly constituted Duclos a passenger within the rules announced in McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, 911, as follows: "Compensation has been deemed made: * * * when the plaintiff accepted the ride at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey. Haney v. Takakura, 2 Cal.App.2d 1,

37 P.2d 170; Lerma v. Flores, 16 Cal.App. 2d 128, 60 P.2d 546; Lyttle v. Monto, 248 Mass. 340, 142 N.E. 795. When * * * a benefit of a tangible nature was conferred upon the driver or his principal by reason of the transportation. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870; Peccolo v. City of Los Angeles [8 Cal.2d 532] 66 P.2d 651; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159; Woodman v. Hemet Union High School Dist., 136 Cal.App. 544, 29 P.2d 257; * * *."

[3, 4] Tashjian urges that as he had not employed Duclos, the benefits of the ride all flowed to Duclos because it gave him the opportunity to secure employment for which he would receive compensation. An actual contract of employment of Duclos by Tashjian was no more necessary to constitute compensation for the ride in this case than was an actual sale of an automobile necessary in the Crawford case. Because some benefit from the trip may accrue to the rider is not controlling. The statute does not so provide. A prospective benefit to the rider does not compensate and destroy by balancing an independent and separate compensation for the ride given by the rider to the driver. It is sufficient if, as here, the person who accepts the ride gives compensation to the driver for it. Sec. 403, Vehicle Code, St.1935, p. 154; Smith v. Joint Union High School Dist., 118 Cal.App. 673, 5 P.2d 930; Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201; Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023; Rogers v. Vreeland, 16 Cal. App.2d 364, 60 P.2d 585.

[5] Tashjian complains of the following instruction given the jury at the request of plaintiffs: "You are instructed that the term 'guest' used in the Motor Vehicle Act of this State, means a person who accepts a ride in any vehicle without giving compensation therefor. You are instructed that the term 'compensation' does not necessarily mean the payment of money or the transfer of property of any description from one person to another. A person who confers any benefit upon another in whose vehicle he accepts a ride may thereby pay a compensation for such ride."

He urges that the instruction fails to incorporate the important element that the compensation given by the passenger to the driver must be *for the ride*. We cannot agree with this argument. The fact that the compensation must be given *for the ride* sufficiently appears from the concluding words of the first sentence of the instruction.

[6] Tashjian also criticizes the instruction because in the last sentence it is stated that *any benefit* conferred by the passenger on the driver is *compensation*. It is now established that the benefit conferred must be not only for the ride but also must be a "tangible" or "material" benefit and cannot be an "incidental" benefit. Rogers v. Vreeland, supra; Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 71 P.2d 298.

In Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, the court held an instruction, couched in language almost identical to the one we are considering, an incorrect statement of the law.

[7] We have quoted practically all of the material evidence in the record concerning the purposes of the fatal trip. From that evidence but one reasonable inference can be drawn, namely, that a tangible and material consideration flowed from Duclos to Tashjian for the ride. That consideration was the service to be rendered and time given by Duclos, the expert mechanic, in inspecting the defective pump of Tashjian to determine if he could repair it. As there is no conflict in the evidence on this question, and as no reasonable conflicting inference could have been drawn from that evidence, the fact that the instruction did not correctly define "compensation" cannot be held to have been prejudicial. Had the instruction been technically correct no other conclusion could have been reached by the jury from the evidence than the one it did reach, namely, that Duclos was the passenger and not the guest of Tashjian.

[8] Tashjian complains of the refusal of the trial judge to give an instruction requested by him to the effect that plaintiffs must prove by a preponderance of the evidence that during the ride Duclos was a passenger and not a guest of Tashjian.

The trial court instructed the jury that "it is the plaintiffs' contention that Mr. Duclos was so riding in said automobile as a passenger for compensation". The jury was also instructed that "upon the plaintiffs rests the burden of proving their case by a preponderance of the evidence". Other proper instructions were given on preponderance of the evidence. Thus the

jury was sufficiently informed that plaintiffs must prove by a preponderance of the evidence that Duclos was a passenger in the Tashjian car before they could recover against him. Further, if we should hold this instruction on the burden of proof and preponderance of the evidence defective we must regard any such error as relatively unimportant from the point of view of being prejudicial, as all the evidence, not a mere preponderance, was to the effect that Duclos was Tashjian's passenger and not his guest.

[9-11] Both defendants stoutly maintain that the judgment for $15,000, general damages, is excessive. They do not question the $330.69 special damages.

The question of the duty of an appellate court in considering the amount of damages awarded in a death case is always a difficult one, where, as here, the verdict is clearly large under the evidence produced. While there are well settled rules of law announcing the principles upon which such awards must be based, there is and can be no fixed sum above which the amount of the verdict cannot go. In all these actions the recovery is limited to the pecuniary loss and "such damages may be given as under all the circumstances of the case, may be just". Sec. 377, Code Civ.Proc. While damages recoverable are only for the pecuniary loss suffered, that loss includes the loss of the comfort, protection and society of the deceased. Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 112 P. 564. "Loss of comfort, protection and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages." Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 200, 295 P. 41, 45. The pecuniary loss suffered from this cause "is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case". Clark v. Tulare Lake Dredging Co., supra [14 Cal.App. 414, 112 P. 572.] "The power of appellate courts to control the amount of damages awarded comes into play only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the jury. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768; Hale v. San Bernardino etc. Co., 156 Cal. 713, 106 P. 83; Webster v. Harris, 119 Cal.App. 46, 6 P.2d 88." Sassano v. Roullard, 27 Cal.App. 2d 372, 81 P.2d 213, 214.

To measure the amount of damages awarded by these rules of law requires a summary of the evidence on that question.

[12, 13] Rose A. Brim and Edith J. Hurlbert are the daughters of Daisy A. Duclos and deceased. Each is married and is living with and is supported by her husband. There is nothing in the record indicating that either of them since marriage had received or had any reasonable expectation of receiving any monetary assistance from deceased. Therefore, as to them, any value of support by deceased is eliminated from the case. However, those facts do not deprive them of their right to recover the actual value of their loss of the comfort, protection and society of their father. As we have seen this loss has an actual value and cannot be compensated by nominal damages.

[14] The question of translating the amount of such a loss into money is always troublesome. Certainly if we should assume that the jury placed a value on this loss to each daughter at one hundred fifty dollars a year, we could not conclude that such an award suggests passion, prejudice or corruption on the part of that body. In the exercise of their discretion we believe the jurors might have concluded that each daughter suffered a pecuniary loss from the death of her father in the total sum of $1665, plus the small interest that sum will earn at the prevailing modest rates, during the eleven and one-tenth years of the life expectancy of deceased.

[15, 16] Daisy A. Duclos was happily married to deceased. He was industrious and hard working. At the time of his death he was making about $1800 a year. He was in excellent health. Although sixty-five years of age, his picture, taken shortly before his death, gives the appearance of a much younger man. Mrs. Duclos was entitled to be compensated for the pecuniary value of the loss of her husband's comfort, protection and society. If we assume that the jury placed a monetary value of three hundred dollars a year on this loss to her, or a total value of $3330, certainly we could not conclude that there had been any abuse of that discretion which the law vests in the jury to fix such damages.

[17] The question yet remains: Is the award to Mrs. Duclos of the $8340 remaining, or $781.35 a year, plus interest, as the pecuniary value of her loss of support by her husband, so large as to suggest at first blush, passion, prejudice or corruption on the part of the jury? We think not.

Therefore, we cannot conclude that the amount of damages awarded plaintiffs is excessive as that term is used in the law in California.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 494

PETERS et al. v. PIONEER LAUNDRY CO.

Civ. 10807.

District Court of Appeal, First District, Division 2, California.

May 2, 1939.

1. Explosives ⇐8

In action against owner of laundry for death of employee of independent contractor when tank, which had contained cleaning solvent, exploded, "res ipsa loquitur doctrine" was not applicable where tank when it exploded was no longer under exclusive management of defendant owner, but for purposes of excavating tank and drawing it up into yard it was under management of independent contractor.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

2. Explosives ⇐8

In action against owner of laundry for death of employee of independent contractor when tank which had contained cleaning solvent exploded, evidence that defendant did not exercise ordinary care for safety of deceased, if he occupied status of an invitee, was insufficient for jury.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Louise Peters and others against the Pioneer Laundry Company for death of Manuel Peters resulting from an explosion on the premises of the defendant. From a judgment for the defendant based on a directed verdict, the plaintiffs appeal.

Affirmed.

Jesse E. Nichols and Paul B. Richard, both of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondent.

STURTEVANT, Justice.

In an action tried before the trial court sitting with a jury the plaintiff Louise Peters and her minor children sued to recover damages for the death of Manuel Peters, the husband of Louise and the father of said minors. After all of the evidence had been received and after both parties had rested the defendant made a motion that the jury be directed to bring in a verdict in favor of the defendant. The motion was granted and from the judgment the plaintiffs have appealed. They contend that the doctrine of res ipsa loquitur was applicable in the trial of said action and that therefore it was improper for the trial court to direct a verdict.

At all times herein mentioned the defendant was the proprietor and operating a laundry in the city of Emeryville in the county of Alameda. The business of the defendant was divided into departments. It conducted a laundry business, a cleaning business, and perhaps some other departments. Its plant was so constructed that buildings extended around the exterior portions of its lot. In what might be called the middle portion of the lot there were no buildings but there was an open space. Generally speaking it was the dirt surface crossed in places by brick or wooden walks. In the southeast corner of the open lot there were tanks embedded in the ground. One tank had been used to hold Stoddard cleaning solvent. In the latter part of January, 1936, it was found that water was entering that tank and the defendant commenced to prevent that condition. On Friday, January 24, 1936, the top soil was removed and it was then ascertained that water was not leaking through the top. On Monday morning, January 27, the tank had been pumped empty and the pipes connected with the tank had been disconnected. There were then four open holes in the top where the pipes had been disconnected. With the tank in that condition the officers of the defendant communicated

with Thomas Brackett, a contractor engaged in excavation work, requesting him to call at the plant. Shortly thereafter Patrick Brackett, the agent of Thomas Brackett, together with Manuel Peters, appeared at the plant. They took shovels, picks, cable, and perhaps some other tools. Fred W. Weiss, the president of the defendant corporation, met them and took both out into the yard. As they were walking out Mr. Weiss testified he told Mr. Brackett he had a gas tank, a solvent tank, he wanted taken out and asked him if he did that kind of work. Mr. Brackett said they did anything. Mr. Weiss pointed out the tank he wanted removed and, shortly thereafter, he left the premises. Thereupon Mr. Brackett turned to Manuel Peters and told him to bring in the tools. Peters did so and at once went to work digging a trench around the tank. He commenced to dig at approximately 9 o'clock and about 11 o'clock he had sunk the trench two or three feet deep. The evidence discloses that the tank had a capacity of about 500 gallons and that it was about six feet high. The evidence shows the bottom of the trench as dug was at least three feet above the bottom of the tank. While Peters was so engaged in sinking the trench, at about 11 o'clock, the top of the tank was blown off by an explosion. Peters was knocked over on the side of the trench and killed. John A. Biedman, one of the officers of the defendant company, was knocked down and seriously injured. Edward Weiss, an employee of the company, was knocked over against a fence and seriously injured.

The plaintiffs contend that the tank which caused the injury was shown to be under the management of the defendant company and the accident was such as in the ordinary course of things does not happen if those who have the management use proper care and therefore the doctrine of res ipsa loquitur was applicable to the trial of the action.

The evidence is without conflict that for some time prior to the accident Manuel Peters had, from time to time, acted as an employee of Thomas Brackett and that never prior to January 27, 1936, had he done or performed any work on the premises of the defendant company. After he arrived at the plant on the date last mentioned the evidence shows no officer or employee of the defendant gave or offered to give him any directions regarding the work to be done, or controlled or attempted to control the performance of said work by said Peters in any manner whatsoever. There is no evidence showing the defendant company had any right to control or direct Peters in the performance of his work nor, during said period of time, did defendant's agents or employees do any work on or adjacent to said tank.

[1] That, prior to January 27, 1936, the tank was under the exclusive management of the defendant is not controverted. However, after the tank had been disconnected and from the time Patrick Brackett and the decedent received the directions of Fred Weiss, as hereinabove stated, we think it is equally clear the tank no longer was under the exclusive management of the defendant. But, on the other hand, for all of the purposes of excavating the tank and drawing it up into the yard, it was under the management of Thomas Brackett, the contractor. Therefore, the doctrine of res ipsa loquitur was not applicable to the trial of the action. Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 688–690, 80 P.2d 185, 1016. We note that the plaintiffs contend the Hubbert case and the other authorities relied on by the defendant are not applicable because in the instant case the decedent, Manuel Peters, did not have the manual management and control of the tank. But an examination of said authorities discloses they do not turn on that distinction. Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873.

[2] Finally, the plaintiffs contend the decedent, Peters, was an invitee and that the defendant owed him the duty of exercising ordinary care for his safety. The defendant concedes he was an invitee and, in all we have said above, we have assumed he was an invitee and that the defendant was bound to exercise ordinary care. But we have shown that there was no direct evidence that it did not exercise ordinary care; and that, under the facts shown in the record, we are not warranted in indulging in any inferences that it did not do so.

The trial court did not err in directing the verdict. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

34 Cal.App.2d Supp. 743

PEOPLE v. TILKIN et al.

SAME v. MEEKS et al.

No. Cr. A. 1557.

Appellate Department, Superior Court, Los Angeles County, California.

1. Municipal corporations ⇐622, 639(1)

The section in Los Angeles ordinance prohibiting picketing must be read with following section rendering preceding section inapplicable to picketing during bona fide strikes, etc., to determine offense created, and following section does not merely set forth exceptions to offense created by preceding section, so that complaint charging picketing in violation of preceding section, without alleging that picketing was contrary to regulations of following section, does not state a public offense.

2. Municipal corporations ⇐622, 639(1)

The section in Los Angeles picketing ordinance which prohibits carrying banners in public places must be read with following section which permits bona fide employees to carry banners while lawfully picketing, to determine offense created, and following section does not merely set forth exceptions to offense created by preceding section, so that complaint alleging facts showing violation of preceding section without averring that acts were contrary to following section does not state a public offense.

3. Municipal corporations ⇐120

An interpretation which would render picketing ordinance violative of due process was to be avoided if another interpretation was reasonable. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

4. Indictment and information ⇐111(1)

A complaint, indictment, or information need not allege that an accused comes within exceptions mentioned in statute on which prosecution is founded.

5. Indictment and information ⇐166

The prosecution need not prove that accused does not fall within an exception of statute on which prosecution is founded, but such proof must be made by accused as matter of defense.

6. Constitutional law ⇐251

"Due process" is not a yardstick of definite value, but is merely an embodiment of the English sporting idea of fair play. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

7. Constitutional law ⇐275(2)

Section in Los Angeles ordinance rendering preceding section, which prohibits picketing, inapplicable to picketing during a bona fide strike, if deemed mere exception to offense created by preceding section, would render ordinance violative of "due process" because placing unconscionable burden on accused of proving as matter of defense that strike was bona fide. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

8. Constitutional law ⇐275(2)

The section in Los Angeles ordinance permitting bona fide employees to carry banners while lawfully picketing, if deemed mere exception to offense created by preceding section, which prohibits carrying banners in public places, would render ordinance violative of "due process" because placing unconscionable burden on accused of proving as matter of defense that picketing was lawful. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

9. Municipal corporations ⇐120

The arguments submitted to voters in favor of initiative ordinance prior to election could be considered by Superior Court as an aid in giving ordinance its proper construction.

10. Municipal corporations ⇐594(2)

The form in which an ordinance is drafted is not determinative of whether provisos in one section constitute mere exceptions to an offense created by another section, or whether provisos constitute definitive part of offense created by both sections.

Appeal from Municipal Court of Los Angeles; Harold B. Landreth, Judge.

Sol Tilkin and others and James Meeks and others were convicted of violating sections 3 and 5 of an ordinance of the city of Los Angeles, No. 80170, relating to picketing, and they appeal.

Reversed, with instructions to dismiss complaints.

Gallagher, Wirin & Johnson, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Joseph McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

We have reached the conclusion that there is a fundamental difference between the form and the substance of those provisions of the recently adopted initiative ordinance of Los Angeles city (ordinance number 80170) dealing with picketing, and that, as the complaints on which the judgments were based followed the form rather than the substance of the ordinance, the judgments must be reversed.

The following four sections of the ordinance are involved, under our interpretation, in the prosecutions under review: Section 3. "It shall be unlawful for any person to picket in or upon any public place, or in or upon any private place within the view of any person or persons who are in or upon any public place, in a manner calculated or with the intent to induce or influence any person to refrain from entering, occupying or leaving any place of business, or to refrain from performing services of labor, or to refrain from seeking or obtaining employment, or to refrain from purchasing, selling, using, delivering, transporting or receiving any goods, wares, merchandise, services, entertainment, accommodations or articles, or to refrain from attempting to do any of the foregoing."

Section 4. "The provisions of Section 3 hereof shall not apply to picketing at a place of business by the persons and in the manner in this Section 4 described if all of the conditions hereinafter specified in this Section exist and if such picketing be conducted by the persons, in the manner and subject to the limitations, provisions and regulations hereinafter in this Section set forth, to-wit:

"(a) If a bona fide strike shall be in progress at a place of business and a majority of the striking bona fide employees of the employer at such place of business shall have designated in writing certain of their number to act as pickets and shall have appointed in writing a representative or representatives to certify to the facts concerning such bona fide strike and to the designation of such pickets, such place of business may be picketed by such bona fide employees so designated, provided that each of such picketing employees shall have upon his or her person and exhibit at any time when acting as such picket, upon request of any police officer, a writing signed by such representative, certifying to the existence of a bona fide strike at such place of business and also certifying to his own designation as such representative and to the designation of such bona fide employee to act as such picket. It shall be unlawful for any person to so certify to statements in such writing which he knows to be untrue or which he has no reasonable grounds to believe to be true.

"(b) No bona fide employee so designated to picket a place of business shall picket such place of business where at the same time more such designated bona fide employees are engaged in picketing such place of business than a number equal to one picket for each entrance to such place of business abutting upon a public place, provided, however, that the limitation of numbers provided by this subsection (b) shall in no case reduce the lawful number of such pickets to less than two persons picketing the same place of business. If the number of such designated bona fide employees so engaged in picketing exceeds the maximum number permitted by this subsection (b), then each and all of the persons so picketing shall be guilty of violations of this Ordinance notwithstanding any provision of this Section 4.

"(c) The activity of any such bona fide employee while so picketing such place of business shall be limited to patrolling upon the public places in front of or about such place of business and to wearing or carrying such an arm band or other banner as is permitted by Section 6 of this Ordinance.

"(d) In the event of a bona fide strike exists at some but not all of the places of business of an employer, those places of business of such employer at which no bona fide strike exists may not be picketed.

"(e) No two such bona fide employees while so picketing such place of business shall be within less than twenty-five (25) feet of each other."

Section 5. "It shall be unlawful for any person to carry, show or display any banner in or upon any public place, or in or upon any private place within the view of any person who is in or upon any public place, in front of, in the vicinity of, or about any place of business, or any of the approaches leading thereto or therefrom (i) in a manner calculated or with the intent to threaten, intimidate, coerce or put in

fear any person who is entering, occupying or leaving any place of business or who is performing any services or labor, or who is seeking or obtaining employment, or who is purchasing, selling, using, delivering, transporting or receiving any goods, wares, merchandise, services, entertainment, accommodations or articles, or who is attempting or seeking to do any of the foregoing, or (ii) in a manner calculated or with the intent to induce or influence any person to refrain from entering, occupying or leaving any place of business, or to refrain from performing services or labor, or to refrain from seeking or obtaining employment, or to refrain from purchasing, selling, using, delivering, transporting or receiving any goods, wares, merchandise, services, entertainment, accommodations or articles, or to refrain from attempting to do any of the foregoing."

Section 6. "Notwithstanding the provisions of Section 5, a bona fide employee while carrying on lawful picketing within the provisions of Section 4 hereof may wear or carry an arm band or other banner not exceeding twenty (20) by thirty (30) inches in size, which arm band or other banner shall set forth (i) the name or initials of the organization represented by the person wearing or carrying such arm band or other banner, and (ii) the word 'picket', and may also set forth (iii) the statement that a strike is in progress at the place of business so being picketed, including the name or address of such place of business so being picketed, but such arm band or other banner shall have thereon no other words, lettering, numbering, picture or design whatsoever."

[1, 2] We would have no fault to find with either of the two counts in the complaint if we could agree with the People's interpretation of the ordinance. The People's contention, which finds support in the form in which the ordinance is drawn, is that the function of sections 4 and 6 is to set forth exceptions to offenses which are created by sections 3 and 5, respectively. It is with this contention, and hence with the conclusion that the two counts are adequate, that we disagree. We are of the opinion that in any case where section 4 is involved, it and section 3 must be read together, and that sections 5 and 6 must be read together, to determine the offenses which have been created. A charge, therefore, such as Count 1, which simply alleges that, as defined earlier in the ordinance, the defendants did picket in the vicinity of and about a place of business contrary to section 3 without declaring that they did so contrary to any of the regulations of section 4 fails to state a public offense. So also a count, as we find is true of Count 2, which states facts showing the violation of section 5 but fails to aver that they were done contrary to any of the provisions of section 6, fails to state a public offense. We are construing the charge of Count 1, that the defendant did picket "in the vicinity of and about a place of business," as making applicable the language of section 4 which concerns itself with picketing "at a place of business." County of Los Angeles v. Hannon, 1910, 159 Cal. 37, 112 P. 878, Ann.Cas.1912B, 1065. We are not faced, therefore, with a complaint which presents a charge that the provisions of section 3 have been violated at some place where section 4 is inapplicable, and the conclusion we have heretofore expressed and what we have to say hereafter has to do with those cases where picketing "at" a place of business is involved.

[3-5] Several considerations have brought us to the conclusion that sections 4 and 6 are not to be given value as mere exceptions to sections 3 and 5, respectively. One reason which seems to us potent, is that to interpret sections 3 and 5 as purposing to create offenses, with sections 4 and 6 as exceptions thereto, would be to present an ordinance which violated the due process provisions of both our state (Art. 1, sec. 13) and federal, U.S.C.A. (Fourteenth Amendment) constitutions, an interpretation which is to be avoided if another is reasonable. A thoroughly established rule of criminal practice is the initial step leading to the conclusion that if sections 4 and 6 are to be construed as exceptions to offenses created elsewhere, due process of law is denied. The rule is stated succinctly in Ex parte Lieritz, 1913, 166 Cal. 298, 301, 135 P. 1129, 1131: "The authorities almost without conflict declare that a complaint, indictment, or information need not allege that an accused comes within exceptions mentioned in the statute upon which the prosecution is founded." We find it more completely set forth in Ex parte Hornef, 1908, 154 Cal. 355, 359, 97 P. 891, 892, in the following words: "There is practically no conflict in the authorities as to

what the general rule is in regard to the necessity of alleging, in a complaint, indictment, or information, facts showing that an accused does not come within exceptions or provisos contained in the statute upon which the prosecution is based. The accepted rule is expressed very clearly in State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. It was there said: 'The question is whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Neither does the question depend upon any distinction between the words "provided" or "except" as they may be used in the statute. In either case the only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it shall be negatived, otherwise it is a matter of defense.' The court further said that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense." A number of cases to the same effect are cited in our recent decision of People v. Fowler, Cal.Super.1938, 84 P.2d 326(9); and a multitude of others may be found in 14 Cal.Jur. 52, 31 C.J. 720, and in the American Digest System, listed under Indictment and Information, § 111. Implicit in this rule, of course, is another of which it is the corollary: it is not incumbent on the prosecution to prove that a defendant does not fall within an exception; that being a matter of defense the burden is on him to make proof of it at his trial. People v. Ruddick, 1930 107 Cal.App.Supp., 785, 793 and cases reviewed at pages 795 et seq., 288 P. 45, at pages 49, 50.

As ordinarily presented, there is no fault to find with the application of this rule. If a defendant claims to come within an exception to a state of facts which has been declared in general language to make one a criminal, it does not place an undue burden on him to be required to raise at least a reasonable doubt as to the matter. Indeed, in some cases where the exception is so woven into the definition of the offense that the prosecution must plead it, it need not prove it; it being a negative, more convenient for the defendant to prove, the defendant has that burden. People v. Boo Doo Hong, 1898, 122 Cal. 606, 55 P. 402.

[6-8] Should our section 4, however, be given the effect of an exception to the offense created in section 3, or section 6 be considered as excepting one therein described from the operation of section 5, a person charged under either section 3 or 5 would have an unconscionable burden placed upon him to prove his innocence. All that the People would have to allege would be an act set forth in one or the other of those sections; either that the accused walked to and fro (an act defined in section 1 of the ordinance as picketing) on a public street in a manner calculated to influence a person not to enter a place of business or that he carried a banner on a public street in that manner, and that is all they would have to prove. To escape conviction on either charge, after this prima facie showing by the People, a defendant would be compelled to prove without exception all of the following. First, he would have to show that a bona fide strike was in progress at the place of business where he was picketing. Without quoting the various definitions in section 1 of the ordinance which become involved, and without discussing and resolving any of the uncertainties in those definitions, with sufficient accuracy for the purposes of the present consideration it suffices to say that, in order to show that a bona fide strike was in progress at a particular place of business, a defendant would have to prove: (a) the number of bona fide employees, that is, the number of "real" persons employed continuously for thirty days before the strike commenced, at the place or places of business at which the strike was taking place, not including in that number, however, any person who had become an employee for the purpose of creating any industrial dispute; (b) that a majority of the bona fide employees had by secret ballot voted to strike; (c) that a majority had actually quit work; (d) and that they had quit in order to obtain or resist a change in wages, hours or conditions of their em-

ployment after demands made therefor on the employer. He would also have to prove that a majority of those who had quit work at the place where defendant was acting as a picket had "designated in writing" him (the defendant) to so act; that the writing in his possession certifying that a bona fide strike was on and that he had been designated as a picket, was signed by one who had been "appointed in writing" by a majority of the striking bona fide employees at the place where he was on picket duty; and that at no time when he was a picket were there more than the prescribed number of designated pickets on duty.

Surely the most unimaginative mind, if at all informed, about conditions usually prevailing when an industrial dispute has reached the picketing stage, can readily see the inapplicability of any rule of convenience, respecting the defendant's effort to prove the various items enumerated. Since in any large organization many of the facts could be established only by its executive departments, it would usually be difficult, at times impossible, for the defendant to prove the fact that a bona fide strike was in progress. Onerous, too, would be his burden of proving the number who had actually quit work, especially as he must prove the motive which entitles them to be counted. Insuperable difficulties may usually be encountered in proving the authenticity of the signatures on the several authorizations which must be in writing. If section 4 is intended to set up an exception to section 3, and also, by the reference in 6, to section 5, all of the items we have just been discussing must be proved by the defendant; if he fails in establishing one of them, he has failed to establish his innocence.

If section 4 was intended to be understood as describing an exception, then we have no hesitancy in saying that the framers of the ordinance attempted to lay the foundations for prosecutions under which those charged as pickets in industrial conflicts would be deprived of their liberties without due process. "Due process," is not a yard stick of definite value; it has been said to be "merely an embodiment of the English sporting idea of fair play." Measured by the conception of due process gained from such cases as Roller v. Holly, 1900, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520, 524; Western & A. R. R. Co. v. Henderson, 1929, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884, and Morrison v. California, 1934, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664, none of them on all fours with our case, but each illuminating the field of our problem, a procedure that would place on a defendant the very weighty burden of proving his innocence which this ordinance would place if it was meant to have sections 4 and 6 operate as exceptions, must be regarded as a denial of due process.

If in answer to what we have said the argument be advanced that the voters of Los Angeles city had a right to prohibit picketing for the purposes mentioned in section 3, and to prohibit the display of banners for the same purposes, and therefore the privilege of escaping punishment for violating the ordinance by being permitted to prove that all the facts required by section 4, were present, is an act of grace extended by the sovereign, and not a burden, we have this reply: even if we should grant that the city had a right to prohibit picketing or to prohibit the display of banners, such is not the intent of the ordinance. Certainly the voters of Los Angeles were not given to understand that the initiative ordinance presented for their consideration was one prohibiting picketing; rather they were told that it was one regulating picketing. Its title declares its scope: "to regulate picketing and the display of banners; to define the conditions under which picketing and the display of banners may be carried on." It does have prohibitory provisions, however, for the title goes on to say: "to prohibit coercion, threats, intimidation," etc.

[9] With copies of the ordinance, arguments in its favor were submitted to the voters as was authorized by the city charter, section 275. These arguments we may consider to aid us in giving the ordinance its proper construction. Cypress Lawn Cemetery Assn v. San Francisco, 1931, 211 Cal. 387, 391, 295 P. 813; Beneficial Loan Society, Ltd. v. Haight, 1932, 215 Cal. 506, and cases cited at page 515, 11 P.2d 857. We find there: "Picketing and related practices need regulation. Unregulated picketing and allied activities are involving civil commotion. * * * Los Angeles is sick and tired of unregulated picketing * * * Proposition No. 1 (the ordinance before us) forbids: 1. Mass picketing and picketing by outsiders * * * 4. Picketing where a majority of the employees have not by secret ballot

decided to strike * * * 5. Picketing in connection with strikes that do not involve wages, hours or working conditions * * *"

It is reasonable to interpret the ordinance in harmony with the words just quoted; that its purpose was not to prohibit picketing, but to regulate it; not to prohibit the display of banners, except under the conditions set forth. In other words, the crimes which the ordinance would create with respect to picketing are these, among others: picketing in greater numbers than prescribed; picketing by those not employees; picketing when there is no bona fide strike; picketing when the strike does not involve wages, hours or working conditions; picketing by one not authorized in writing. With respect to the display of banners, the ordinance does not attempt to prohibit all display, as we interpret its provisions, but only to prohibit the display of a banner in excess of the size prescribed or when carried by a person not lawfully acting as a picket. But, it will be noted, to discover the creation of these crimes in the ordinance, section 4 must be added to section 3, and sections 4 and 6 added to section 5, not read as exceptions to them.

[10] We see no argument which weighs against our conclusion other than the form in which the ordinance was drafted. The form of the ordinance, however, is not conclusive; that which appears to be an exception, set up in a separate section, may prove to be actually a part of the definition of the offense sought to be created. To quote again from State v. Abbey, 1856, 29 Vt. 60, 67 Am.Dec. 754, as found in Ex parte Hornef, supra, 154 Cal. 355, 360, 97 P. 891, 892: "It is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question." A similar expression appears in Groskins v. State, 1931, 52 Okl.Cr. 197, 4 P.2d 117, 119, where it is said, after giving the general rule that the exception need not be negatived, but is a matter of defense: "There are exceptions to this rule, where the nature of the exemption constitutes a part of the definition or description of the offense, although it is not in the enacting clause," citing cases. In Baker v. State, 1937, 132 Tex.Cr.R. 527, 106 S.W.2d 308, at page 311, we find: "We feel impelled to say that if there be possibly an exception to the rule above mentioned, it must be when the exception or omission * * * is of the very gist of the offense, and then same would have to be negatived in the indictment, no matter where its location in the statute, and the Legislature in such latter case would be powerless to enact a statute making it unnecessary to negative such an exception, and this, as stated, whether such exception be in the article defining the offense or be in a separate article. In other words, if the thing forbidden by the particular statute under consideration could not be proved, or the case could not be made out without proof of the so-called exception or omission, then said exception would be a necessary element of the offense, and its existence should be negatived in the indictment and find support in proof."

The form of the ordinance does not make impossible, then, our conclusion. While the manner in which the ordinance is drafted constitutes the strongest argument against our conclusion, we find in further details of its drafting support for our interpretation. That is to say, while the introductory paragraph of section 4 might well be said to be cast in the form of an exception, much of the content of the section is plainly in the language used in creating crimes. This is unmistakably true of the last sentence of subsection (a) of section 4, which by no stretch of interpretation can be construed as anything but the creation of a specific offense. It is true, indeed, of all of that portion of section 4 following the opening paragraph, except the first sentence of subsection (a).

To avoid a construction which would offend our state and federal constitutions, but rather to adopt one in harmony with the arguments submitted to the voters, and which is reasonable, giving effect to the obvious purposes of the ordinance, we conclude that the complaints involved in these cases fail to charge any public offense, for they fail to charge that any of the defendants committed an act in violation of any of the provisions of either section 4 or 6. The result of our conclusion may be of only temporary advantage to the defendants; if they did picket or carry banners contrary to the provisions of the ordinance, they may yet have charges preferred against them and be brought to judgment. But if they, or defendants in other cases, are charged with a violation

of the ordinance, so long as our conclusion is observed, they will have to be charged with committing an act contrary to the regulations thrown around picketing.

The judgments are reversed with instructions to the trial court to dismiss the complaints.

SHAW, P. J., concurs.

SCHAUER, Judge (concurring).

I concur in the judgment holding that the complaints do not state facts sufficient to constitute any public offense.

Without intimating any opinion as to the validity or invalidity of any part of the ordinance when sections 3 and 5 are interpreted as complemented, respectively, by section 4 and by sections 4 and 6, I agree, generally, with the propositions of law stated in the foregoing opinion but think, however, that there is no fundamentally sound basis for distinguishing this case, on the question of pleading, from that of People v. Fowler, Cal.Super.1938, 84 P.2d 326, and that the latter should be avowedly overruled, not as to the general propositions of law therein enunciated, as such, but in their application to the facts of that case.



34 Cal.App.2d Supp. 755

PEOPLE v. HERON.

No. Cr.A. 1569.

Appellate Department, Superior Court, Los Angeles County, California.

April 28, 1939.

1. Constitutional law ⇐67

Statutes of doubtful meaning must be interpreted, in event of controversy regarding their meaning, by courts established by the organic law for that purpose.

2. Statutes ⇐201, 202, 203

When it is necessary to effectuate the legislative intent in enacting a statute, words or phrases may be changed, added, or stricken out.

3. Druggists ⇐3

The statute prohibiting any one other than a registered pharmacist or registered assistant pharmacist from selling a drug, but exempting "registered, trade-marked or copyrighted proprietary medicines, registered in the United States Patent Office," exempts from the restriction those proprietary medicines which are sold in containers bearing the trade-mark of the manufacturer of the medicine, if the trade-mark is registered in the United States Patent Office. St.1937, p. 1300, §§ 4030, 4032; 15 U.S.C.A. § 81.

4. Druggists ⇐12

Where the eucalyptus oil which defendant, who was not a registered pharmacist or assistant pharmacist, was found guilty of selling bore defendant's registered trademark, and the oil was of defendant's own manufacture and was labeled and sold as defendant's pure eucalyptus oil, the oil was a "proprietary medicine" within statute permitting general sale of proprietary medicines registered in the United States Patent Office. St.1937, p. 1300, §§ 4030, 4032; 15 U.S.C.A. § 81.

[Ed. Note.—For other definitions of "Proprietary Medicine," see Words & Phrases.]

5. Criminal law ⇐304(2)

The court took judicial knowledge that in the period between 1890 and 1910 a preparation was commonly known as a "patent or proprietary medicine," dependent not on the fact that it was protected by a patent, nor on the fact that its maker actually had a secret formula or process, but on the dress in which it was offered to the public.

[Ed. Note.—For other definitions of "Patent Medicines," see Words & Phrases.]

6. Druggists ⇐5

The term "proprietary medicines," as used throughout the legislation respecting the practice of pharmacy, has been used not in a technical, but in the commonly accepted sense as preparations prepared and sold throughout the country in original packages under a trade-name or under the proprietor's name. St.1937, p. 1300, §§ 4030, 4032.

Appeal from Municipal Court of Los Angeles; C. Newell Carns, Judge.

N. C. Heron was convicted on the charge that he, not being a registered pharmacist or assistant pharmacist, had sold a drug, and he appeals.

Reversed, with directions.

Edward J. Cotter, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. Mcfarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Judge.

Appellant was convicted and sentenced on the charge that he, not being a registered pharmacist or assistant pharmacist, had sold a drug, to wit, eucalyptus oil, the appellant sold a bottle of eucalyptus oil, which was a drug, and he was neither a registered pharmacist nor a registered assistant pharmacist. The provisions of section 4030 of our Business and Professions Code, St.1937, p. 1300, were thus plainly violated unless the article sold falls within the saving words of section 4032 of the same code. These two sections, both found in Chapter 9 of the code, read: Section 4030. "Except as otherwise provided in this chapter, it is unlawful for any person to manufacture, compound, sell or dispense any drug, poison, medicine or chemical, or to dispense or compound any prescription of a medical practitioner, unless he is a registered pharmacist or a registered assistant pharmacist under the provisions of this chapter."

Section 4032. "This chapter does not apply to registered, trade-marked or copyrighted proprietary medicines, registered in the United States Patent Office, but it does apply to the sale by or through any mechanical device of drugs, medicines and proprietary medicines registered or trademarked in the United States Patent Office."

We are of the opinion that the evidence permits of no conclusion other than that the eucalyptus oil that appellant sold was a proprietary medicine, the trade-mark of which was registered in the United States Patent Office, and that as a consequence the judgment must be reversed.

[1, 2] In employing in section 4032 the words "registered, trade-marked or copyrighted proprietary medicines, registered in the United States Patent Office," to denote medicines that could be sold by persons not registered either as pharmacists or assistant pharmacists, the legislature made a choice of words which was not a happy one; they cannot be given a literal interpretation without robbing them of effect, for medicines, proprietary or not, may not be registered in the United States Patent Office, nor may they be trademarked or copyrighted. It is in such cases as these that the courts are compelled to engage in a type of construction of language which is sometimes termed judicial legislation. "The courts, with due regard to the prerogatives of a co-ordinate branch of government, approach this duty with caution, and with a proper appreciation of the distribution of the powers of government. But statutes of doubtful meaning must be interpreted * * * in event of controversy as to their true meaning, by the courts established by the organic law for that purpose." In re Sekuguchi, 1932, 123 Cal.App. 537, 540, 11 P.2d 655, 656. Earlier in the same case it was stated (123 Cal.App. page 538, 11 P.2d page 656), "When it is necessary to effectuate the legislative intent, it is equally clear that words or phrases may be changed, added, or stricken out. 23 Cal.Jur. 737." Of an early addition to the Penal Code which, taken literally, was meaningless ("robbing a train") our supreme court said in People v. Lovren, 1897, 119 Cal. 88, 90, 51 P. 22, 23, 638: "It certainly was the creation of an amateurish legislative hand; yet at the same time courts are compelled to sustain it if possible."

[3, 4] We have no doubt that the legislature intended to exempt from the operation of Chapter 9 of the Business and Professions Code, in addition to others not involved in this case, those proprietary medicines that are sold in containers bearing the trade-mark of the manufacturer of the medicine, if the trade-mark is, as it may be (sec. 81, Title 15, United States Code Annotated) registered in the United States Patent Office. The medicine which appellant sold was clearly within the exception, if it was proprietary, for its container bore appellant's trade-mark, which he had registered in the United States Patent Office. This leaves only one question: was it a proprietary medicine? It appears without contradiction that it was of his own manufacture and was labeled and sold as Heron's Pure Eucalyptus Oil and that he had been manufacturing and selling, wholesale and retail, since 1895, the remedies known as Heron's Pure Eucalyptus Oils. Appellant claimed that he alone of all mortals knew how to make pure eucalyptus oil. The process, which he claimed was his secret, he declined to divulge, and it may well be that the trial court was warranted in disregarding, as insufficiently based, appellant's claim that

he alone knew how to make the product which he sold. But even if this be so, and there be others on this planet who know how to manufacture a product just like appellant's, we are nevertheless of the opinion that Heron's Pure Eucalyptus Oil, which he was found guilty of selling, is a proprietary medicine.

The first act regulating the practice of pharmacy for this state was adopted in 1891 (Stats.1891, p. 86). In section 11 we find this provision: "Nor shall general dealers come under the provisions of this Act, in so far as it relates to the keeping for sale of proprietary medicines in original packages of drugs and medicines." In 1901 a new act was passed (Stats. 1901, p. 299) in general scope quite similar to the 1891 act, which it supplanted, but expressing the exception with which we are concerned in this language (Sec. 11): "Nor shall this act apply to registered or copyrighted proprietary medicines registered in the United States patent office, nor to the manufacture of proprietary remedies or the sale of the same in original packages by persons other than pharmacists."

Again in 1905 (Stats.1905, p. 535) a new act took the place of the old, but the language just quoted reappeared almost without change. Section 12. At the next session of the legislature (Stats.1907, p. 768) for the first time the group of words appear as we now have them, "registered, trademarked or copyrighted proprietary medicines registered in the United States Patent Office," the adjective "trademarked" being added. In the 1905 act we find this further provision, in section 11: "Every proprietor or manager of a pharmacy or drug-store shall be held responsible for the quality of all drugs, chemicals and medicines sold or dispensed by him, except those sold in the original package of the manufacturer, and except those articles or preparations known as patent or proprietary medicines. * * *"

We have traced the legislative development of the provision excepting proprietary medicines from the operation of Chapter 9 of the Business and Professions Code to show that the term "proprietary medicines" is not new to that chapter, but rather that it dates back to 1891. By the adding of adjectives and the omission of a phrase, the legislature has varied from time to time the scope of the provision exempting proprietary medicines from the operation of the statutes regulating the practice of pharmacy, but apparently the words "proprietary medicines" have been used in the same meaning throughout the several acts, and as now used should be given the same meaning as that which they had in the early statutes. People v. Moss, Cal.Super. 1939, 87 P.2d 932, and see People v. Fowler, Cal.Super.1938, 84 P.2d 326.

[5] An instructive framing of the real question remaining before us is found in State v. Donaldson, 1889, 41 Minn. 74, 42 N.W. 781, 784, in these words: "Whether the term 'patent and proprietary medicines' is to be understood in a strict and technical sense, as limited to those in the preparation of which there is an exclusive right of property in some proprietor * * * or whether it is used in a popular and more extended sense, as including all preparations prepared and sold throughout the country in original packages, as patent medicines are." Strictly speaking, one may say that a patent medicine is only one which is protected by a patent. Also, it is possible to say a proprietary medicine is only one which is protected by a patent, for in no other way does a "proprietor" secure an exclusive right of property in its manufacture. But, and of this we take judicial notice, People v. Silva, 1924, 67 Cal.App. 351, 357, 227 P. 976; People v. Garcia, 1934, 1 Cal.App.Supp.2d 761, 765, 32 P.2d 445, in the period between 1890 and 1910, even more than today, a preparation was commonly known as a patent or proprietary medicine, dependent not on the fact that it was protected by a patent, nor on the fact that, thanks to a secret imparted by an Indian chief or obtained by years of laboratory research, its maker actually had a secret formula or process,—though in such cases the medicine would doubtless be proprietary—but on the dress in which it was offered to the public. Protected by no patent, and even though others might actually be manufacturing the same article, a medicine was commonly referred to as a patent or proprietary medicine if its proprietor gave it a trade name, or his name, offered it to the public as his product, put it up in a distinctive container, and expressly or impliedly claimed special virtue for it because of the special formula, skill or care which went into its manufacture.

As one out of several, similar, possible illustrations of the meaning with which the words "patent medicines" were commonly

used in the early years of this century, we refer to an article in the July, 1906, issue of "The Review of Reviews." In this article, entitled "The So-Called 'Patent-Medicine' Evil," the adjectives "patent" and "proprietary" are used interchangeably, and it is evident throughout that the medicines under discussion are not limited to those actually patented or actually made by a secret process or from a secret formula.

The early case of State v. Donaldson, supra, 41 Minn. 74, 42 N.W. 781, 783, affords further proof of the common use of the terms we are considering in this quotation: "Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics."

In Riggs v. City of Hot Springs, 1930, 181 Ark. 377, 26 S.W.2d 70, 72, we find a further recognition that the terms we have been considering were in common use. The issue in the case was whether or not appellant was subject to an occupation tax imposed on the manufacturer of patent medicines. Appellant claimed that he was not subject to the tax because, while he assembled herbs and made medicine by a secret process, he was not protected by a patent. After determining that the term "patent medicine" was no longer limited to medicines which were protected by a patent, but that "patent medicines" and "proprietary medicines" were now interchangeable terms, the Arkansas supreme court went on to say, having in mind appellant's claim to a secret process: "where any article intended to be used for medicinal purposes is prepared from a secret formula and is placed in containers, either packages or bottles, for sale, to be used without further preparation, and is labeled so that it may be for immediate use, it is a matter of common knowledge that such remedies are called 'patent' or 'proprietary' medicines."

[6] We are, furthermore, of the opinion that the term "proprietary medicines," as used throughout the legislation respecting the practice of pharmacy, has been used not in a technical but in the commonly accepted sense already stated by us. It seems apparent from the words found in section 11 of the pharmacy act of 1905, "those articles or preparations known as patent or proprietary medicines," that the legislature thought that the terms were commonly known and intended to employ them in the sense in which they were generally used. Our statutes governing the practice of pharmacy parallel in substance so closely those found in other states that the meaning in which the words "proprietary medicines" are used by the appellate courts of sister states is particularly helpful. In this connection this further quotation from State v. Donaldson, supra, 41 Minn. 74, 42 N.W. 781, 783, is of interest: "But, because it was deemed either impractical or unnecessary to regulate the sale of patent or proprietary medicines, of the acts of nearly 30 states or territories regulating the practice of pharmacy (all so nearly alike as to suggest a common source) which we have examined, every one, unless ours be an exception, expressly excepts the sale of patent or proprietary medicines from its operation." As the supreme courts of the several states construe their respective pharmacy acts, cut by the common pattern, they regard the words "proprietary medicines" as having a general, not a technical meaning; these decisions do not make sense on any other basis.

In Noel v. People, 1900, 187 Ill. 587, 58 N.E. 616, 52 L.R.A. 287, 79 Am.St. Rep. 238, a person in the employ of the defendant had sold a package of "Concentrated Compound Extract of Vitæ-Ore Elixir." From the statement of facts, we gather that the defendant took a "kind of iron ore," which "becomes disintegrated or slaked" when exposed to the air for a long period, and which if put in water "makes an agreeable, subacid drink, which possesses, or is claimed to possess, valuable medicinal qualities." It was one of the "remedies" thus prepared which the defendant's employee, not a registered pharmacist, had sold. Without a discussion of the matter this was assumed to be a patent or proprietary medicine, and that assumption was necessary to one of the grounds on which the reversal of the judgment imposing a penalty on the defendant was based. That ground was that a statute which excepted from its terms the sale of patent and proprietary medicines only in villages and some other places not involved in the case, but otherwise prohibited their sale at retail by those not registered pharmacists, was unconstitutional, because the only justification for the control of the sale of medicines was the

public welfare, and the public welfare was in no wise furthered by giving registered pharmacists a monopoly of the sale of patent and proprietary medicines. In support of the proposition that the public welfare would not thereby be furthered, the Illinois supreme court pointed out that the act placed no duty on the pharmacist with respect to the sale of patent or proprietary medicines, and made this, among other, quotations from State v. Donaldson, supra, 41 Minn. 74, 42 N.W. 781, 783, with reference to patent and proprietary medicines: "There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another." So the Minnesota supreme court held that a provision of its pharmacy act which it characterized as "grammatically a jumble" should be construed as excepting from its operation patent and proprietary medicines, and the Illinois supreme court held its pharmacy act to be unconstitutional because it failed to except them.

A Vitae-ore product is again involved in Kentucky Board of Pharmacy v. Cassidy, 1903, 115 Ky. 690, 74 S.W. 730, 732, and again we have a case where the problem is whether the statute meant to except from its provisions "proprietary or patent medicines in original packages." The same answer was made in this case as in the Minnesota case just referred to, and on the same premise governing that case and the Illinois case, that is, the manner in which proprietary and patent medicines are sold gives no excuse for including them in a provision that only registered pharmacists may sell them.

It would add quite unnecessarily to the number of printed pages in the field of law to quote extensively here from these three cases. A reading of them makes clear that in the solution of their respective problems they had a common understanding of what was meant by patent or proprietary medicine, and that the idea of limiting the terms to such medicines as were actually protected by patents or were in the strictest sense proprietary in that the manufacturers alone knew how to make them, was far from their thoughts. The method of sale makes an attempt to safeguard the public's interest futile or unnecessary.

Two more recent cases have held their pharmacy laws unconstitutional because they failed to except the sale of proprietary medicines. Watkins Lax-Tone was the subject of the sale that gave rise to State v. Wood, 1927, 51 S.D. 485, 215 N.W. 487, 54 A.L.R. 719, while it was Emerson's Bromo-Seltzer, among other articles, that had been sold in State v. Childs, 1927, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736. In these cases, as in those previously cited, the reason for the conclusion reached was based on a concept of proprietary medicine wherein the method of sale and not the method whereby the manufacturer was protected in his "proprietary" interest, was the significant thing. See, also, State v. Geest, 1929, 118 Neb. 562, 225 N.W. 709, and State v. Stephens, 1936, 102 Mont. 414, 59 P.2d 54, and its review of the cases.

That the constitutional question decided by these cases would probably be given a different answer by our supreme court, in view of Ex parte Gray, 1929, 206 Cal. 497, 274 P. 974, does not weaken their value on the question we are considering, which is whether "proprietary medicine" is to be understood in a technical or a general sense.

Two further cases shed a little light on our problem. In West v. Emanuel, 1901, 198 Pa. 180, 47 A. 965, 53 L.R.A. 329, Kohler-Headache Powders were stated to be "a patent or proprietary medicine, manufactured by Kohler," largely, we infer from the opinion, on the strength of the court's judicial knowledge that they had been in demand at least 12 or 15 years and on sale in most if not all of the principal drug stores. Be that as it may, the existence of a patent or a secret formula was not mentioned.

In Tiedje v. Haney, 1931, 184 Minn. 569, 239 N.W. 611, 613, we have this qualified approval of the conclusion which we have reached: "The word proprietary, as applied to medicines, necessarily implies that the medicine has been compounded by a manufacturer who prepared the medicine according to his own formula, State v. Kendig, 133 Iowa 164, 110 N.W. 463, 465; though probably it is not necessary that the formula should be the exclusive property of the maker, or that the process be secret. It may have a character of its own according to the reputation of the manufacturer and the nicety with which it is prepared."

The question which we have been considering has not been answered alike by all courts which have considered it. This court, in the case of People v. McClain,

1934, 2 Cal.App.Supp.2d 751, 33 P.2d 710, gave an answer which we now think to be too restricted, and in doing so cited and relied upon the several decisions which place, we believe, too much weight on what the adjectives "proprietary" and "patent" denote, without recognizing the broader meaning that had come to be given to the combination of those adjectives with the word "medicines" than they have alone or in combination with such nouns as "shoes."

For the reasons given, the judgment should be, and it is, reversed, with directions to the trial court to dismiss the complaint and exonerate the bail of the appellant.

SCHAUER, J., concurs.

SHAW, Presiding Judge.

I concur. Upon further consideration of the question in the light of the decisions from other jurisdictions and other matters affecting it, I have concluded that the definition given the term "proprietary medicine" in People v. McClain, 1934, 2 Cal.App.Supp.2d 751, 756, 33 P.2d 710, is too limited, and I agree to that stated in the main opinion herein, which is substantially the "more extended sense" referred to in State v. Donaldson, therein quoted. It seems that Ferguson v. Arthur, 1886, 117 U.S. 482, 6 S.Ct. 861, 29 L.Ed. 979, cited and relied on in the McClain case, does not go quite so far as there supposed, for in the opinion in Ferguson v. Arthur appear the following statements: "It is quite plain, we think, that Thomas and William Henry recommended their calcined magnesia to the public as a medicine in which they had a proprietary right as owning all that there was of good-will and business reputation appurtenant to the article, resulting from its name and from what they stated about its manufacture." (117 U.S. page 487, 6 S. Ct. page 863, 29 L.Ed. 979); "Thus a medicinal preparation might be proprietary, without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent." (117 U.S. page 488, 6 S.Ct. page 864, 29 L.Ed. 979.)

In reaching my present conclusion, I am also moved somewhat by the lack of apparent reason for making a distinction between those medicines covered by the definition stated in the McClain case and those outside of it but within the definition here adopted. As forcefully urged here in argument of another case, the result of the definition in the McClain case is that a medicine which is patented or is made by some secret formula or exclusive process may be sold by any one, but after the patent has expired or the formula has been discovered or the process made public, so that other persons than the original manufacturer may and do make the medicine, it is no longer proprietary and may be sold only by registered pharmacists or assistants. Thus a new medicine, of whose composition and effect little or nothing is publicly known, may be sold without restriction, but the sale of the same medicine, made by the same manufacturer, after it does become publicly known is restricted. No good reason appears for such a distinction, and In re Gray, 1929, 206 Cal. 497, 274 P. 974, while upholding the limitation made by the act on the sale of original package medicines not proprietary, does not deal with this distinction or suggest any good reason for it, nor does it put any construction on the term "proprietary medicine."

It also appears that the definition stated in the McClain case is difficult of application, by reason of its requirement that a proprietary medicine must have "exceptional virtues * * * as distinguished from other preparations of the same sort." [2 Cal.App.Supp.2d 751, 33 P.2d 713.] Other cases involving the same statute have come up to us on appeal since the McClain case, and in each of them the trial court has been obliged to make inquiry into this matter of exceptional virtues, and thereon to hear testimony reading much like the ballyhoo of the salesmen of proprietary medicines in their palmiest days. When even the courts, with unlimited time at their disposal, have difficulty in ascertaining the fact in such a matter, the ordinary merchant desiring to know whether he may sell an article is presented with a practically insoluble question, whose correct answer he must guess on penalty of criminal liability if he errs. The rule now adopted makes it possible to determine on examination of the article whether it may be sold, and should present no greater problems in compliance with it than may reasonably be thrust upon a citizen desiring to be lawabiding.

13 Cal.2d 529

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 16995.

Supreme Court of California.

May 8, 1939.

1. Workmen's compensation ⇐518

As used in Workmen's Compensation Act, "artificial member" of body, for injury to which compensation may be allowed, must be a substitute for, and not a mere aid to, a natural part, organ, limb, or other separable part of the body. St.1937, p. 266, § 3208.

2. Workmen's compensation ⇐518

Damage to compensation claimant's eyeglasses was not compensable under Workmen's Compensation Act as being an injury to an "artificial member" of the body. St. 1937, p. 266, § 3208.

3. Workmen's compensation ⇐518

Under Workmen's Compensation Act providing for compensation for injury to "artificial members" of the body, an award may be made for damage to or destruction of such artificial members, even though the employee may as efficiently discharge his duties without them. St.1937, p. 266, § 3208.

4. Workmen's compensation ⇐518, 968

Provision of Workmen's Compensation Act requiring employer to furnish apparatus, including artificial members, reasonably required to cure and relieve from effects of injury, applies to the alleviating and curing of physical injuries suffered by employee, but does not authorize granting of compensation for damage to employee's eyeglasses, as an injury to an "artificial member" of the employee's body. St.1937, pp. 266, 281, §§ 3208, 4600.

In Bank.

Petition for writ of review by the California Casualty Indemnity Exchange against the Industrial Accident Commission of the State of California and another, for annulment of an award made against petitioner.

Award annulled.

Prior opinion, 82 P.2d 1115.

Richard L. Oliver, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

A hearing was granted in this cause after decision by the District Court of Appeal of the Second Appellate District, Division Two, in order that this court might more thoroughly examine into the questions presented for determination. Further consideration thereof has satisfied us as to the correctness of the opinion prepared by Mr. Justice Wood when the matter was before the District Court of Appeal. Therefore, with such additional comment as shall be appended thereto, we hereby adopt said opinion as and for the opinion of this court. It reads:

[1, 2] "Respondent Crawford filed an application with the Industrial Accident Commission wherein he sought to recover from petitioner, the insurance carrier for his employer, the reasonable value of his eye-glasses which were damaged in an industrial accident. The commission filed its findings in favor of Crawford, awarding him the cost of replacing the lenses of his eye-glasses. The insurance carrier seeks annulment of this award.

"The sole question presented to us for consideration is whether or not eye-glasses are artificial members within the meaning of the Workmen's Compensation Act. Section 3208 of the Labor Code, St.1937, p. 266 (formerly sec. 3(4) of the Workmen's Compensation Act, St.1919, p. 911), provides: 'Injury includes any injury or disease arising out of the employment, *including injuries to artificial members.*' (Italics ours.)

"It becomes necessary for us to determine what the legislature meant when it used the term 'artificial members' in that section. 'Member' is defined in Webster's New International Dictionary as being: 'A part or organ of the animal body; especially a limb or other separable part.' The word 'artificial' is defined by Webster's New International Dictionary as being in opposition to the word 'natural'. An artificial member must be held to be a substitute for a natural part, organ, limb or other separable part of the body. We believe this conclusion to be fully in accord with the decision * * * in the only case in this jurisdiction which has been brought to our attention, involving an interpretation of this section of the Workmen's Compensation Act. In Pacific Indemnity Co. v.

Industrial Accident Commission, 215 Cal. 461, at page 465 [11 P.2d 1, at page 3, 82 A.L.R. 1170], the court, in holding that an award may be made for an artificial leg, states: 'Fear is expressed by petitioner that the award is the forerunner of others for injuries to clothes, tools, automobiles, or other personal property. We anticipate no such result. The Constitution, in our opinion, authorizes compensation for injury to the body of the workman, including every part thereof, natural or artificial, which is essential to its proper functioning. Other things, such as clothes and tools, may be necessary if he is to perform his duties, but their destruction does not cause him a physical injury or disability. His body may function without them.'

"The ultimate test to be applied to any given case in order to determine whether it comes within the provisions of the above section is: Was the thing injured a substitute for, or a mere aid to some natural part of the body? Eye-glasses are in no sense a substitute or replacement for a natural part of the body; they are merely aids to the eyesight. The eyes, which are the organs of sight, however defective they may be, are still a natural part of the human body."

Prior to the award in the present case, the respondent commission applied the foregoing reasoning to a similar situation in the case of Schneider v. Cal. Coop. Canneries, 18 I.A.C. 78, wherein it denied an award to an applicant for the repair of eye-glass frames broken in an industrial accident on the ground that eye-glasses "constitute an aid to, and not a substitute for, a portion of the body". This test was again set down in Elliott v. Commercial Cas. Co., 19 I.A.C. 51, 52, wherein the respondent commission made an award covering replacement of bridgework on the ground that "a bridge is a substitute for, and not an aid to, a part of the body. * * *" Of course a glass eye, false teeth, and other substitutes for natural members would be compensable under this test.

In 1 Campbell on Workmen's Compensation 75, section 99, it is stated that "The breakage of eye-glasses, injury to a wig or toupee, ear-horns, * * * orthopedic shoes and apparatus whose correction or replacement is less than such a portion of a limb as to be regarded as 'an artificial member' would thus come under the classification of 'property damage' and is not a compensable injury. The test is whether the thing injured was a substitute for or a mere aid to a portion of the body."

In 1 Schneider on Workmen's Compensation 539, section 147, it is stated that "neither is the breaking of an eye-glass, as a result of a fall, a personal injury".

Though eye-glasses may in many instances be "essential to the proper functioning of the body", as urged by respondent, it may equally be argued that the chill blasts of winter and the heat rays of summer make clothing "essential to the proper functioning of the body" and yet, it would hardly be contended that an injury to clothes, or other articles of personal property, should be compensable under our present law. Many persons, equipped with all of their natural members, use various types of personal property to enable such natural members to function more efficiently. Among such aids may be mentioned corsets, trusses, elastic supports, ear horns, elastic stockings, back braces, knee braces, goggles, and others. These articles cannot be said to be "artificial members" or substitutes therefor.

[3] The fact that the breakage of eye-glasses may, as in this case, cause disability in the sense that the applicant is thereby precluded from properly discharging his duties as an employee, is not necessarily determinative. Disability of such a character is not the test. Under our present statute which provides for compensation for injury to "artificial members" an award may be made for damage to or destruction of such artificial members even though the person may as efficiently discharge his duties without them. To illustrate, a person whose artificial eye or bridgework has been damaged in an industrial accident would be entitled to an award therefor regardless of his ability to continue his work without them.

[4] The provisions of section 4600, St. 1937, p. 281, do not suggest a different result in this case. Under that section an employer is required to furnish "nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members * * * reasonably required to cure and relieve from the effects of the injury * * *". This section obviously applies to the alleviating and curing of physical injuries suffered by the employee. Eye-glasses furnished thereunder are supplied as an "apparatus" reasonably required to relieve from the effects of an injury to the eye. They are not furnished as "artifi-

cial members" for, as stated, they do not fall within such category. Section 3208 defines an "injury" while section 4600 defines the duty of the employer after an "injury" has occurred within the meaning of the former section. As shown above, damage to eye-glasses is not an "injury" within the meaning of section 3208.

This discussion may well be concluded by again quoting from our decision in the "wooden leg" case, supra, 215 Cal. 465, 11 P.2d 3, 82 A.L.R. 1170, to the effect that "The Legislature has only gone so far as to provide for compensation for injury to *artificial members*. Whether it may in the future seek to go beyond this point is not a proper question for our consideration at this time."

For the foregoing reasons, we conclude that ordinarily, damage to eye-glasses is not compensable under the Workmen's Compensation Act as being an injury to an "artificial member" of the body.

The award must be and it is annulled.



32 Cal.App.2d 151

PEOPLE v. YUEN et al.

Cr. 1648.

Supreme Court of California.

May 12, 1939.

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

On rehearing.

Prior opinion, 89 P.2d 438.

George R. Andersen, Herbert Resner, and George G. Olshausen, all of San Francisco, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

PER CURIAM.

In denying the petition of the appellants for a hearing herein after decision by the District Court of Appeal we withhold approval of the conclusions of law contained in the following portion of the opinion appearing in 89 P.2d 438, at page 443, first column:

"They attempted to justify their resistance upon the ground that they were entitled to resist an unlawful attack upon them by the sheriff. That, however, is not the law. It is the duty of a citizen to obey the commands of a peace officer given in his line of duty. If the officer is exceeding his authority, the recourse of the citizen is to the courts and not to open resistance."

The petition for a hearing is denied.

HOUSER, J., voted for a hearing.



13 Cal.2d 521

PEOPLE v. KING et al.

Cr. 4219.

Supreme Court of California.

May 8, 1939.

1. Homicide ⇐308(5)

In murder prosecution, refusing to instruct upon murder of the second degree was not error, where evidence conclusively disclosed that the homicide was committed in the commission or the attempt to commit the crime of robbery, which is "murder of the first degree." Pen.Code, § 189.

[Ed. Note.—For other definitions of "Murder in First Degree," see Words & Phrases.]

2. Homicide ⇐18(5)

That victim was shot shortly before actual taking of money from his person did not preclude conviction for murder in first degree on ground that defendants were not engaged in robbery or attempted robbery when shooting occurred, where evidence clearly disclosed that shooting was simultaneous with forcible entry and assumption of possession of victim's automobile which constituted preliminary step in consummation of robbery. Pen.Code, § 189.

3. Homicide ⇐311

In murder prosecution, instruction, in effect, that if jury returned a verdict of murder of first degree and found some ex-

tenuating circumstance it could in its discretion relieve defendants, or either of them, from extreme penalty, but that such discretion was not arbitrary and should not be exercised in absence of some extenuating circumstance, was not error, especially where there were no circumstances which would have justified jury in affixing less than extreme penalty. Pen.Code, §§ 189, 190.

4. Homicide ⇐125

Contention that codefendant did not intend to fire the gun and that the gun, by reason of the wearing of its parts, was capable of being automatically discharged several times by a single pressure on trigger, did not present a defense to murder of the first degree, especially where evidence did not show such condition existed in the death gun.

5. Criminal law ⇐729, 730(12), 1086(14)

Remarks of district attorney, in argument to jury in murder prosecution, claimed to have characterized defendants in uncomplimentary terms, were not grounds for complaint by defendants, where result of case was not influenced thereby and record failed to show objection to remarks or request that jury be admonished to disregard them except as to a remark which district attorney requested and trial court instructed jury to disregard.

6. Witnesses ⇐277(4)

In murder prosecution where defendant had testified that a short time previous to robbery and fatal shooting in question he had engaged in several holdups, permitting district attorney, upon cross-examination, to bring out location and character of previous holdups and that defendants on such occasions had employed the gun involved, was proper. Pen.Code, § 189.

7. Criminal law ⇐372(4)

In prosecution for murder committed in the perpetration of a robbery, the state could show that the robbery and fatal shooting of victim were part of a general plan or scheme to commit robberies. Pen.Code, § 189.

8. Criminal law ⇐1038(1)

In prosecution for murder committed in perpetration of a robbery where defendants were jointly charged, instructing that verdict did not necessarily have to be the same for each defendant and that consideration of jury should be as to each separate defendant was not ground for complaint by codefendant where no objection was made. Pen. Code, § 189.

9. Witnesses ⇐319

Ordinarily, when a defendant takes the witness stand, he may be impeached, like any other witness. Code Civ.Proc. § 2051.

10. Witnesses ⇐337(5)

That defendant in murder prosecution had admitted previous conviction of a felony did not preclude prosecution from challenging defendant's credibility under established rules of evidence by inquiring whether defendant had previously been convicted of felony. Pen.Code, § 189; Code Civ.Proc. § 2051.

In Bank.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Wilbert F. King, alias Bert Williams, and Neil Anderson, were convicted of murder of the first degree under an indictment charging Neil Anderson with a prior conviction of felony in the State of Nevada, and they appeal.

Affirmed.

Robert M. Wash, of Fresno, for appellant Wilbert F. King.

Gerald H. Catania, of Fresno, for appellant Neil Anderson.

U. S. Webb and Earl Warren, Attys. Gen., Eugene M. Elson, Deputy Atty. Gen., and Dan F. Conway, Dist. Atty., and S. L. Heisinger, Jr., Deputy Dist. Atty., both of Fresno, for the People.

PER CURIAM.

In an amended indictment returned by the grand jury of Fresno county, the defendants were jointly charged with the crimes of murder and robbery, each offense being separately stated. The defendant Anderson was also charged with having suffered a prior conviction of felony in the state of Nevada in 1936, for which he served a term of imprisonment. Each defendant entered a plea of not guilty to both counts. Defendant Anderson admitted the prior conviction. Subsequently, the defendants withdrew their pleas to the robbery count and entered pleas of guilty thereto, the degree of which was fixed by the trial court as of the first. At the conclusion of the trial, verdicts were returned by the jury finding each defendant guilty of murder of the first degree with-

out recommendation. Judgments were accordingly entered imposing the death penalty upon the defendants. The cause comes before us on appeals from the judgments and the orders denying a new trial.

The facts surrounding the commission of the robbery and murder are simple of statement and free of dispute. It appears that the defendants had been friends for a period of several years and for a few months prior to the perpetration of the crimes here involved they had roomed together in the city of Fresno, where, by their own admission, they had jointly participated in a series of thefts and robberies culminating in the robbery and murder of one G. E. Ward at approximately 10:30 p. m. on July 17, 1938. Defendants freely admitted in confessions made by them prior to trial and when on the witness stand in their own defense, that as the victim Ward brought his automobile to a stop in response to an automatic traffic signal at an intersection of two streets in the city of Fresno, they stepped from the curb where they had been standing and forcibly entered the victim's car. Defendant Anderson, flourishing a loaded gun in the victim's face, opened and entered the right door of the car while the defendant King went around the rear of the car and opened and entered the left door. Ward was pushed over between them on the seat and the defendant King immediately took over the operation of the car. Almost simultaneous with Anderson's entry of the car the gun held by him belched forth several shots, five of which entered Ward's body and according to medical testimony, caused his demise shortly thereafter. Upon entering the car and shooting its operator, the defendants, with King at the wheel, drove the car some distance, robbed the victim of seventy dollars, which they admittedly divided, removed the victim from the car, and then proceeded on to another point where they abandoned the vehicle. Anderson was later apprehended in Las Vegas, Nevada, and King was subsequently taken into custody in Provo, Utah.

The presence of several persons at or near the intersection where the defendants entered Ward's car and shot him did not deter them in the carrying out of their admittedly prearranged plan to forcibly enter an automobile. These persons testified as prosecution witnesses. The testimony shows and the defendant King admits that he had purchased the gun about one month prior to the homicide. It had been used by them in their earlier thefts and robberies, each having apparently indiscriminately carried it. On cross-examination, the defendant Anderson testified that as he entered Ward's car he "told him this was a hold up". To more fully state the facts would add nothing to this opinion for it must now definitely appear that the confessed and admitted homicide was perpetrated in the commission of a robbery, and, under the provisions of section 189 of the Penal Code, can be designated only as murder of the first degree. We therefore direct our attention to the contentions of the defendants that certain alleged errors occurring during the conduct of the trial served either to deny them a fair trial or to prejudice them before the jury. The defendants have filed separate briefs but such of the contentions as are common to both shall, of course, receive joint attention.

[1,2] Both defendants urge that the trial court erred in refusing to give an instruction upon murder of the second degree. They concede that the refusal of the court below "was based upon the premise that the evidence conclusively disclosed that the homicide was committed in the commission or the attempt to commit the crime of robbery, and was therefore murder in the first degree or nothing". As already indicated, we are in accord with this asserted "premise" of the trial court and we cannot accept the defendants' theory that they were not engaged in a robbery or attempted robbery for the reason that the shooting preceded by a short interval of time the actual taking of the money from the person of the victim. The facts above stated clearly disclose that the shooting was simultaneous with the forcible entry and assumption of possession of the victim's car which, in turn, constituted but one of the preliminary steps in the consummation of the "hold up" or robbery which one of the defendants announced to the victim as they entered his car. In other words, the forcible entry of the car and the shooting were the initial overt acts in the actual perpetration of an admittedly preconceived "hold up" of any person who might be unfortunate enough to happen along. However, even if the defendants had terminated their plan after entering the car and shooting its operator and thereafter had made no effort to take his money, the homicide would still constitute murder

of the first degree because committed in an attempt to perpetrate a robbery. Sec. 189, supra; People v. Anderson, 1 Cal.2d 687, 689, 37 P.2d 67. There was no occasion in this case for the giving of an instruction on murder of the second degree and the contention of defendants is wholly lacking in merit.

[3] Both defendants complain of an instruction which, in effect, told the jury that in the event it returned a verdict of murder of the first degree and found "some extenuating fact or circumstance in the case" it could in its discretion relieve the defendants, or either of them, from the extreme penalty of the law but that such discretion was "not an arbitrary one" and should not be exercised in the absence of "some extenuating fact or circumstance". It is now urged, as it has been on many other occasions, that section 190 of the Penal Code does not limit the right of the jury to fix the punishment at life imprisonment to those cases wherein extenuating circumstances appear but that, on the contrary, the jury is free to prescribe such punishment, in its discretion, in any and all cases. Though perhaps not in literal compliance with the provisions of section 190, supra, the instruction is practically identical with one given in People v. Rogers, 163 Cal. 476, 483, 126 P. 143, 146, in which case it was held that "The law of this state thus appears to be thoroughly settled to the effect that the instruction in question is not erroneous". On many occasions the giving of a similar instruction has been held not to constitute error. People v. Bawden, 90 Cal. 195, 27 P. 204; People v. Casade, 194 Cal. 679, 682, 230 P. 9; People v. Harris, 219 Cal. 727, 733, 28 P.2d 906; People v. Goodwin, 9 Cal.2d 711, 715, 72 P.2d 551. The record discloses that defendants are guilty of a cold-blooded murder. There can be no question in the mind of one who reads it that there are no circumstances which would have justified the jury in affixing anything less than the extreme penalty of the law.

[4] In so stating, we are not unmindful of the attempt to show upon the trial, and of the argument here to the effect that there was no intent to shoot the victim but that the gun by reason of the wearing of its parts was capable of being automatically discharged several times by a single pressure on the trigger. Even if we were to concede that the gun was a true automatic in the sense that one pulling of the trigger would cause all shells in the chamber to be discharged in rapid succession, we fail to perceive wherein the defendants would be benefited for someone had to apply the initial pressure to the trigger to start such automatic firing and it is nowhere shown or contended that any one but the defendant Anderson was holding and pointing the gun at the deceased at the time of the shooting. Nor does the fact that Anderson testified that he did not "intend to fire the gun" alter the situation. People v. Anderson, supra. Moreover, we are of the view that the record here fails to disclose that the gun employed by the defendants was a true automatic in the sense above mentioned. A prosecution expert testified that he fired the death gun innumerable times and that it was necessary to pull the trigger each time a shell was to be discharged. Generally speaking, the evidence of the defendants along this line had to do with guns other than the one used by the defendants, though of the same make or type, or had to do with guns on which the "sear" had become so worn or had been so filed or honed as to cause automatic firing with a single pressure on the trigger. As stated, we are of the opinion that this condition was not shown to exist in the death gun but, as also stated, even if it had been shown, we fail to perceive wherein the defendants could derive any comfort from the fact.

[5] The defendants next urge that the district attorney was guilty of prejudicial misconduct in his argument to the jury. Both complain of substantially the same portions of the argument wherein they were castigated and characterized in decidedly uncomplimentary terms. While we have frequently indicated that a prosecuting officer should not overstep the bounds in his argument to the jury we are of the view that no prejudice could have resulted from the remarks here complained of even if we should concede, without deciding, that said remarks were intemperate and might well have been left unuttered. In our opinion, the result in this case would have been the same if there had been no argument for, as indicated, the evidence discloses a planned robbery in the commission of which the victim was fatally shot by the perpetrators thereof. In addition, the record fails to show that either defendant objected to any of the remarks or requested that the jury be admonished to

disregard them with but one exception and in this particular the district attorney asked the jury to disregard the remark and the court so instructed. In the absence of objection and request that the jury be admonished, the defendants are now foreclosed from complaining. People v. Green, Cal.Sup., 87 P.2d 821; People v. Gist, 28 Cal.App.2d 287, 82 P.2d 501; People v. DuBois, 16 Cal.App.2d 81, 87, 60 P.2d 190.

[6, 7] When on the witness stand in his own defense, the defendant King testified that a short time prior to the robbery and fatal shooting of Ward he had "engaged in several hold ups". Upon cross-examination, the district attorney brought out, over objection, the location and character of these several "hold ups" and that the defendants on these occasions had employed and flourished the gun here involved. It is now urged that this was improper cross-examination and that the recitation of the details of these earlier offenses did not serve to prove any of the issues here presented. We entertain no doubt as to the propriety of the cross-examination as to matters admittedly generally divulged on direct examination. People v. Mammilato, 168 Cal. 207, 213, 142 P. 58; People v. Gallagher, 100 Cal. 466, 475, 35 P. 80. In addition to many other reasons that might be advanced in support of the materiality and relevancy of the evidence adduced on such cross-examination, it may be stated that it was there disclosed that the defendants had on these several prior occasions employed the death gun to intimidate their victims and accomplish their objective and without any accidental or unintentional discharge thereof. In other words, the continued use of the gun by the defendants without undue happening tends definitely and strongly to overcome and destroy the theory here advanced that the gun by reason of wear or other causes was practically "hair trigger" in character and capable of discharging its entire contents of shells without exterior assistance. Moreover, the prosecution was free to establish that the robbery and fatal shooting of Ward were part of a general plan or scheme to commit robberies. People v. Thorne, 10 Cal.2d 705, 76 P.2d 491.

[8] The defendant King also urges that the trial court erred to his prejudice when in response to a query of the jury "whether the verdict has to be the same for each defendant", replied "No, not necessarily. The verdicts can be different for the two different defendants, if that is what you had in mind. * * * In other words, each defendant is to be considered as if he were alone in the case, although they are charged jointly. The consideration of the jury should be as to each separate defendant." It is now contended that the words "No, not necessarily" indicated to the jury that the verdicts should be the same. The point lacks every vestige of merit. Counsel did not object at the time and, in fact, now concedes that "the instruction clearly states the law". It is difficult to conceive how the statement of the matter could be improved. At the time, the trial judge inquired if counsel desired "to add anything further to the explanation of the court" whereupon counsel for both defendants stated "I think that is correct".

[9, 10] It is urged by the defendant Anderson that he was prejudiced by the district attorney inquiring, and the trial court permitting him to inquire, whether he (Anderson) was ever convicted of a felony. He concedes that ordinarily when a defendant in a criminal case takes the witness stand he may be impeached, like any other witness, under the provisions of section 2051 of the Code of Civil Procedure. But, he contends, where, as here, the defendant confesses to the crime and admits its commission on the witness stand, the prosecution may not question his credibility. We do not understand the rule to be so limited. Contrary to the defendant's statement we do not find in the record that the district attorney "stipulated" to the truth of the confession. He merely offered it in evidence as the voluntary extrajudicial statement of the defendant and was free to challenge the defendant's credibility under the established rules of evidence.

As stated at the commencement of this opinion, the evidence against both defendants is clear and undisputed that while engaged in robbing the deceased they mortally wounded him. They fled the scene and were later apprehended out of the state and returned here where they had a fair trial and were properly convicted. We find nothing in the record calling for a reversal.

The judgments and orders are, and each is, hereby affirmed.

I concur in the judgments: HOUSER, J.

13 Cal.2d 407

SKINNER et al. v. COY, Agricultural Commissioner of San Bernardino County, et al.

L. A. 16673.

Supreme Court of California.

May 5, 1939.

1. Agriculture ⇐9

Trees which are growing upon private property and are affected with a virus disease may constitute a "public nuisance" which can be summarily abated by an officer authorized thereto by law. Civ.Code, §§ 3479, 3480, 3494.

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words & Phrases.]

2. Agriculture ⇐9

Where a tree or plant has become to such an extent infected by a disease that the disease cannot be eradicated without the destruction of the plant, and such disease is one which, if not eradicated, threatens other plant life in the neighborhood, the tree or plant harboring the disease is in itself a "pest" and subject to abatement as such by agricultural commissioner under Agricultural Code. St.1933, pp. 82–84, §§ 129–138.

3. Agriculture ⇐9

Any form of vegetable life which is the host of any infectious, transmissible or contagious disease liable to be dangerous or detrimental to the agriculture industry of the state is a "pest" which agricultural commissioner, under the Agricultural Code, can require the owner to eradicate, destroy or control, and remains such, unless it is possible to eradicate the disease. St.1933, pp. 74, 82–84, §§ 100(a), 129–138.

4. Agriculture ⇐9

A tree or plant infected with a communicable disease amounting to a pest is a "nuisance" which can be abated by the agricultural commissioner by destroying the pests or, if necessary, the plant, notwithstanding that tree or plant is a neglected or abandoned plant within provision of Agricultural Code providing for destruction of neglected or abandoned plants whereon pests exist. St.1933, pp. 83, 85–87, §§ 135, 136, 141–148; Civ.Code, § 3494.

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

5. Health ⇐13(1)

Public authorities exercising their powers summarily to destroy property deemed likely to spread disease must follow statutory provisions regulating the manner in which such power shall be exercised, and their failure to follow such provisions will render their action unlawful.

6. Agriculture ⇐9

Under statute requiring agricultural commissioner to give landowner notice of diseased plants before commissioner should undertake to eradicate the disease, a notice correctly designating premises on which infected peach trees were located and stating the existence of the infection in trees thereon was sufficient without designating every particular tree in which the infection existed. St.1933, p. 82, § 129.

7. Injunction ⇐85(1)

Landowners could not obtain injunction restraining agricultural commissioner from destroying landowners' diseased peach trees pursuant to the authority given commissioner by the Agricultural Code. Code Civ.Proc. § 526; Civ.Code, § 3423, subd. 4; St.1933, pp. 82–84, §§ 129–138.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by S. A. Skinner and another against John P. Coy, Agricultural Commissioner of San Bernardino County, and another for an injunction restraining the defendant from destroying plaintiffs' peach trees. From a judgment awarding an injunction, the defendant appeals.

Reversed.

Prior opinion, 81 P.2d 982.

Jerome B. Kavanaugh, Dist. Atty. of San Bernardino County, Albert E. Weller, Chief Deputy Dist. Atty., and Stanley Mussell, all of San Bernardino, for appellants.

U. S. Webb and Earl Warren, Attys. Gen., and Bayard Rhone, Deputy Atty. Gen., amici curiae for A. A. Brock, Director of Agriculture of the State of California.

Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, for respondents.

Meserve, Mumper & Hughes and Hewlings Mumper, all of Los Angeles, amici curiae.

PER CURIAM.

After further study of the record in this case, we are of the opinion that the District Court of Appeal arrived at the correct conclusion in its opinion filed in this action, and written by Judge Charles C. Haines of the superior court in and for the county of San Diego while sitting as a member of the District Court of Appeal, Fourth District. We have adopted in part the opinion of the District Court and have followed the same by certain conclusions of our own. That portion of said opinion which we have adopted, reads as follows:

"This action was brought by respondents, S. A. Skinner and Gem Rounds Skinner, to obtain an injunction forbidding appellant, John P. Coy, who is the agricultural commissioner of San Bernardino county, from entering upon a peach orchard within that county owned by respondents and removing and destroying peach trees which, according to respondents' claim were and are producing marketable crops. The complaint alleges that appellant, prior to November 21, 1936, informed respondents of his intention to enter upon their premises for that purpose; that on the date mentioned he did enter thereon for that purpose, and only desisted therefrom temporarily when threatened by respondents with bodily injury, and still threatens to return and uproot and remove peach trees from the premises, whereby respondents' property will be made unproductive and practically valueless. In the answer appellant admits that he threatened to enter and did on November 21, 1936, enter upon respondents' premises, but that such entry was for the purpose of uprooting and removing certain diseased peach trees therefrom; that he only desisted from so doing because of respondents' threats of bodily injury if he persisted; but that the only peach trees that he threatened or attempted to remove were trees infected with the disease known as 'peach mosaic'. He admits that it is his intention, unless restrained by the court, to return and remove such trees. By way of a separate defense appellant in his answer sets up his status as agricultural commissioner of the county and that he was and is a duly appointed, qualified and acting state plant quarantine officer and an enforcing officer of all laws, rules and regulations related to the prevention of the introduction into or spread within the state of pests, all under the supervision of the director of the department of agriculture of the state of California. He alleges further that on or about October 9, 1936, in his capacity as such agricultural commissioner he received information from the department of agriculture of the state of California of the existence of the fruit disease known as 'peach mosaic' in certain of the peach orchards in San Bernardino county; that, pursuant to the authority vested in him by the Agricultural Code of the state, St.1933, p. 60 et seq., and accompanied by duly qualified plant pathologists of the department of agriculture of the state of California, he entered upon respondents' premises for the purpose of making an inspection to determine whether or not such 'peach mosaic' existed thereon and proceeded with said pathologists personally to examine the peach trees there growing and then and there determined that certain of the said peach trees were affected by such 'peach mosaic'. He further sets up that said 'peach mosaic' is a transmissible and infectious disease; that the Yucaipa valley, wherein respondents' premises are located is planted to many thousands of peach trees, many of which are healthy and in bearing but many others whereof are affected by said 'peach mosaic'. He further avers that it has been determined by the departments of agriculture of the United States and of the state of California that said 'peach mosaic' is a virus disease existing in the sap of fruit trees; that its presence ultimately destroys the productivity of the trees; that it spreads to other trees in the same orchard and to adjoining orchards; that it will not respond to exterior treatment such as fumigation or sprays; that the scientists of the said departments have reached the conclusion which appellant alleges to be the fact, that the only effective method of control is the extermination of infected trees by uprooting and burning the same. It is further alleged that in pursuance of his duties appellant on the 24th day of October, 1936, caused to be personally served on respondents a notice, a copy of which is attached to the answer, requiring respondents to eradicate, destroy or control the said 'peach mosaic' within ten days after service upon them of the notice, all of which they refused and neglected to do, in consequence of which, on or about November 21, 1936, appellant attempted to enter upon their premises to destroy said diseased peach trees pursuant to law, but was forcibly prevented from so doing, and

threatened by respondents with bodily injury if he persisted in so doing. Appellant further alleges that unless the diseased peach trees on respondents' premises are eradicated and destroyed said 'peach mosaic' will spread to other peach trees in the vicinity of respondents' premises and infect a large number thereof and that the eradication and destruction of respondents' diseased trees is necessary to the preservation of the peach orchards and peach industry of San Bernardino county. An injunction was therefore sought on behalf of appellant restraining respondents from interfering with his enforcement of the Agricultural Code of the state by so destroying and eradicating the disease aforesaid from respondents' premises. A copy of the notice referred to, served upon respondents in attempted compliance with section 129 of the Agricultural Code, St.1933, p. 82, is directed to respondents, describes their premises, sets out that the same were inspected on the 21st and 22d days of October, 1936, and determined to be infected with 'peach mosaic' disease and proceeds to notify them that there are thereon peach trees infected with such disease, which the notice states was declared by law to be a public nuisance. The notice then proceeds as follows:

"'You are hereby required to eradicate, destroy or control the said peach mosaic disease to the satisfaction of the said Agricultural Commissioner within ten days after the service on you of this notice by removing the infected trees with sufficient roots that no shoots will develop therefrom, and burning the brush.'

"The notice concludes with information that if respondents neglect or refuse to comply with its requirements appellant will cause the nuisance to be abated and that the expense thereof will become a lien upon respondents' premises.

"The evidence shows that in the year 1931 there appeared in Texas the so-called 'peach mosaic', which is a virus disease affecting peach trees. This disease has since been identified in Colorado, Utah, New Mexico, Arizona, and in the counties of Riverside and San Bernardino in California. According to testimony given by Dr. Lee M. Hutchins, a plant pathologist of the United States department of agriculture, who states that for some years he has devoted himself chiefly to the study of this disease, as well as by one Gilbert L. Stout and one M. R. Harris, plant pathologists of the California state department of agriculture, and various other pathologists and inspectors attached to the latter department, the symptoms of the disease are, among others, breaking in the flowers, both in shape and color patterns, retarded foliation in the spring with a tendency to crinkling and mosaic-like discolorations and yellow mottling of the leaves, stunting of growth by the shortening of the internodes, the tufting of foliage at the terminals of growing shoots, and bumpiness and general malformation of the fruit, including an abnormally deepened crease on the suture side of the peach, and an abnormally prominent apex. The disease, according to these experts, differs in the details of its behavior with the different varieties of peach trees and most conspicuously affects the freestone peaches such as Elbertas, but is by no means confined to them; and its tendency is to reduce the size, destroy the symmetry and general appearance of the peach and to make the crops unmarketable. No single one of the symptoms referred to is deemed sufficient for identification of the disease, but reliance is placed on the picture presented by the appearance of various symptoms, some of which may be absent in certain varieties of peach trees. Dr. Hutchin's testimony is that the disease, like other virus diseases, both in the vegetable and animal kingdoms is deep-seated in the tissues; that in the case of peach trees it cannot be reached by exterior applications and that there is no known means of eradicating it otherwise than by the uprooting and destruction of the trees affected by it. His testimony is further to the effect that the disease is, as respects any given tree, slow acting and does not kill the tree, but that it is infectious and that the vector of the infection is thus far unknown, so that it is impossible to say at what particular time of the year the infection occurs. It has, however, according to him, been demonstrated that the infection is not transmitted in the seed nor yet carried in the soil. The effect of Mr. Stout's testimony is that, in areas affected, the increase among infected trees has been largely above 100 per cent per annum, proceeding, of course, by geometrical progression, so that if it is uncontrolled the orchard will in the course of a few years become completely diseased. According to appellant's witnesses some 16 peach trees on respondents' property were in 1936 definitely determined to be infected with 'peach mosaic' and under appellant's

supervision marked as being so infected. After such marking the notice already referred to was given.

"Plaintiff and respondent S. A. Skinner, and various other orchardists, testified on behalf of respondents. It was not denied that some of the trees were infected with a malady constituting a virus disease. It was not denied that most, at least, of the 16 trees marked by the inspectors in 1936 had various of the symptoms described by appellant's experts as present in cases of 'peach mosaic'. Indeed, Skinner, when asked whether he was not unable to state whether or not certain of these trees had the infection of 'peach mosaic' frankly said: 'As far as I know they do have. It seems to correspond to the description that has been given of "peach mosaic".' Skinner says that the fruit of only five of the 16 marked trees was unmarketable. He conceded that all or practically all of these 16 trees had, to some extent mosaic marked leaves, but claimed that several of them had, under intensive conditions of fertilization and general care, shown marked improvement in condition. A number of them, however, were old trees past their prime. After the initial trial of the case the court postponed its disposition during the cropping season of 1937 for the purpose of permitting observation to be had of the behavior of the orchard during that season. There is testimony in the record that during the season of 1937, 25 additional trees showed signs of infection. There is also testimony on the part of appellant's witnesses that the general increase in infection in the Yucaipa district between 1936 and 1937 had been approximately 170 per cent.

"The court filed findings of fact and conclusions of law which are attacked in various particulars as self contradictory as well as unsupported by the evidence. It was found to be true that appellant was, at the times mentioned, and is agricultural commissioner of San Bernardino county and as such, in October, 1936, was advised by the state department of agriculture of a report that 'peach mosaic' existed in certain peach orchards in San Bernardino county; that in his capacity as such commissioner, and accompanied by duly qualified plant pathologists, he entered upon respondents' property to determine the existence of the disease in the peach trees there growing and personally examined respondents' peach trees with said plant pathologists, and, upon such examination, determined that some of the same were affected by a virus disease which he and said plant pathologists believed to be 'peach mosaic'. The court further went on to find that 'peach mosaic' is a transmissible and infectious disease, that the Yucaipa valley and territory in the immediate vicinity of respondents' real property is planted to many thousands of peach trees, many of which are healthy and bearing, but some of which are infected with a virus disease; that it has been determined by the departments of agriculture of the United States and of the state that 'peach mosaic' is a virus disease existing in the sap of fruit trees, of such character as ultimately to destroy their productivity; that it spreads to other trees in the same and adjoining orchards, and that the scientists of said departments have reached the conclusion that it can only be eradicated by uprooting and burning the infected trees. The court went on to find that 'pursuant to the duties imposed upon him' appellant personally served on the respondents on October 24, 1936, the notice to which reference has already been made, and that copy of the same was recorded in the office of the county recorder of San Bernardino county and that the respondents have failed and neglected to eradicate the virus disease with which some of their peach trees are infected; that appellant, in his capacity as agricultural commissioner of said county, accompanied by deputy agricultural commissioners of the county, attempted on November 21, 1936, to enter upon respondents' property to eradicate the virus disease there existing, then believed by them to be 'peach mosaic', and to destroy the peach trees affected thereby, from which action they were deterred by force and treats of violence on the part of respondents. The court, however, found to be untrue the allegations of paragraph 10 of the second defense contained in the answer, which paragraph is to the effect that:

" 'That unless the diseased peach trees on plaintiffs' premises are eradicated and destroyed the disease with which said trees are affected, to-wit: Peach Mosaic, will spread to other peach trees in the vicinity of plaintiffs' premises and will infect a large number of peach orchards in the area adjacent to plaintiffs' real property. That the eradication and destruction of said diseased trees is necessary to the preservation of the peach orchards and the peach industry in the County of San Bernardino.'

"The court concluded as a matter of law that appellant had no right or authority to enter upon said real property for the purpose of destroying any of the peach trees growing thereon; that appellant had not given notice to respondents as required by section 129 of the Agricultural Code; that the 16 peach trees affected with the virus disease claimed by appellant to be 'peach mosaic' constituted 'neglected plants' within the meaning of section 141 of the Agricultural Code, St.1933, p. 85; that it was necessary that appellant be perpetually enjoined from entering upon respondents' real property and uprooting and removing the 16 trees affected by said virus disease or other trees or plants growing or that might thereafter be planted upon said real property. Judgment awarding such injunction was thereupon entered, from which the present appeal follows:

[1-3] "Evidently the theory of the trial court was that it was entitled, in a proceeding in equity, to investigate and determine the question whether the trees involved were or were not affected with 'peach mosaic', or merely with some other virus disease not susceptible of dangerous results. Its conclusion apparently was that this particular orchard was not infected with 'peach mosaic' but merely with some other relatively innocuous virus disease and its action was a result of that conclusion. It is conceded by respondents that trees growing upon private property affected with a virus disease may constitute a public nuisance. Civ.Code, secs. 3479, 3480. It is also conceded that a public nuisance may be summarily abated by an 'officer authorized thereto by law'. Civ.Code, sec. 3494. It is, however, claimed that sections 129 to 138, both inclusive, of the Agricultural Code, St. 1933, pp. 82–84, do not authorize appellant to summarily destroy trees conceived by him to be infected by disease. Counsel undertake to draw a distinction between 'pests' which the commissioner may require the owner to eradicate, destroy or control, and trees which are the victims of such pests; and this, notwithstanding that section 135 of the same code, St.1933, p. 83, declares that 'premises, plants, conveyances or things infected or infested with pests or premises where pests are found' constitute public nuisances and may be prosecuted as such. It is observed that where the notice to the owner to eradicate, control or destroy the pests is disregarded the commissioner may, under the provisions of section 136 of the Agricultural Code, St.1933, p. 83, proceed to abate the nuisance by eradicating, controlling or destroying the 'pests'. A tenuous distinction is attempted between his power to eradicate the disease and his power to eradicate the trees which harbor the disease. The distinction is obviously fallacious. It seems entirely clear to us that where a tree or plant has become to such an extent infected by a disease that the disease cannot be eradicated without the destruction of the plant, and such disease is one which, if not eradicated, threatens other plant life in the neighborhood, the tree or plant harboring the disease is in itself a pest and subject to abatement as such. Furthermore, under subdivision (a) of section 100 of the Agricultural Code, St.1933, p. 74, defining a 'pest', it may consist not only in any infectious, transmissible or contagious disease of plants, 'liable to be dangerous or detrimental to the agricultural industry of the state', but of any form of vegetable life liable to be so dangerous or detrimental, from which it must follow that when any form of vegetable life is the host of any infectious, transmissible or contagious disease liable to be so dangerous or detrimental it also is a 'pest' and must remain such, unless it is possible to eradicate from it the disease in such infectious, transmissible or contagious form.

"A further claim on the part of respondents is that, if the trees which appellant has sought to destroy can be said to constitute public nuisances at all, the exclusive method of abating them is that provided by sections 141 et seq. of the Agricultural Code. The first paragraph of section 141 is to the effect that:

"'Neglected or abandoned plants or crops which, because of the existence therein or thereon of pests, or because of other conditions, constitute a menace to the agriculture of the county, district, or vicinity, or which are host plants of or provide a favorable and likely harbor for pests are public nuisances and it is unlawful to maintain the same, and all remedies which are or may be given for the prevention or abatement of nuisances apply thereto.'

"Subsequent provisions of this section and of sections 142, 143 and 144 provide machinery in the nature of a special proceeding in the superior court whereby a judicial ascertainment of the necessity of

the 'removal or destruction of the neglected or abandoned plants or crops' may be had and the owner be required to remove or destroy the same. Section 145 provides for their removal or destruction by the commissioner in the event of failure by the owner to comply with the court's order. Further provisions contained in sections 146 and 147 provide for the establishment and foreclosure as against the property affected of a lien for the costs incurred, and section 148 makes it contempt to disobey the court's order in the matter.

[4] "We think it clear that there is nothing in sections 141 to 148, both inclusive, of the Agricultural Code above outlined, to militate against the lawfulness of appellant's attempted conduct here involved. It is highly questionable whether the court's conclusion of law that the peach trees on respondents' premises found to be infected with a virus disease 'constitute neglected plants within the meaning of section 141 of the Agricultural Code' is right. The evidence tends to show that instead of neglecting them respondents have given them special attention and fertilization. The machinery for judicial investigation and action provided for in sections 141 et seq. is not by their terms made applicable to all plants or crops wherein or whereon pests exist, or which are host plants of, or provide favorable and likely harbor for pests, but only to such plants or crops wherein and whereon pests exist or which are such host plants or provide a favorable and likely harbor for pests as are also neglected or abandoned. What we have in the instant case are trees that are being given a high degree of care but are nevertheless infected. Even if it be conceded, however, that these trees can be properly described as 'neglected' or 'abandoned' plants within the meaning of said section 141 it does not follow that the method of procuring their removal provided by said sections 141 to 148, both inclusive, is the exclusive method permitted. On the contrary, by the express terms of section 141 'all remedies which are or may be given for the prevention or abatement of nuisances apply thereto'; and under section 3494 of the Civil Code 'a public nuisance may be abated by any public body or officer authorized thereto by law'. We think that a tree or other plant infected with a communicable disease or diseases amounting to a pest or pests, even if it be conceded to fall within the definition of a 'neglected' or 'abandoned' plant, is not only a nuisance but a nuisance of the description specified in section 135 of the Agricultural Code and subject thereunder to abatement by the commissioner under section 136 of that code 'by eradicating, controlling, or destroying such pests' and that when the only practical method of eradicating, controlling or destroying the pests is to destroy the plant, the power to destroy the pests necessarily includes the power to destroy the plant.

"Respecting provisions for the summary abatement of agricultural nuisances, it is in 1 Ruling Case Law 790 said:

"'The efficiency of regulations of this type necessarily depends upon their prompt and summary execution, and it is, therefore, unavoidable that a certain amount of discretion must devolve upon the administrative officers entrusted with their enforcement, as before they act they must necessarily decide whether a thing possesses the qualities constituting it a nuisance under the statute or not. While in a strict sense this discretion is judicial in its nature, it does not constitute a delegation of "judicial powers" within the meaning of the usual constitutional inhibition against the delegation of judicial powers to an administrative officer. Consequently, statutes providing for the summary destruction of vegetation infected with contagious pests, without any preliminary judicial inquiry and without compensating the owner for the resulting loss, are perfectly constitutional so long as they themselves define what constitutes a nuisance, and there is a right to a subsequent judicial review of the action of the administrative officer. As property thus destroyed is confiscated under the police power of the state, the owner thereof is not entitled to be compensated as a matter of right.'

"Various aspects of such regulations have frequently been before the courts both of this and of other jurisdictions. Statutes frequently provide for the summary abatement of agricultural nuisances by executive officers and the establishment and foreclosure of liens upon the property affected to defray the cost involved. Often such statutes define in a general way what shall constitute a nuisance but leave it in the first instance to the determination of the enforcing officer to decide in a particular case whether such a nuisance has come to exist. A familiar example is the legislation providing for the control of ground squirrels. Of this it is said in Contra Costa

County v. Cowell Portland Company, 126 Cal.App. 267, 271, et seq., 14 P.2d 606:

"'The police power is universally considered "to justify the destruction or abatement * * * of whatever may be regarded as a public nuisance * * *." Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 500, 38 L.Ed. 385. * * * "every property owner * * * is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this * * * duty which pertains to the police power of the state so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation and not a taking, an exercise of police power and not of eminent domain." (1 Lewis on Eminent Domain, 3d Ed., sec. 6.)'

"The court then proceeds to quote the portion of the paragraph from Ruling Case law above set out.

"The Supreme Court in the case of Los Angeles County v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am.St.Rep. 217, had before it a statute providing for a county horticultural commission, authorizing it to abate insect pests in citrus orchards and providing for liens against the property involved for the expense. The action was to foreclose such a lien and the statute was attacked as unconstitutional. The court said:

"'It is urged that the act in question is unconstitutional and invalid because it confers judicial powers upon the horticultural commissioners, contrary to article 3 of the state constitution; but we do not think that this contention can be maintained. This provision of the constitution must be understood as construed by judicial decisions, and with reference to the subject of police power. The act itself defines the nuisances to which it relates, and declares that "all places, orchards, nurseries," etc., infected with "scale insects, or codlin moth, or other pests injurious to fruit, plants," etc., are public nuisances. In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion, which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid. Ordinances prohibiting the erection of wooden buildings within fire limits, except upon the order of fire commissioners; giving viticultural commissioners power to prohibit the importation of diseased vines; prohibiting the carrying on of a public laundry without a certificate of the health officer and of the board of fire wardens; prohibiting retail liquor business without permission of the board of police commissioners; giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any rubbish should be deposited; forbidding orations, harangues, etc., in a park without consent of the park commissioners, or upon other grounds except by permission of the city government committee; beating drums, etc., without permission of the president of the village; prohibiting manufacturers and others from ringing bells, etc., except at such times as the board of aldermen may designate; authorizing harbor masters to station vessels and to assign each its place; forbidding the keeping of swine without a permit from the board of health; and giving to boards of health, quarantine officers, and milk inspectors discretion as to the exercise of police powers,—all such laws and ordinances have been judicially held to be valid, although they confer the same power upon designated public officers as is given by the act here in question to the commissioners. Ex parte Ah Fook, 49 Cal. 402; In re Flaherty, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529, and cases there cited; Ex parte Fiske, 72 Cal. 125, 13 P. 310; Bittenhaus v. Johnston, 92 Wis. 588, 66 N.W. 805, 32 L.R.A. 380; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N.E. 929 [59 Am.Rep. 113]; Newton v. Joyce, 166 Mass. 83, 44 N.E. 116 [55 Am.St.Rep. 385]. The efficiency of many police regulations depends upon their prompt and summary execution; and therefore, from necessity, certain discretion must be given to the officers who are to make the regulations effective. In Ex parte Ah Fook, supra, this court said: "It is obvious that, to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws, it must be prompt and summary, and we are not aware that any reasonable provisions of the statute clothing such officers or boards with enlarged powers often exercised by them, have ever been held unconstitutional." * * *

" 'It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is therefore a proper exercise of the police power which the legislature has, under section 1 of article 19 of the constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state.'

"The particular statute involved in County of Los Angeles v. Spencer, contained no authority to destroy the affected trees, as the destruction of the particular pests there provided against did not necessitate such destruction. The same principles have, however, been often applied where the more or less summary destruction of property is involved, notably in legislation now also embodied in the Agricultural Code for the eradication of bovine tuberculosis. Such legislation is regularly upheld. Coelho v. Truckell, 9 Cal.App.2d 47, 48 P.2d 697; Stanislaus County Dairymen's Protective Association v. County of Stanislaus, 8 Cal.2d 378, 65 P.2d 1305; Loftis et al. v. Superior Court, [25 Cal.App.2d 346], 77 P.2d 491. It is to be observed that this legislation provides for the destruction of animals 'reacting positively to a tuberculin test conducted by a representative of the Federal or State Department of Agriculture or adjudged tuberculous upon physical examination by said representative', Agricultural Code, secs. 236, 237, St.1933 pp. 100, 101, without any provision for any hearing for the owner as to whether or not such animals are in fact diseased. There are, indeed, certain provisions for compensation when the slaughtering of diseased stock is done by state officials and the animals are found within control areas established by the state, but it is held that when, outside of such state control areas, counties have, under the authorization of the statute established 'voluntary control areas' and enacted control ordinances providing for no compensation for animals destroyed, reactors may nevertheless, under the supervision of county inspectors thereunto authorized by ordinance, be slaughtered without payment of compensation. Stanislaus County Dairymen's Protective Association v. County of Stanislaus, supra.

"In Graham v. Kingwell, 218 Cal 658, 24 P.2d 488, the Supreme Court sustained the constitutionality of the California Apiary Inspection Act (Stats. 1927, p. 1724, as amended, now part of the Agricultural Code). It was there said [218 Cal.] page 660 [24 P.2d page 489]:

" 'The act does no violence to the fourteenth amendment to the federal constitution, for it is elementary that where the exercise of the police power is applicable, the provision of the Constitution declaring that property shall not be taken without due process of law is inapplicable. Ex parte Elam, 6 Cal.App. 233, 237, 91 P. 811.'

"Under this statute, as under those provisions of the Agricultural Code involved in the instant case, notice is first given to the owner of the infected condition of his property and he is given a limited time in which to abate the nuisance, and in the event of his failure to do so, its abatement by the officer giving the notice is provided for.

"Cases from other jurisdictions illustrative of the right of properly constituted public authorities summarily to destroy property deemed likely to spread disease are: Miller v. Schoene, Va., 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568; Carstens v. De Sellem, 82 Wash. 643, 144 P. 934; State v. Main, 69 Conn. 123, 37 A. 80, 36 L.R.A. 623, 61 Am.St.Rep. 30; Shafford v. Brown, 49 Wash. 307, 95 P. 270; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Louisiana State Board of Agriculture v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A.1917C, 894, Ann.Cas. 1917E, 217; Kelleher v. French, D.C. Va., 22 F.2d 341; Wallace v. Dohner, 89 Ind.App. 416, 165 N.E. 552; Miller v. Horton, 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 Am.St.Rep. 850; Pearson v. Zehr, 138 Ill. 48, 29 N.E. 854, 32 Am.St.Rep. 113; Lemon v. Rumsey, 108 W.Va. 242, 150 S.E. 725; Upton v. Felton, D.C., 4 F.Supp. 585.

[5, 6] "It cannot, of course, be doubted that in the exercise of such powers public officers are bound to follow such statutory provisions as may exist regulating the manner in which they shall be exercised and that a failure to do so will render the action taken unlawful. County of San Benito v. Wapple, 188 Cal. 423, 205 P. 673. Respondents in the instant case claim that appellant failed to follow the procedure prerequisite under section 129 of the Agricultural Code to any right on his part to proceed to eradicate the

disease on their premises, in that the notice that he caused to be served failed to identify the particular 16 trees which he asserts to have been infected. The court's conclusion of law evidently adopted this view, because, despite the finding that the notice made an exhibit of the complaint was served, the court has concluded that the notice required by section 129 was not given. The notice, however, informs respondents that their premises, which are there properly described, have been 'found and determined to be infected with peach mosaic disease' and that there are there 'peach trees infected with peach mosaic disease', and proceeds to declare such infected trees a public nuisance and to require respondents within ten days to eradicate, destroy or control the said 'peach mosaic' disease by 'removing the infected trees with sufficient roots that no shoots will develop therefrom, and burning the brush'. The evidence shows that certain WPA workers, after an instruction from the experts of a week or thereabouts, with respect to the symptoms of the disease to be looked for, went through respondents' orchard and charted fifteen trees, to which a sixteenth was later added, as having the symptoms of the mosaic. These charts were furnished to appellant and the department pathologists followed up the WPA men and verified the presence of the symptoms and, according to their opinion, the existence in these trees of the 'peach mosaic', and thereupon proceeded to mark the trees with white paint. Respondents now claim that they were not advised by the notice and do not even know from the evidence that the trees so marked are those found by appellant to be infected. Respondent, S. A. Skinner, not only knew that appellant was having a search made to locate infected trees but he testified at length to his observation of the marked trees with the particular view of testing the diagnosis, and says himself that these trees showed the symptoms described in the evidence as indicative of the disease. As respects the notice, it is, under section 129 of the Agricultural Code, to be given to the 'record owner or person in charge of said premises, plants, conveyances or things, that the same are infected or infested with said pest', etc. We think that under the statute a correct description of the premises as infected, with a specification of the existence of the infection in trees thereon is, in general, enough, without an attempt in the notice to designate every particular tree or plant in which the infection exists. It might be that in a property of very extensive area more particularity would be reasonably necessary. The statute, however, must be given a reasonable construction and in the circumstances here shown the notice given was in our opinion sufficient."

[7] In the performance of the duties of his office as prescribed by the Agricultural Code, St.1933, p. 60 et seq., it was the duty of appellant as Agricultural Commissioner of said county, under the circumstances set forth herein, to eradicate the pests infecting the trees upon respondents' premises, and as it was necessary to destroy said trees in order to eradicate said pests, the appellant was clothed with statutory authority to destroy said diseased trees. No injunction will, therefore, lie against appellant in the discharge of these official duties imposed upon him by statute.

The judgment is reversed.



13 Cal.2d 497

Petition of SPECIAL ASSEMBLY INTERIM COMMITTEE ON PUBLIC MORALS OF CALIFORNIA LEGISLATURE.

In re SOUTHARD et al.

L. A. 16753.

Supreme Court of California.

May 6, 1939.

1. States ⇐34

The fact that interim committees had been appointed by single house resolutions and had theretofore carried on without objection was not determinative of whether the Legislature by single house resolution during regular session might lawfully create an investigating fact-finding committee with power to function after adjournment of the Legislature sine die.

2. States ⇐34

A legislator's service on an interim committee appointed pursuant to statute duly adopted, for purpose of investigating and re-

porting to the next Legislature, would not be violative of constitutional prohibition against occupation by legislators of any other office, trust, or employment. Const. art. 4, § 19.

3. States ⇐34

The Legislature and each house thereof has the inherent and implied power to appoint committees for the purpose of obtaining information concerning proposed legislation and reporting back its findings to the body appointing them.

4. States ⇐34

A committee for the purpose of obtaining information concerning proposed legislation and reporting back its findings, with power to sit during a session or during the constitutional recess between sessions, may be appointed by a single house or by concurrent resolution.

5. States ⇐34

Neither house of a Legislature may lawfully appoint by single house resolution a committee with power to sit after adjournment sine die. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

6. States ⇐32

The Legislature is not a continuing body, but each session thereof is composed of a new body, separate from its predecessor, since all members of the assembly and one-half of the members of the senate are newly elected for each regular session. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

7. States ⇐32

Though the legislative power continues perpetually, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

8. States ⇐34

The Legislature cannot by concurrent resolution lawfully create a committee with power to sit after adjournment. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

9. States ⇐24

Usage and custom, no matter how long continued, cannot create a right in the Legislature that otherwise it does not possess, and which is impliedly denied to it. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

10. States ⇐34

A fact-finding committee, which was appointed by a single house resolution during a regular session of the Legislature, had no legal authority to sit after adjournment of the Legislature sine die. Const. art. 3, § 1; art. 4, §§ 1–5, 15, 23; art. 5, § 9.

LANGDON and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in the matter of the petition of the Special Assembly Interim Committee on Public Morals of the California Legislature, wherein the Committee filed a petition to compel Harry A. Southard and others to give testimony. From an adverse judgment, the Committee appeals.

Judgment affirmed.

Prior opinion, 83 P.2d 932.

Fred B. Wood, of San Francisco, George W. Wakefield, of Los Angeles, Arthur McHenry, of Sacramento, and Norris J. Burke, of San Francisco, for appellant.

Melvyn I. Cronin, of San Francisco, amicus curiae.

George W. Rochester, of Los Angeles, for respondents.

PER CURIAM.

[1, 2] A rehearing was granted in this matter in order that a re-examination of the law applicable thereto might be made in the light of further arguments advanced in the petition for rehearing. Such re-examination has convinced us that to announce a contrary conclusion could be in disregard of established law on the subject in this and other jurisdictions, and that we would not be justified in taking such a course. The power here sought to be exercised by a single house of the legislature has uniformly been denied whenever it has been questioned. The fact that interim committees have been appointed by single house resolutions and have heretofore carried on without objection is beside the point. Their authority is now vigorously attacked in this proceeding. The problem is not one of a restrictive or liberal construction of the law applicable to the powers of the legislature. A single house is not the legislature. The decision herein does not prevent the appointment of interim committees to investigate and report to the next legislature. It is clearly pointed out that they may be appointed

pursuant to a statute duly adopted. Assuming that their appointment be desirable, no good reason has been advanced why they should not be appointed by following that orderly and authorized course. Service of a legislator on such a committee would in nowise be in violation of section 19 of article IV of the Constitution prohibiting members of the legislature from occupying any other "office, trust or employment". We feel impelled to adhere to the conclusion heretofore reached and in doing so adopt the former opinion as the opinion of the court on rehearing, as follows:

"This appeal presents for determination the question whether the state assembly by single house resolution during a regular session of the legislature may lawfully create an investigating fact finding committee with power to function after the adjournment of the legislature sine die.

"The assembly, at the fifty-second session of the legislature, while the legislature was in session, in May, 1937, passed house resolution No. 171. This resolution recites that in the past the assembly has customarily adopted resolutions creating interim committees to study and investigate problems of public concern; that these committees in the past have developed facts and information valuable to the assembly in proposing legislation; that it appears desirable that such committees be consolidated for better efficiency and for reasons of economy 'so that they may better study upon a broader scope the various problems of governmental concern to the end that these committees may determine upon desirable changes in, or additions to, the statutory laws of the State of California, and to recommend such changes and additions to the fifty-third session of the legislature thereby rendering a valuable legislative service to the people of the State of California'. The resolution then created 10 interim committees, including appellant, the Assembly Interim Committee on Public Morals, and in addition created a special coordinating committee with power generally to supervise the work of the various committees and with power to control the expenditures of such committees. In reference to the committee here involved the resolution provides: 'That there are hereby created certain Assembly committees to function during the interim between the fifty-second and fifty-third sessions of the Legislature * * * to wit: * * *

"'(8) Assembly Interim Committee on Public Morals, to consist of seven (7) members, which committee is authorized and directed to study and investigate all matters and things pertaining to existing or proposed laws of this State and its political subdivisions, with reference to all matters of public morality, including alcoholic beverages, gambling, vice of all kinds, wrestling and boxing matches, horse racing, dog racing and matters of a similar nature, and the administration of such existing laws.'

"The resolution further provided that 'the sum of twenty-five thousand dollars ($25000) is hereby appropriated and set aside from the contingent fund of the Assembly, for the purpose of paying the expenses of the committees created by this resolution, including costs of any records and transcripts, and an allowance of $8 per day (in lieu of expenses for living accommodations and meals) and 5½ cents per mile each way, incurred in connection with the powers granted and duties imposed by this resolution * * *'. Each of the committees was 'authorized and empowered to summon and subpoena witnesses, require the production of papers, books, accounts, reports, documents, records and papers of every kind and description, to issue subpoenas and to take all necessary means to compel the attendance of witnesses and to procure testimony'. The resolution also authorized the members of such committees to administer oaths, and the pertinent provisions of the Political Code relating to the attendance and examination of witnesses before the legislature and its committees were made applicable to proceedings before each of the newly created committees.

"The fifty-second session of the legislature adjourned sine die on May 28, 1937.

"The committee here involved called a meeting of its membership to be held in Los Angeles on February 7, 1938, 'for the purpose of determining whether vice and crime in the State of California, and more particularly in the city and county of Los Angeles was so widespread and notorious as to require additional legislation for its control and suppression'. The committee met at the time and place specified, and thereupon proceeded to administer the oath and question the 11 respondents who had been subpoenaed and who were then in attendance. It is not disputed that all of the proceedings up to this point were regular in all respects, if the committee itself had

lawful existence. To each of the respondent witnesses certain questions dealing with his supposed knowledge or connection with vice conditions in Los Angeles were propounded. The witnesses refused to answer these questions on the ground the committee had no lawful existence. Thereafter, purporting to act under section 302 of the Political Code, the committee caused to be filed in the Los Angeles superior court a petition to compel the giving of testimony. Section 302, supra, as amended in 1937, St.1937, p. 176, § 2, purports to confer on the superior court power to compel the giving of testimony before such committees when the legislature is not in session. The trial court issued to each of the respondents its order to show cause. On the return date each of the recalcitrant witnesses appeared in person and by counsel, but filed no written appearance or pleading. The trial court, after a hearing and argument, held that it had no power to compel respondents to answer the questions for two reasons:

"1. That the committee was not lawfully created, in that the assembly is without power to create a committee by a single house resolution with authority to sit after adjournment sine die; and

"2. That even if lawfully constituted as to many of the questions, the committee had exceeded its inquisitorial powers.

"The trial court thereupon entered its judgment discharging the order to show cause, denying the petition, and dismissing the cause. From this judgment (and as well from the opinion and minute order of the trial court) the committee has appealed.

"The cause has been exhaustively and ably briefed by both appellant and respondents. As already indicated, the main question presented on this appeal is whether the assembly may lawfully create an investigating committee by single house resolution with power to sit after the legislature has adjourned sine die. On behalf of appellant it is urged that the legislature is a continuing body; that incidental and auxiliary to the lawmaking power is the power to appoint committees for the purpose of investigation; that this power is necessarily implied from the express powers conferred on the legislature by the Constitution; that this implied power exists not only during legislative sessions but also during the interim between sessions; that from a practical standpoint this power must exist because during the sessions time is not available to properly consider the need for changes in the law; that this power has been exercised by the legislature of this state for many years, and that this constitutes a practical construction of the constitutional power of the legislature. Respondents, while conceding that the legislature possesses the implied power to appoint investigating committees to act during the session, contends that no such implied power exists to appoint a committee to act after the session has been adjourned sine die.

"The parties concede that there is no provision of the Constitution expressly conferring or denying the challenged power, but both refer to certain provisions which it is contended impliedly support their respective positions. The more important provisions referred to are article III, section 1, which contains the so-called separation of powers provision; article IV, section 1, which provides that 'The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California * * *"'; article IV, section 2, which provides 'The sessions of the Legislature shall be biennial, unless the Governor shall, in the interim, convene the Legislature, by proclamation, in extraordinary session. All sessions, other than extraordinary, shall commence at twelve o'clock m., on the first Monday after the first day of January next succeeding the election of its members, and shall continue in session for a period not exceeding thirty days thereafter; whereupon a recess of both houses must be taken for not less than thirty days * * *'; article IV., section 3, provides that the members of the assembly shall be chosen biennially each even numbered year for two year terms; article IV, sections 4 and 5, provide that senators shall be chosen for four-year terms at the same time and places as members of the assembly; that the senate shall consist of 40 members elected from 40 senatorial districts; that the seats of 20 senators shall be vacated each two-year period, so that one-half of the senators shall be elected every two years; article IV, section 15, provides that 'No law shall be passed except by bill. * * * any bill may originate in either House'; article IV, section 23, provides that 'The members of the Legislature shall receive for their services the sum of one hundred dollars each for each month of the term for which they are elected, to be paid monthly in the even

numbered years, and to be paid during the regular legislative session in the odd numbered years at such times as may be provided by law'; article V, section 9, provides that the governor 'may, on extraordinary occasions, convene the Legislature by proclamation, stating the purposes for which he has convened it, and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session, and other matters incidental thereto'.

[3-5] "Under these constitutional provisions it is obvious that the major function of the legislature is that of enacting legislation. This power is expressly conferred by the Constitution. This power necessarily presupposes that the members of each house of the legislature must investigate the necessity for legislation. It is impractical that the entire membership should participate in such preliminary investigation. Consequently, it is well settled by practice and decision, that incidental and auxiliary to the express power conferred, the legislature and each house thereof has the inherent and implied power to appoint committees for the purpose of obtaining information concerning proposed legislation, and reporting back its findings to the body appointing them. From a practical standpoint this implied power must exist in order that the legislature may properly discharge its functions. It is equally well settled that such committees with power to sit during a session or during the constitutional recess between sessions, may be appointed by single house or concurrent resolution. (In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497; Ex parte Lawrence, 116 Cal. 298, 48 P. 124; Ex parte McCarthy, 29 Cal. 395; Fergus v. Russel, 270 Ill. 304, 110 N.E. 130, Ann.Cas.1916B, 1120; Dickinson v. Johnson, 117 Ark. 582, 176 S.W. 116, L.R.A.1915E, 496, Ann.Cas. 1916B, 1067.) In the Battelle case, supra, the investigating committee was appointed by a single house resolution, and the committee was authorized to and did sit during the constitutional recess required under article IV, section 2, supra. The power of the senate to create the committee by single house resolution and the power of the committee to sit and to require the attendance of witnesses, the production of books, and to prosecute for contempt was fully vindicated. All of these cases and others that could be cited, however, simply hold that either by single house or concurrent resolution, the legislature may appoint committees and delegate to them the power of investigation, with the duty of reporting back to the body that appointed them. That is not the problem involved in the instant case. Here the legislature, after the assembly had appointed the appellant committee, adjourned sine die in May of 1937. The resolution creating the committee purported to authorize the committee to sit after such adjournment, and to report back, not to the body that had appointed it, but to a new body, the thereafter to be elected assembly of the fifty-third session. The overwhelming weight of authority is to the effect that neither house of a legislature may lawfully appoint a committee by single house resolution with power to sit after adjournment sine die, in fact, every state court that has considered this problem has so held. (Tipton v. Parker, 71 Ark. 193, 74 S.W. 298; State v. Guilbert, 75 Ohio St. 1, 78 N.E. 931; Ex parte Caldwell, 61 W.Va. 49, 55 S.E. 910, 10 L.R.A.,N.S., 172, 11 Ann.Cas. 646; Commonwealth v. Costello, 21 Pa.Dist.R. 232; State v. Childers, 90 Okl. 11, 215 P. 773; Brown v. Brancato, 321 Pa. 54, 184 A. 89.) The only case holding to the contrary is McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1, a case hereafter discussed.

"The theory of the above-cited cases holding that a single house resolution cannot lawfully create a legislative investigating committee with power to sit after the legislature adjourns sine die seems to us to be unanswerable. Although stated in different ways, it is basically this: Under the various state constitutions, including that of California, the legislature, with the approval of the governor, has the power to legislate—that is the power to make laws; each house of the legislature has the power to initiate legislation; incidental to and implied from this power to legislate, each house has the implied and auxiliary power to appoint committees for the purpose of aiding it in the proper performance of this function; this power to appoint committees exists by implication, only because of the existence of the express power to legislate; consequently, when the power to legislate ceases, then the power to investigate for the purpose of aiding the legislature in exercising this power ceases, or stated another way, when the main power of legislating dies the incidental or implied power dies with it; that upon adjournment sine die the legislative powers of both houses of the legislature cease; that thereafter the mem-

bers of the legislature have no legislative powers unless a special session is called which can only be done at the call of the governor, and at which only those matters set forth in the call may be considered; that during a session each house can function separately as to the introduction of bills, but it has no such power after adjournment; that each regular session of the legislature is composed of a different body from its predecessor; that the only lawful purpose of a committee is to investigate the facts and to report back to the body creating it; that the power conferred on a committee is a delegated power, and the legislature cannot lawfully delegate power that it itself does not possess; that neither house has the power to appoint a committee to function when the legislature itself could not act in the premises.

"These principles were succinctly summarized in Ex parte Caldwell, supra. After pointing out that upon adjournment the power of each branch of the legislature as far as its power to legislate is concerned ceases, the West Virginia court stated (55 S.E. page 911): 'When the powers of one branch are ended, the powers of the other branch are ended. If we give effect after adjournment to the mere resolution of one branch, it is in effect the continued power of that single branch. If the powers of that branch are at an end, the powers of a committee appointed by it are also at an end. The limb cannot exist after the body has perished. The agent or deputy cannot act after his principal is extinct. If the branch cannot act, how can a committee act deriving its life from the branch?'

"In Tipton v. Parker, supra, the supreme court of Arkansas summarized its conclusions as follows (74 S.W. page 298): 'The Senate has no power by resolution of its own to extend its session, and neither did it have power by such separate resolution to continue its committee, a mere agency of the body, beyond the term of the body itself which created it. Each house, says Judge Cooley, must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions; and, whenever it is deemed desirable that witnesses should be examined, the power and the authority to do so is very properly referred to a committee, with any such powers short of final legislative or judicial action as may seem necessary or expedient in the particular case. Such a committee has no authority to sit during a recess of the house which has appointed it, without its permission to that effect. But the house is at liberty to confer such authority if it sees fit. The recess here referred to by Judge Cooley we think should be construed to mean only the intermission between sittings of the same body at its regular or adjourned session, and not to the interval between the final adjournment of one body and the convening of another at the next regular session. When applied to a legislative body, it means a temporary dismissal, and not an adjournment sine die. Cen.Dic. verbo "Recess"; Cooley, Con. Lim. 161. The committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law, and it is not within the power of either house of the General Assembly to separately enact a law or pass a resolution having the force and effect of a law. To do this requires a majority of each house voting in its favor. Art. V, § 23, Const. The only legitimate office, power, or duty of a committee of the Senate, in the absence of a law prescribing other functions and duties, is to furnish the Senate which appointed it, with information and to aid it in the discharge of its duties. The Senate alone has no power to appoint a committee to make an investigation after its adjournment, and to make a report to another department of the government, or to another session of the Senate or General Assembly. Ordronaux on Const.Leg., p. 375. Each session of the Senate is separate and distinct from every other session, and is generally composed of different members.'

"As already indicated the only case contrary to those above cited is McGrain v. Daugherty, supra. In that case the United States Supreme Court, without reference to the cases holding to the contrary, held that the United States Senate lawfully by resolution could create a legislative committee with power to sit after the adjournment of Congress. The court held that probably the House of Representatives cannot appoint a committee with power to sit after adjournment because its members, like the California Assembly, are all elected for the period of a single session, but that the senate 'is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at

the end of each Congress, two-thirds always continuing into the next Congress * * *.' [273 U.S. 135, 47 S.Ct. 331.]

[6, 7] "Whatever may be the rule as to the United States Congress, it is quite clear that in this state the legislature is not a continuing body—each session is composed of a new body, separate from its predecessor, all of the members of the assembly and one-half of the members of the senate being newly elected for each regular session. In French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann. Cas. 756, the petitioners sought mandate to compel the state senate to admit them as members. They had been expelled by that body. This court refused to entertain jurisdiction on the ground that (146 Cal. page 607, 80 P. page 1033, 69 L.R.A. 556, 2 Ann. Cas. 756): 'The thirty-sixth session of the Legislature has adjourned sine die; it is a thing past, and cannot be reconvened upon the mandate of the judicial power. Const., art. 3. The Senate could not reinstate the petitioners as members of that session except when lawfully in session. Nor can the body which composed the thirty-sixth session be again called together except in special session and at the behest of the Governor. Const., art. 4, § 2; article 5, sec. 9. The next regular session of the Senate will be composed of different persons and will be a different body from that now supposed to be before the court.' The same principle was enunciated by the Supreme Court of the United States in Anderson v. Dunn, 6 Wheat. 204, 19 U.S. 204, 230, 5 L.Ed. 242, when it stated: '* * * although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution'.

[8] "Appellant refers to several cases holding that by concurrent resolution the legislature may lawfully create a committee with power to sit after adjournment. (Sullivan v. Hill, 73 W.Va. 49, 79 S.E. 670, Ann.Cas.1916B, 1115; People v. Backer, 113 Misc. 400, 185 N.Y.S. 459; People v. Hofstader, 258 N.Y. 425, 180 N.E. 106, 79 A.L.R. 1208; Terrell v. King, 118 Tex. 237, 14 S.W.2d 786.) On this subject there is a conflict in the authorities. Several well-reasoned cases hold that the legislature by joint resolution cannot create a committee with power to sit after adjournment—that such committee can only be created by statute. (Dickinson v. Johnson, 117 Ark. 582, 176 S.W. 116, L.R.A.1915E, 496, Ann.Cas.1916B, 1067; Fergus v. Russel, 270 Ill. 304, 110 N.E. 130, Ann.Cas. 1916B, 1120; Ex parte Hague, 105 N.J.Eq. 134, 147 A. 220; affirmed on other grounds, 150 A. 322, 9 N.J.Misc. 89.) Several of these cases last cited discuss the cases holding to the contrary and point out that in several of the jurisdictions approving the power to create such committees by joint resolutions there is no distinction between joint resolutions and statutes, both requiring the signature of the governor. The validity of concurrent resolutions in this respect in this state is more directly involved in the companion case of Swing v. Riley, 83 P.2d 938, this day decided, and is fully discussed therein. For the purposes of the present opinion, suffice it to say that the concurrent resolution cases are not authority for the validity of a single house resolution and even if they were, it is our opinion that the last cited cases holding concurrent resolutions invalid, state the proper and correct rule.

"Appellant also relies on Phillips v. Riley, 6 Cal.2d 414, 57 P.2d 1308, recently decided by this court as sustaining its position. This case did involve an interim committee, and did hold that such a committee could lawfully incur certain expenses. The opinion states that the committee was created by concurrent resolution, appellant contending that this is an error, the true fact being that the committee was created by a single house resolution. Whatever the true fact may be in this regard, that case cannot be considered as an authority in the present controversy, for the reason that both parties to that appeal conceded that the committee was validly created. The opinion is very short. At page 415 of 6 Cal.2d., 57 P.2d at page 1309, it is stated: 'The due appointment of the committee by joint action of both Houses of the Legislature is not challenged, nor is it charged that the committee has not full power and sufficient authority to carry out the letter and spirit of the resolutions creating it." The point involved in the present controversy was not only not passed upon but was conceded by the parties. We find nothing helpful in In re Connolly, 16 Cal.App.2d 709, 61 P. 2d 490, also cited by appellant, the point here under discussion not being involved or discussed.

[9] "Appellant's last argument is that the legislature for many years past has created interim committees by single house

or concurrent resolution, and that such legislative usage, never before challenged, is entitled to the greatest weight in determining the validity of the appellant committee. The obvious answer to this contention is that usage and custom, no matter how long continued, cannot create a right in the legislature that otherwise it does not possess, and, which, as already held, is impliedly denied to it. As was said in Fergus v. Russel, supra, in answering an identical contention (110 N.E. page 146): 'We are not unmindful of the fact that for many years it has been the practice of the Legislature of this state, and of each house thereof, to thus appoint, by joint, or separate resolutions, committees to act after the session of the Legislature had ended, but we have never been called upon to determine the validity of such action. The long indulgence in this custom cannot create a right in the Legislature, or either house thereof, to do that which it has no power or authority to do.'

[10] "In view of our conclusion that appellant committee had no legal authority to sit after adjournment of the legislature sine die, no necessity exists for passing on the other question raised, viz., the propriety of the specific questions asked of respondents."

For the foregoing reasons the judgment appealed from is affirmed.

LANGDON, Justice.

I dissent.

Article IV, section 1 of our state Constitution declares that "The legislative power of this state shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California' ".

Section 2 of the same article provides that "The sessions of the legislature shall be biennial, unless the governor shall, in the interim, convene the legislature, by proclamation, in extraordinary session. * * *"

Sections 3 and 4 provide that the "term" of office of members of the Assembly and of the Senate shall be two years and four years, respectively.

Section 23 declares that members of the legislature "shall receive for their services the sum of one hundred dollars each for each month of the term for which they are elected * * *".

None of the foregoing sections, in my opinion, expressly declares or impliedly infers that either house of the legislature is not a "continuing body". In fact, said sections appear to suggest a contrary conclusion and for the following reasons: (1) The length of the session is not prescribed or limited—if necessary, it could extend until the date fixed for the next biennial session which would coincide with the term of the members of the assembly and the remainder of the term of one-half of the senate. (2) The members of both houses are paid for their full "term" and not on a per diem or session basis. (3) After adjournment sine die, and at any time prior to the next insuing biennial session, they may be convened at the call of the governor and may "legislate" upon matters included in such call; that is to say the power to legislate is ever present and continues to exist even after adjournment sine die.

In the early case of Ex parte McCarthy, 29 Cal. 395, this court had occasion to declare that "A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self-preservation. The Constitution is not a grant, but a restriction upon the power of the legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent, and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same. (Cush.Law and Practice of Legislative Assemblies, p. 221.)

"What powers and privileges, therefore, a legislative assembly takes by force and effect of its creation are to be ascertained by a reference to the common parliamentary law. These powers and privileges are classified by Cushing (p. 246) as follows: * * *

"12. To investigate, by the testimony of witnesses or otherwise, any subject or matter, in reference to which it has power to act; * * *."

It goes without saying that a legislature cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. Certainly if a legislature needs information concerning a problem simple enough to be canvassed quickly, it probably stands in greater need of accurate insight into a problem of greater complexity. Is it not strange to imply a power to investigate without also implying a power to investigate thoroughly? The public interest in the competent discharge of legislative functions should be strong enough to overwhelm technical objections.

The case just above cited, and others that might be mentioned, recognize, and all parties to this litigation concede, that investigation is an indispensable and important incident, and an inherent auxiliary to the proper exercise of the legislative power and that such incidental and auxiliary function may be exercised by either house by single house resolution empowering a committee to sit during the constitutional recess. Inasmuch as the power to legislate continues and exists after adjournment sine die, just as fully and completely as during the constitutional recess, and inasmuch as either house may concededly by single house resolution lawfully create a committee to investigate during the period of such constitutional recess, when technically it is no more engaged in legislating than it is following an adjournment sine die, there would appear to be no substantial reason for denying to either house the right by single resolution to create interim committees for the purpose of carrying on proper legislative investigations. In other words, if the express power to legislate continues and exists (though it be dormant) in the interim between sessions of the adjourned legislative body, it seems reasonable to conclude that the incidental and auxiliary investigatory function likewise continues and may be employed during such period, thus insuring a more effective exercise of the principal legislative function. If this be so, a single house resolution is sufficient to create a lawful interim committee, for under section 9 of article IV, supra, "each house shall determine the rule of its proceeding"—which latter provision would appear to delegate to each house the choice of methods for the most advantageous use of its functions in the exercise of the state's legislative power.

The question here involved is a novel one in this state, and being peculiar to our constitutional setup, I have treated the same solely in the light of our constitutional provisions and without regard to the weight of authority elsewhere apparently to the contrary. The decisions of other jurisdictions are considered at length in the majority opinion. They may be correct under the constitutional provisions there prevailing but even if decided under provisions analogous to our system of government, they need not prove determinative here. In the absence of express constitutional prohibition, I am of the opinion that interim committees of the legislature may be lawfully created by single house resolution.

SEAWELL, Justice.

I concur in the dissent.

The law as announced in the earlier decisions of other jurisdictions, in the absence of constitutional restrictions, is founded on a policy which appeared to be most expedient for the promotion of public welfare as conditions existed in those jurisdictions at the time said decisions were written. The development of the agricultural, industrial and commercial life of this state has been so vast and varied that, in the opinion of the legislature, it has become necessary to adopt expedient methods for the investigation and study of questions which have never before confronted the legislative body. Proper study and investigation of momentous subjects cannot be given to important matters which affect the welfare of the state and which are being pressed for solution without the adoption of the interim system. There being in our Constitution no inhibition against the continuance of the system which has existed during past years, I am of the view that we should not adopt the law as written in the decisions of other jurisdictions at distant periods of time, under wholly different conditions, and with no thought of the complex problems which are hourly calling for study and investigation by the ablest in statesmanship and the science of government. Being free so far as constitutional restraints are concerned, the legislature should be free to adopt its own policy in the transaction of its business.

13 Cal.2d 513

SWING et al. v. RILEY, State Controller.

S. F. 16035.

Supreme Court of California.

May 6, 1939.

1. States ⇐34

The legal basis of the rule holding that a single house resolution is ineffective to authorize a committee to function after adjournment is that on adjournment sine die all legislative power of both houses terminates, including the auxiliary power of functioning through legislative committees.

2. States ⇐34

A senate interim committee, when it reports back to the senate, is not reporting back to a continuing body, since 50 per cent. of the senators are elected anew each two years, so that there is not present a majority of the membership of the body originally appointing the committee. Const. art. 4, § 8.

3. States ⇐34

A concurrent resolution of the Legislature, passed at a special session, and purporting to validate, affirm, and authorize the prior action of the senate in creating an interim committee to sit after adjournment sine die, was ineffective for that purpose. Const. art. 4, § 8.

4. Statutes ⇐5

The section of the Constitution providing that the Legislature at special session shall have no power to legislate on any subjects other than those specified in the proclamation constitutes a prohibition against exercising legislative powers at a special session except in considering matters included within the call. Const. art. 5, § 9.

5. States ⇐34

The Legislature has no power by concurrent resolution to create a committee with power to sit after adjournment sine die.

6. States ⇐34

If an interim committee appointed by the Legislature is to function lawfully after adjournment of the Legislature, it can be created only by statute.

7. States ⇐34

An interim committee, appointed by the senate to act after adjournment, was not validly created merely because statutes providing for expenses of interim committees were passed prior to creation of the committee, where one statute was passed two years before creation of the committee and the other statute two months before creation of the committee. St.1935, p. 1176, § 1, item 3; St.1937, p. 91.

LANGDON and SEAWELL, JJ., dissenting.

In Bank.

Mandamus proceeding by Ralph E. Swing, as Chairman of the Senate Interim Committee Appointed to Study Methods and Means for Promoting the Temperate Use of Alcoholic Beverages, and another, against Harry B. Riley, as Controller of the State of California, to compel him to issue warrants for claims of the Committee.

Writ denied.

For prior opinion, see 83 P.2d 938.

Fred B. Wood, of San Francisco, George W. Wakefield, of Los Angeles, Arthur McHenry, of Sacramento, and Norris J. Burke, of San Francisco, for petitioners.

Ralph E. Swing, of San Bernardino, W. P. Rich, of Marysville, T. H. DeLap, of Richmond, Thomas F. Keating, of San Rafael, A. L. Pierovich, of Jackson, Irwin T. Quinn, of Eureka, Bradford S. Crittenden, of Stockton, Andrew R. Schottky, of Merced, Earl D. Desmond, of Sacramento, John H. O'Donnell, of Woodland, Charles W. Lyon, of Los Angeles, Walter McGovern, of San Francisco, Paul Peek, of Long Beach, Edgar C. Levey, of San Francisco, Ben Rosenthal, of Los Angeles, Gerald C. Kepple, of Whittier, and Edward H. Law, amici curiæ on behalf of petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

George W. Rochester, of Los Angeles (Harry P. Bowman, of Los Angeles, of counsel), and William B. Beirne, of Los Angeles, amici curiæ.

PER CURIAM.

This proceeding is companion to the matter of the Petition of the Special Interim Committee, etc., L. A. No. 16753, 83 P.2d 932. A rehearing was granted herein for the reason set forth in the opinion filed this day, 90 P.2d 304, in that matter. For the reasons stated therein the opinion of this court on the former hearing is adopted as the opinion of the court on rehearing, as follows:

"The present petition * * * involves several additional points not involved in L. A. No. 16753.

"The state senate at its fifty-second session, just prior to the adjournment of that session sine die on May 28, 1937, duly passed a single house resolution reciting the need for regulation of the manufacture, sale and disposition of alcoholic beverages 'in the interest of the moral, social and economic welfare of the people and in the interest of the temperate use of such beverages', and the helpfulness of a 'study of the problems relating to such matters * * * in the drafting of legislation and rules and regulations designed to accomplish such purposes', and creating a committee of five of its members with power and authority 'to make a full, complete study and investigation of all matters relating to the manufacture, sale and disposition of alcoholic beverages within this state. * * * in relation to the issuance of licenses and the enforcement of laws, rules and regulations concerning such business'. The committee was given full power to subpoena witnesses and to compel the giving of testimony. It was given leave 'to sit during the sessions of the senate, and/or during recess and at such times and at such place or places as the committee may determine' and was directed to 'report to the Senate at the next regular session of the Legislature its findings and recommendations * * *.' The resolution also provided that 'the sum of $2000 * * * is hereby set aside and made available for the purpose of defraying the expenses of such committee and the members thereof, other than that required by law to be paid from the legislative help fund. Said sum to be paid from the contingent fund of the Senate and the State Controller is hereby authorized and directed to draw his warrants in favor of the person or persons entitled thereto for such expenditures as may be certified to him from time to time by the chairman of said committee, and the State Treasurer is hereby authorized and directed to pay the same.'

"Thereafter the committee was duly selected and petitioner Swing was appointed chairman thereof. Thereafter the committee proceeded to meet for the purpose of performing the functions delegated to it.

"In January of 1938, the governor, pursuant to the powers conferred upon him by article V, section 9, of the Constitution, called a special session of the legislature. It is conceded that in the proclamation calling the special session there was no mention of legislative committees generally, nor of the committee here involved specifically. The proclamation was likewise silent as to the subject-matter delegated to this committee for study and report. At this special session the legislature by concurrent resolution passed assembly concurrent resolution 18 (chap. 27 of Resolutions, Extra Session, 1938, p. 172). This resolution should be quoted in full. It provides:

"'Whereas, Several interim committees have been established by single house and concurrent resolutions; and

"'Whereas, It is desired to supplement and affirm such single house and concurrent resolutions; now, therefore, be it

"'*Resolved by the Assembly of the State of California, the Senate thereof concurring,* That all Assembly and Senate single house and concurrent resolutions heretofore passed at the regular session of the Fifty-second Legislature and heretofore and hereafter passed at the first extra session of the Fifty-second Legislature, are hereby validated, affirmed and authorized, and the committees established and to be established thereunder are hereby authorized to exercise all the powers and perform all the duties vested in them and imposed upon them by the particular resolution under which the committee or committees are established.'

"Prior to the adoption of this concurrent resolution certain incidental expenses were incurred by the committee. Other expenses were incurred after the adoption of the concurrent resolution. The chairman of the committee duly certified these expenditures to the respondent controller. The controller refused to draw warrants for the claims on the grounds that 'interim committees cannot be established by single house resolution with power to function after the adjournment of the Legislature', and that the concurrent resolution was also ineffectual as a valid authorization for the creation of the committee. Petitioners thereupon brought this proceeding in mandamus to compel the issuance of the warrants.

"In so far as the petition involves the question as to whether either house of the legislature by single house resolution may lawfully create a fact finding interim-committee with authority to function after adjournment of the legislature sine die, that

question need not be discussed in this opinion. The identical question was answered in the negative in L. A. No. 16753, 83 P.2d 932, this day decided. For the reasons therein stated, and upon the authority of that case, it must be held that the senate resolution of May 28, 1937, was legally insufficient to authorize the committee to incur the expenditures here involved.

"Petitioners contend that, even if it be held that the assembly cannot lawfully create committees with authority to sit after adjournment, for the reason that the assembly is not a continuing body because all of its members are elected each two years, such rule has no application to the senate where only one-half of the membership is elected every two years. It is contended that for this reason the senate must be held to be a continuing body, with power to appoint its committees with authority to sit after adjournment. In this connection petitioners rely on McGrain v. Daugherty, 273 U.S. 135 [47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1].

[1, 2] "To this contention there are two answers. In the first place the legal basis of the rule holding that a single house resolution is ineffectual to authorize a committee to function after adjournment is that upon adjournment sine die all legislative power of both houses terminates, including the auxiliary power of functioning through legislative committees. In the second place, even if we were inclined to follow the holding of the Daugherty case, supra, the rule of that case would not be applicable here. As was pointed out in the assembly committee case, L. A. No. 16753, 83 P.2d 932, in the Daugherty case the United States Supreme Court held that senate interim committees could lawfully sit after adjournment for the reason that the senate is a continuing body, two-thirds of its membership at each new session of congress consisting of holdover senators. The United States Supreme Court intimated that this rule probably did not apply to the house of representatives whose entire membership is elected anew each two years. Apparently the theory of the Daugherty case is that a senate interim committee when it reports back to the senate will be reporting back to a body whose membership consists of at least two-thirds of the members that originally appointed the committee. The California senate cannot be held to be a continuing body under any such theory. Article IV, section 8, of the Constitution provides that 'A majority of each House shall constitute a quorum to do business * * *.' As already pointed out fifty per cent of the senators are elected anew each two years. It follows that since fifty per cent of the senate membership at each regular session is newly elected, there is not present a "majority" of the membership of the body that originally appointed the committee.

[3] "Petitioners next rely on the concurrent resolution passed at the special session, purporting to validate, affirm and authorize the prior action of the senate in creating the committee here involved. This resolution, in our opinion, was ineffectual for the purpose for which it was passed.

[4] "If it be assumed that by concurrent resolution the legislature could validly create an interim fact finding committee with power to sit after adjournment sine die (and could therefore validate by subsequent resolution a committee improperly appointed in the first instance) we have grave doubts that such a concurrent resolution could be constitutionally passed at a special session when the subject-matter contained in the resolution is not mentioned in the governor's proclamation calling the special session, Article V, section 9, of the Constitution provides that the legislature at special session 'shall have no power to legislate on any subjects other than those specified in the proclamation * * *'. This constitutes a prohibition against exercising legislative powers at a special session except in considering matters included within the call. The work of legislative committees is subsidiary and auxiliary to the legislative functions of each house. If the legislature cannot directly legislate on matters not included within the call, then it cannot exercise dependent or subsidiary powers derived solely from the direct power to legislate. This problem was exhaustively considered and discussed in Ex parte Wolters, 64 Tex.Cr.R. 238, 144 S.W. 531, 535, Ann.Cas.1916B, 1071, where it was held that the legislative power to create legislative committees by single house or concurrent resolution at a special session was necessarily limited to the creation of committees to consider legislation within the governor's call. (See, also, Gilbreath v. Willett, 148 Tenn. 92, 251 S.W. 910, 28 A.L.R. 1147.) In People v. Curry, 130 Cal. 82, 62 P. 516, it was held that the legislature in special session by concurrent res-

olution had no power to propose a constitutional amendment on a subject not included within the governor's call. The court pointed out that (130 Cal. page 89, 62 P. page 517): 'It may be admitted that proposing constitutional amendments is not legislation * * * but it is nevertheless performing a legislative function.' The same reasoning is applicable to the appointment of legislative committees.

[5, 6] "Another and complete answer to this contention is that we are of the opinion that under our Constitution the legislature has no power by concurrent resolution to create a committee with power to sit after adjournment sine die. As far as the question of power is concerned there is no difference in this regard between a single house and a concurrent resolution. It is true that on this subject there is a conflict of authority. The cases both ways are noted in the assembly committee case, L. A. No. 16753, 83 P.2d 932. As was pointed out in the assembly committee opinion, several of the cases holding that by a concurrent resolution the legislature may validly create an interim committee, are in fact not authority for that holding, for the reason that in the particular jurisdiction there is no legal distinction between a concurrent resolution and a statute, both requiring the governor's signature. The reasoning of the several cases holding that a concurrent resolution is ineffectual to validly create such a committee seems to us to be unanswerable. If such a committee cannot lawfully be created by single house resolution (and on this point all state courts agree) it cannot be created by concurrent resolution. Every argument fully set forth in the assembly committee case, L. A. No. 16753, 83 P.2d 932 is equally applicable here. Legislative powers of the legislature cease upon adjournment sine die. Such powers cannot be continued after adjournment by either single house or concurrent resolution. The power to investigate by committees is subsidiary to the legislative power. When the main power ceases, the auxiliary power dies with it. If such committee or commission is to function lawfully after adjournment it can be created only by statute.

"Petitioners' last argument is that if a statute is required to validly create such a committee, such a statute was in fact passed in reference to the committee here involved. In this connection petitioners rely on two statutes. The first of these is the 1935 Budget Act (Stats.1935, chap. 341, p. 1176) which provides in part as follows:

"'Item 3—For contingent expenses of Senate for fifty-second session and interim committees thereof, twenty thousand dollars.'

"The second statute relied upon is the Appropriation Act of 1937 (Stats.1937, chap. 23, p. 91) which provides in part as follows:

"'Section 1. The sum of twenty thousand dollars is hereby appropriated out of any money in the State treasury, not otherwise appropriated, for contingent expenses of the Senate, for fifty-second session and interim committees thereof to be expended for such purposes and in such manner as the Senate shall by resolution direct. This appropriation shall be available without regard to fiscal years.

"'Sec. 2. Inasmuch as this act provides an appropriation for the usual current expenses of the State, it is hereby declared an urgency measure and shall, under the provisions of Article IV, section 2, of the Constitution, take effect immediately.'

"In their opening brief petitioners contend that these statutes constitute 'statutory recognition and validation of the instant committee'. (Pet. Op. Brief, p. 29.) In their closing brief petitioners concede that the statutes cannot be considered 'technically' as validating statutes, because they were passed before the committee was created. (Pet. Reply Brief, p. 74.)

[7] "It is quite clear that these statutes in no way constitute a statutory recognition of interim committees generally, or of the committee here involved specifically. The provisions for expenses contained in these statutes obviously contemplated the creation of valid and legal interim committees. It cannot logically be argued that in passing these statutes (one over two years, the other over two months, *before* the committee here involved was created) the legislature had in mind that interim committees would thereafter be unlawfully created by resolution, and that this was an attempt to 'validate' or 'authorize' them in advance. The statutes are of no legal significance in this case.

"The other points involved have all been discussed in the assembly committee case, L. A. No. 16753, 83 P.2d 932, and need not be discussed in this opinion."

For the foregoing reasons the alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ is denied.

LANGDON, Justice (dissenting).

I dissent.

My views and conclusion on the issues involved herein are set forth in a dissenting opinion, this day filed, in the proceeding entitled In re Petition of The Special Assembly Interim Committee, etc., 90 P.2d 304.

SEAWELL, Justice (dissenting).

I dissent for the reasons expressed by me in the companion case of In re Petition of The Special Assembly Interim Committee, etc., 90 P.2d 304, this day filed.



32 Cal.App.2d 574

BOYD v. LANCASTER.

Civ. 2264.

District Court of Appeal, Fourth District, California.

May 8, 1939.

1. Abatement and revival ⇐73

The personal representatives of a deceased party to an action are the persons to be substituted in an action which is continued following death of the party, and upon their appointment, and, even before their substitution, all rights and interests in the litigation vest in them and they become the real "parties in interest." Code Civ.Proc. § 385.

[Ed. Note.—For other definitions of "Party in Interest," see Words & Phrases.]

2. Courts ⇐114

Function of a "nunc pro tunc order" is to supply deficiencies in the record of orders or judgments already actually made or rendered so as to make the record conform to the truth.

[Ed. Note.—For other definitions of "Nunc Pro Tunc," see Words & Phrases.]

3. Abatement and revival ⇐77

Where cause has been tried and finally submitted for judgment, rights of parties are to be determined as they existed at time of such submission, and upon death of a party whether nunc pro tunc judgment can be entered depends upon whether the action at time of death of the party was ready for rendition of final judgment.

4. Appeal and error ⇐80(1)

Where several issues of law and of fact are presented for consideration of trial court in same proceeding, there can be no judgment from which an appeal can be taken so long as it remains necessary for court to determine some issue of law or of fact.

5. Judgment ⇐12

Court should cease to exercise jurisdiction over a party at his death until an authorized representative has been appointed and substituted, and judgment rendered for or against a person after his death is reversible if the fact and time of his death appear in the record.

6. Judgment ⇐273(5)

In suit to cancel deed, where court gave interlocutory decree for plaintiff upon conditions so that final adjudication depended upon further determination of whether interlocutory decree had been substantially complied with, and plaintiff died while final adjudication was thus undetermined, "nunc pro tunc" judgment entered by court with knowledge of plaintiff's death and before personal representative was substituted was ineffectual, since until representative was substituted there was no plaintiff before court and court therefore had no jurisdiction to enter such judgment. Code Civ.Proc. § 385.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceedings to cancel a deed by C. M. Grove, guardian ad litem of Henry O. Boyd, against J. M. Lancaster, wherein defendant cross-complained. Henry O. Boyd died and Joseph L. Boyd, as administrator with the will annexed, was substituted as plaintiff. From an adverse judgment, the substituted plaintiff appeals.

Reversed and cause remanded.

Edgar T. Fee, of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles, and J. O. Reavis, of Bakersfield, for respondent.

GRIFFIN, Justice.

On *August 6, 1935,* the trial court made an order appointing C. M. Grove guardian ad litem of Henry O. Boyd, an alleged incompetent person, for the purpose of commencing proceedings in his behalf to cancel a deed executed by the incompetent. On the same day the action was instituted, defendant and respondent appeared by answer and cross-complaint. After trial, the court on *June 29, 1937,* signed findings of fact and conclusions of law conditionally ordering respondent to reconvey the property upon the payment to respondent Lancaster of certain amounts therein specified and decreed that if the sums were not paid within 60 days from and after *July 1, 1937,* then the title to the property would be quieted in respondent, and appellant would take nothing. On *July 26, 1937,* the court signed an order modifying the interlocutory decree and granted an extension of time to *August 15, 1937,* in which to comply with the terms of that decree and provided an additional condition in reference to the deposit of the sum of $5,300 with the clerk of the court. On *August 16, 1937,* upon an ex parte application, there was entered in the minutes an order granting a stay of proceedings to comply with the order theretofore made, *to and including August 30, 1937.*

Henry O. Boyd died *on the 30th or 31st day of August, 1937.* The record is not clear as to the date of his death. The affidavit of counsel for appellant fixes the date as *August 30, 1937.* Counsel for respondent, in his notice of motion, suggested the date as *September 1, 1937.* The court in its judgment recites *August 31, 1937,* as the date of death. No proceedings to substitute an administrator as party plaintiff was ordered until *November 15, 1937.* Letters of administration with the will annexed were issued to Joseph L. Boyd *November 10, 1937.* After the death of Henry O. Boyd, and prior to the substitution of the administrator as party plaintiff, the fact of Boyd's death was called to the attention of the trial court. A motion was thereafter made by respondent for an order signing and filing a final decree nunc pro tunc as of the day preceding the death of Henry O. Boyd, and the trial court found by minute entry that "the plaintiff (Henry O. Boyd) having failed to comply with the interlocutory judgment of *June 29, 1937,* and the orders of *July 26, 1937,* and *August 16, 1937,* it is ordered that title to the property be quieted in the defendant. It further appearing that the plaintiff has died since the signing of the last order and after the expiration of the time fixed, it is ordered that said judgment be entered nunc pro tunc as of *August 17, 1937.*"

Thereafter, and upon the same day, *September, 22, 1937,* a signed judgment was entered and ordered recorded nunc pro tunc as of *August 31, 1937,* providing that title be quieted in respondent for the reason that no deposit had been made as required by the order of the court. Soon thereafter, on *October 27, 1937,* the court signed and filed an order amending the final judgment for the purpose of correcting a clerical error in the description of the property set forth in the final judgment made on the *22nd* day of *September, 1937,* and ordered that it be entered nunc pro tunc as of the date of the entry of the final decree. Appellant appeals from the judgment entered on the *21st* day of *September, 1937.*

Several questions are raised on this appeal. If the first question presented is to be answered in the affirmative, i. e., that the judgment is void or ineffectual in that it was disclosed that Henry O. Boyd, at the time of its entry, was deceased and that there had been no substitution of any duly qualified and authorized representative prior to the making thereof, then it becomes unnecessary to consider the other points raised.

In Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162, this court had before it a similar question. We there held (quoting from the syllabus) that: "Where such a judgment, and the findings on which it is based, are actually entered before there is any substitution of the representative of the deceased husband's estate, there is, as to the decedent's interest, no plaintiff before the court, and such defect goes to the jurisdiction of the court to file and enter such findings and judgment". See, also, De Leonis v. Walsh, 140 Cal. 175, 73 P. 813, 814, wherein our Supreme Court said:

"It has been held that a court may direct that its findings of fact and conclusions of law thereon be filed as of a date anterior to the death of a party de-

fendant against whom judgment is thereby ordered. * * *

"If in this case the findings had been properly filed on July 11, 1901, the authorities would compel us to hold that judgment was actually rendered on that day, and that the appeal was not taken in time to allow a review of the evidence. But that date also must be disregarded, we are satisfied, for the reason that at that time *there had been no substitution of any representative of the deceased.* (Italics ours.) The defendant having died, the court could, on motion, allow the action to be continued against his representative * *, but it could regularly take no action in the case until there was a substitution of some one to defend the action, *especially as the death of the defendant had been suggested to it.* (Italics ours.) The rendition of judgment nunc pro tunc in Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 478, 41 P. 328, was made after such substitution and on notice. Until such substitution was had, no judgment could legally be rendered, and, so far as the time of rendition of judgment is concerned, the case stands precisely as if no findings were ever filed."

Appellant cites Saddler v. California Bank, 75 Cal.App. 488, 242 P. 1085, which holds a contrary rule. Estate of Pillsbury, 175 Cal. 454, 458, 166 P. 11, 3 A.L.R. 1396 is cited as authority for the contrary rule. The facts in Estate of Pillsbury are not similar and do not support the holding in the Saddler case. In Estate of Pillsbury, the court entered a judgment not knowing of the death of the decedent. When apprised of such fact the court set aside the judgment and several months thereafter and *after the appointment of an administrator* and *after the administrator,* through his attorney, *appeared in court and vigorously opposed respondent's motion* to enter the decree nunc pro tunc, another judgment nunc pro tunc was entered. (The fact that the administrator was appointed and prior to the signing of the subsequent decree he appeared and resisted the motion for a judgment nunc pro tunc, was obtained from the record in the cited case.) This is clearly the correct procedure under the cases heretofore cited. (See, also, Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 478, 41 P. 328; sec. 385, CodeCiv.Proc.; Conlin v. Blanchard, 219 Cal. 632, 28 P.2d 12; Copp v. Rives, 62 Cal.App. 776, 781, 217 P. 813; Estate of Thomas S. Page, 50 Cal. 40; Phelan v. Tyler, 64 Cal. 80, 28 P. 114; Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335; 1 Cal.Jur., sec. 34, p. 61.)

In Maxon v. Avery, Cal.App., 89 P.2d 684, which is a case factually similar and just decided by this court, we held that the authority of the guardian ended with the death of the ward and that a judgment entered after the death of the real party in interest was void since no substitution of parties had been made, and held that the order entering the judgment nunc pro tunc was ineffectual.

[1–3] The personal representatives of a deceased, i. e., his executors or administrators, are the persons to be substituted in an action which is continued following the death of the party, by virtue of section 385 of the Code of Civil Procedure. Upon their appointment and even before their substitution, all rights and interest in litigation vest in them, and they become the real parties in interest, and save for a possible exception in the case of death pending an appeal, the rule seems to be that the personal representative of the deceased must be brought into the suit as a party before he can be affected by any judgment. Judson v. Love, 35 Cal. 463, 464; Abadie v. Lobero, 36 Cal. 390; 1 Cal. Jur., sec. 34, p. 61; 4 Am.St.Rep. 828; Elliott v. Paterson, 65 Cal. 109, 3 P. 493; 126 Am.St.Rep. 622, 637. It is the important function of a nunc pro tunc order to supply deficiencies in the record of orders or judgments already actually made or rendered so as to make the record conform to the truth. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission. Where the suitor is not at fault, the determining consideration is whether or not the action at the death of the party *was ready for the rendition of final judgment.* Estate of Pillsbury, supra, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396; 14 Cal.Jur., sec. 40, p. 931; Freeman on Judgments, sec. 59. This question has been thoroughly discussed in the late case of Leavitt v. Gibson, 3 Cal.2d 90, 43 P.2d 1091, and is decisive of the point here raised. The court there held (quoting from the syllabus) that "the court had power *after substitution of the executrices* (Italics ours) * * * to order judgment entered nunc pro tunc as of a date prior to the death of defendant".

[4, 5] Sometimes several issues of law and of fact are presented for the consideration of the court in the same suit or proceeding. In such case there can be no judgment from which an appeal can be taken when it remains necessary for the court to determine some issue of law or of fact. In the instant case, on August 27, 1933, the Richfield Oil Company deposited $5,300 with the Title Insurance & Trust Company conditionally, in an effort to comply with the terms of the decree. Whether there had been a substantial compliance with the order remained undetermined at the time of decedent's death. The rights of the parties, therefore, remained undetermined prior to the death of Mr. Boyd. The court ought to cease to exercise its jurisdiction over a party at his death until an authorized representative has been appointed and substituted. Todhunter v. Klemmer, 134 Cal. 60, 63, 66 P. 75; Phelan v. Tyler, supra, 64 Cal. 80 at page 82, 28 P. 114. A judgment rendered for or against a person after his death is reversible if the fact and time of his death appear in the record. 126 Am.St.Rep. 637.

The case of Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363, involved an interlocutory decree given by the court after trial of the issues and *not one entered by stipulation of the parties.* By that interlocutory decree it was adjudged that the plaintiff's title to certain property be quieted against the claims of the defendant unless within thirty days after entry of judgment the company pay to a trustee for the plaintiff $15,500. It was provided that upon payment of said sum by the company to the trustee within said period plaintiff should execute a deed to the company and deliver a certificate of title, and if the company did not pay within the thirty-day period, then title should be quieted against defendant by final decree. No payment was made, and after the time had expired to make a deposit, plaintiff moved for final judgment. The motion was denied on a showing that defendant would be able to comply within a short period of time. No compliance was had and several similar applications were made for final judgment and were by the court continued or denied. Plaintiff sought a writ of mandate to compel the court to enter a final decree. The appellate court held that from the language of the interlocutory decree the trial court did not intend that the interlocutory judgment should of itself operate to complete the record of the action and that therefore it was subject to amendment by the trial court in the exercise of its discretion. There are many other authorities cited to the same effect. Gerrish v. Black, 109 Mass. 474; 21 Cor.Jur., 703; 10 R.C.L., sec. 350, p. 562; Security-First National Bank of Los Angeles v. Superior Court, 132 Cal.App. 683, 23 P.2d 1055; United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999. A different rule seems to prevail where the interlocutory decree is entered by *stipulation.* Perry v. West Coast Bond, etc., Co., 136 Cal.App. 557, 29 P.2d 279.

"When further directions are reserved by a decree or order, it becomes necessary to set the cause down for hearing for such further directions." Los Angeles Auto Tractor v. Superior Court, supra [94 Cal.App. 433, 271 P. 366]; Fletcher's Equity Pleading & Practice, par. 740.

From the language of the instant decree it seems clear that the court did not intend that the "interlocutory judgment" should of itself operate to complete the record of the action, but that the court intended that the ultimate remedy as between two stated alternative conditions should depend upon the actions of the respective parties in relation to the execution of the decree, and that in accordance with those subsequent transactions a final judgment should be granted. The terms of the final judgment, therefore, would depend upon proof of the facts of such subsequent transactions.

[6] We are unable, in view of the cited decisions, to avoid the conclusion that the trial court erred in undertaking to sign and enter its judgment before making an order of substitution of the administrator with the will annexed of the estate of Henry O. Boyd. In so far as the interest of the decedent was concerned, there was, at the date when the judgment was actually filed and entered, no plaintiff before the court, and an order made entering such a judgment nunc pro tunc at that time was ineffectual. The defect would appear to us to go to the jurisdiction to file and enter such an order.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: BARNARD, P. J.; MARKS, J.

32 Cal.App.2d 582

HEPNER v. HEPNER et al.

Civ. 6060.

District Court of Appeal, Third District, California.

May 8, 1939.

1. Fraudulent conveyances ⇐299(9)

In action to set aside husband's transfer of stock in trade to wife for fraud on husband's creditor, wife's uncontradicted testimony that she continued to work in spouses' business and that running thereof was not changed after transfer showed that transfer was void as not accompanied by change of possession. Civ.Code, § 3440.

2. Fraudulent conveyances ⇐132(1)

Good faith and adequate consideration for transfer of personalty are immaterial and constitute no defense to action to set aside transfer for fraud on transferor's creditor, in absence of change in possession of personalty. Civ.Code, § 3440.

3. Limitation of actions ⇐127(12)

An action to set aside transfer of stock in trade for fraud on transferor's creditor was not barred by three years' statute of limitations, though complaint was amended to bring case under Bulk Sales' Law over three years after transfer, where ground of fraud in making transfer without change in possession was alleged in original complaint filed within statutory time. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 3440.

Appeal from Superior Court, Los Angeles County; Warren V. Tyron, Judge.

Action by Frances Hepner against Rita Hepner, as executrix of the last will and testament of William Hepner, deceased, to set aside a transfer of stock in trade as fraudulent. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Louis Feinstein, of Los Angeles, for appellant.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought by a creditor to set aside a transfer of stock in trade, upon the ground of fraud. Findings upon all issues were made in favor of defendants by the trial court, and judgment was rendered for defendants.

Defendant, Rita Hepner, is executrix of the estate of William Hepner, deceased. Plaintiff filed two creditor's claims against said estate, one for $6,380, and the other for $2,640. The first was based upon a promissory note executed by decedent, and the second upon alimony due. The claims were allowed and approved. This action was then brought to set aside a conveyance of a stock in trade which was owned by decedent.

[1] William Hepner and his wife, Rita, were married in 1916. They lived and worked together until Hepner died in February, 1932. He was engaged in the manufacture and sale of wigs, cosmetics and beauty specialties, with stores in New York, Washington, D. C., and Los Angeles. This controversy arose over the transfer of stock in a store conducted on Sunset boulevard, Los Angeles. For a number of years Hepner's wife (defendant here), had worked with him in the store, and she continued to do so until his death. On October 28, 1929, Hepner executed and delivered to plaintiff the promissory note which is the basis of one of the claims filed against the estate. This note was for $6,380, and should be construed as payable on demand. Prior to May 1, 1930, Hepner was also indebted to plaintiff for accrued alimony in the sum of $2,640, (the basis of the second claim filed against the estate). On the last mentioned date Hepner sold and transferred to his wife the stock of goods and fixtures in said store. The trial court found that there was consideration for this transfer, and this finding has evidentiary support. After the transfer the wife continued to work in the business as she had done for some years prior thereto. There was absolutely no outward indication of any change in the management and possession of the store, as the following testimony of defendant clearly indicates:

"Q. After this business was transferred to you in May, 1930, did you continue to work in the business? A. I did.

"Q. and was the setup of the business changed in any way as to the running of the business? A. No."

One of the vital issues in the case was that of change of possession when the transfer was made. The trial court found as follows: "That it is true that no notice of intention to transfer the said business

and assets by William Hepner to his wife, Rita Hepner, was recorded in the office of the County Recorder of Los Angeles County; and in this connection the court further finds that when said transfer was made, the said business and assets, and the possession thereof, were immediately delivered to said Rita Hepner, by said William Hepner, and the said Rita Hepner thereupon actually took possession of the same, and thereafter actually and continuously held possession of the same."

It is the contention of appellant that the evidence is insufficient to sustain the finding, and that the transfer is therefore void under the provisions of section 3440 of the Civil Code, which provides as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

The contention must be upheld. The general rules designed to test the sufficiency of the evidence in a case of this character are laid down in 12 California Jurisprudence p. 996, as follows: "The delivery must be immediate, actual, visible, apparent and not constructive; possession of the transferee must be continued, and so open and unequivocal as to carry with it the usual marks and indications of ownership. The change of possession must be an open, visible change, manifested by such outward signs as render it evident that the transferor's possession has wholly ceased. No writings pertaining to the transfer, regardless of number or character, can be substituted for actual and continued change of possession. So the indorsement of a stock certificate is not in itself sufficient. Any change of possession must at least sufficiently change the apparent custody of the property so as to put one dealing with the vendor with respect to it upon inquiry, or which might suggest a change in the ownership."

The case of Ross v. Thomas, 24 Cal.App. 734, 142 P. 102, 103, is directly in point. It is there said: "There is nothing in the record which in the slightest degree tends to show that anything was done by either Stager or his wife to acquaint the public with the fact that he had transferred the property to her. On the contrary, she testified that after the execution of the bill of sale each, in so far as concerned the outward apparent relation to the property, occupied the same relative position thereto as they did prior to the transfer. As between themselves, the prior relation, wherein Stager was owner and his wife employee, was reversed, but nothing was done to disclose such change; each continued to perform the same duties and apparently occupied the same relation to the business. There was no actual change of possession, by reason of which fact Sarah A. Stager, as against the attaching creditor of Stager, acquired no interest in, or title to, the property, the purported transfer thereof being void. The finding that the transfer to her was not fraudulent and that she was the owner and entitled to possession of the property, is not supported by the evidence."

We are of the opinion that the undisputed evidence here shows that the transfer was void under the provisions of the code mentioned above.

[2] It is contended by respondents that there was a consideration for the transfer; hence, it is valid. The question of good faith and adequate consideration is wholly immaterial, and is no defense where the case comes under the provisions of the code section mentioned. 12 Cal.Jur. p. 995.

At the trial the complaint was amended to bring the case under the Bulk Sales Law (sec. 3440, Civ.Code), by alleging that no notice of the sale and transfer was recorded at least seven days prior to such sale and transfer. The court found that no such notice had been recorded, but held that plaintiff was barred by her laches from the advantage of this portion of the section. We do not deem it necessary to discuss this cause of action, as the case must be reversed upon other grounds.

[3] It is also contended that the action is barred by the three-year limitation relating to fraud. Subdivision 4, § 338, Code Civ.Proc. The complaint was filed within three years from the transfer. The amend-

ment relating to the Bulk Sales Law was made at the trial after three years had expired. If this opinion were predicated upon the latter law, there might be some force to the contention. But the ground of fraud which we are considering was contained in the original complaint which was filed within the statutory time. The contention is without merit.

The record presents a clear case of fraudulent transfer under the provisions of section 3440 of the Civil Code, and a reading of the entire record convinces us that plaintiff was unlawfully deprived of her right to resort to the property transferred in satisfaction of a claim which the court found was justly due her.

The judgment is reversed, with directions to the trial court to enter findings and judgment in conformity herewith.

We concur: PULLEN, P. J.; MONCUR, Justice pro tem.



32 Cal.App.2d 606

In re BRUNEMAN'S ESTATE.

BRUNEMAN v. BRUNEMAN.

Civ. 12175.

District Court of Appeal, Second District, Division 2, California.

May 10, 1939.

1. Executors and administrators ⇐17(3)

Letters of administration were properly granted to decedent's widow, instead of his mother, though he had been granted divorce by court of another state, where neither spouse resided therein and wife was fraudulently induced to file appearance in divorce suit.

2. Divorce ⇐327

The courts of Nevada were without jurisdiction of divorce suit between residents of California.

3. Divorce ⇐327

A wife was powerless to confer jurisdiction of divorce suit between California residents on Nevada court by filing appearance therein.

4. Divorce ⇐327

Lack of jurisdiction of court of another state over divorce suit between California residents may be shown in California courts when attempt is made to establish rights based on divorce decree granted by former court, as in proceeding by divorced husband's mother and widow for appointment as administratrix of his estate.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

In the matter of the estate of George L. Bruneman, deceased. From an order granting letters of administration to Patricia O'Neil Bruneman, Mae Bruneman appeals.

Affirmed.

Caulfield & Keil, C. Harold Caulfield, Edward D. Keil, and Robert McMahon, all of San Francisco (William J. Dowling, Jr., of San Francisco, of counsel), for appellant.

Zagon & Aaron, of Los Angeles (Harold E. Aaron, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

George L. Bruneman died on October 25, 1937, leaving an estate consisting of cash in the sum of $20,000. His mother, Mae Bruneman, sought to be appointed administratrix of his estate but the trial court denied her petition and granted letters of administration to petitioner Patricia O'Neil, who claims to be the widow of deceased. The appeal is by Mae Bruneman from the order granting the letters of administration.

From the findings of the trial court, which are sustained by the evidence, it appears that respondent was married to decedent on April 8, 1930. A petition was filed by decedent in the state of Nevada on June 18, 1936, by which he sought a divorce from respondent and on the following day, June 19, 1936, the district court of Clark county, Nevada, rendered its decree purporting to dissolve the marriage between decedent and respondent. Both parties to the Nevada action were residents of Los Angeles, California, and neither at any time resided in the state of Nevada. Finding VIII is as follows: "That there was filed in said divorce action in said Clark county, state of Nevada, what purported to be an appearance on the part of Petitioner herein (respondent), the de-

fendant in said action, said appearance having been made by one Morris Wolfman, an attorney; that prior to the entry of said appearance by said Wolfman, he had received what purported to be a Power of Attorney authorizing his appearance in said action on behalf of Petitioner herein, the defendant therein. That said Power of Attorney was procured from Petitioner by decedent under the following circumstances: Decedent handed said paper to Petitioner and asked her to sign the same and told Petitioner that said document was one whereby decedent would be enabled to obtain a valid divorce from Petitioner; that Petitioner, at said time, was not able to read said document without use of eye glasses and that at said time she had no such eye glasses in her possession and therefore was unable to, and did not, read said document; that Petitioner believed that said document related to the commencement of an action for divorce in California and did not know nor was it divulged to her that the same purported to authorize any attorney to appear for her in any action filed in the State of Nevada; or any other place outside of the State of California; that had said Petitioner known the true nature of the contents of said document, she would not have signed said instrument; that said instrument purported to authorize said Wolfman to waive answer and notice of time and place of hearing of the trial of said Nevada divorce action and that had Petitioner known that such were the recitals in said document, she would not have executed the same; and that by her execution of said instrument, Petitioner was deprived of all opportunity of appearing personally in said Nevada action and of defending the charges set forth in the complaint of the decedent, the plaintiff therein; that said Wolfman was selected, employed and paid by decedent, all without the knowledge or consent of Petitioner; and that the first knowledge that Petitioner had of the granting of said decree was when she read the same in the newspapers following decedent's death. That said Power of Attorney was procured from Petitioner by the fraudulent representation, acts and conduct of and by the decedent."

[1-4] Appellant argues that respondent "appears not garbed in the raiment of erstwhile wifehood, but in the avaricious weeds of simulated widowship". In support of her contention she points out that respondent did not live with decedent after the granting of the Nevada decree and made no demands upon him for support; that she did not use the name "Bruneman" after June 19, 1936, but used the name Patricia O'Neil; when decedent was shot and confined to a hospital in July, 1937, respondent did not visit him; when he was killed on October 25, 1937, she did not claim his body, although she was at the time in Los Angeles, and made no arrangements for his burial. However much may be said in favor of the justice of appellant's argument we are compelled to uphold the ruling of the trial court in view of the legislation on the subject and the decisions of reviewing courts.

Since decedent was not a resident of the state of Nevada the courts of that state were without jurisdiction over the subject-matter to dissolve the marriage between the parties, who were residents of California. If it be considered that respondent attempted to confer jurisdiction on the Nevada court she was powerless to do so. In such an action the lack of jurisdiction of the court of another state over the subject-matter may be shown in the California courts when an attempt is made to establish rights based thereon. In re James' Estate, 99 Cal. 374, 33 P. 1122, 37 Am.St. Rep. 60; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; Kegley v. Kegley, 16 Cal.App.2d 216, 60 P.2d 482, 483; Anthony v. Tarpley, 45 Cal.App. 72, 187 P. 779. In both the Ryder and Kegley cases consent to the entry of foreign decrees had been filed by the defendants, but it was held they were not thereafter estopped from asserting the nullity of such decrees for lack of jurisdiction of the foreign courts. In Andrews v. Andrews, 188 U.S. 14, 16, 23 S.Ct. 237, 47 L.Ed. 366, husband and wife were residents of Massachusetts. The husband went to South Dakota where he obtained a divorce on simulated claims of residence and thereafter returned to Massachusetts. The wife appeared in the South Dakota court and consented to the decree. Thereafter Mr. Andrews remarried in the state of Massachusetts and upon his death a petition was filed for appointment as administratrix by the first wife, who relied upon the nullity of the South Dakota proceedings. Although the second wife also filed a petition, the Massachusetts court awarded the letters to the first wife. The case was taken to the Supreme Court of the United States under the claim that

the full faith and credit clause of the Constitution, U.S.C.A.Const. art. 4, § 1, had been violated, but the judgment of the Massachusetts court was upheld. In the case now before us the factual situation is stronger than in any of the cases above cited, for here the trial court found that respondent had been fraudulently induced to file an appearance in the Nevada court.

The order is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



32 Cal.App.2d 630

Ex parte SATTERTHWAITE.

Cr. 1675.

District Court of Appeal, Third District, California.

May 11, 1939.

1. Breach of the peace ⇐20

Affidavit, filed at time of making complaint seeking order requiring peace bond and before issuance of warrant, substantially complied with conditions laid down in statute providing for filing of information and taking of depositions before magistrate. Pen.Code, § 702.

2. Breach of the peace ⇐20

The procedure under which peace bond may be required is purely statutory, and the steps set forth in statute must be closely followed. Pen.Code, §§ 701–714.

3. Criminal law ⇐258(1)

The justice's court is a court of limited jurisdiction, and there is no presumption in favor of the validity of its judgment.

4. Breach of the peace ⇐20

Where judgment was rendered by justice of the peace ordering defendant to furnish a peace bond, but it did not appear that the defendant was confronted with his accuser or his witnesses, or that any testimony was taken or that evidence there propounded was reduced to writing, the statutory procedure had not been followed and defendant was entitled to be discharged. Pen.Code, §§ 701–714.

Habeas corpus proceeding by George E. Satterthwaite.

Writ granted and petitioner discharged.

E. L. Webber, of Napa, for petitioner.

Tom Hanrahan, Asst. Dist. Atty., of St. Helena, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

Petitioner, in lieu of a bond, is confined in the Napa county jail under an order of commitment to keep the peace. A complaint was filed charging petitioner with the crime of threats against life, and after a hearing before a justice of the peace an order committing petitioner was made. Alleging illegality in the procedure, this writ of habeas corpus is presented.

Section 701 of the Penal Code provides that an information charging that a person has threatened to commit an offense against the person or property of another may be laid before a magistrate.

The next section provides that upon the filing of such an information the magistrate must examine on oath the informer and any witnesses he may produce and must take their depositions in writing, subscribed by the party making the same. If it appears therefrom that there is just reason to fear the commission of the offense threatened by the person so informed against, the magistrate must issue a warrant to a peace officer, reciting the substance of the offense and commanding the officer forthwith to arrest the person informed of and to bring him before the magistrate. Section 703. Section 704 of the Penal Code then requires that if the charge is controverted the magistrate must take testimony, which must be reduced to writing and subscribed by the witnesses. If it appears from such testimony that there is no just reason to fear the commission of the offense alleged to have been threatened the person complained of must be discharged, otherwise he may be required to enter into an undertaking to keep the peace.

Section 714 of the Penal Code provides that surety to keep the peace or be of good behavior cannot be required except as prescribed in chapter III, part 2, title 1, which are the sections above summarized.

Examining the allegations of the writ which are not challenged by the return, we find that on January 14, 1939, a document referred to as a complaint was filed in the justice's court, in the following words:

"John S. Smith of Calistoga in the county of Napa, State of California, being first duly sworn, makes complaint and deposes and says, that in Calistoga Township, County of Napa, State of California, on the 14th day of January, 1939, and before the filing of this complaint, the crime of Threats against Life was committed by George Satterthwaite, who is now in the County of Napa, as follows, to-wit:

"That said George E. Satterthwaite at the time aforesaid, and at Lake County Highway, in the County of Napa and State aforesaid, did commit a misdemeanor, to-wit: By making threats against the life of John C. Smith in the presence of witnesses, all while in the County of Napa, State of California, Secs. 701 to 714 P.C., all of which is contrary to the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

On January 23, 1939, there was filed with the justice, an affidavit of Edwin C. Wilkins, as follows:

"Edwin C. Wilkins, being first duly sworn, deposes and says: On or about the 28th day of December, while on the premises of George E. Satterthwaite located on the Lake County Highway, Calistoga Township, County of Napa, State of California, the following took place. In the presence of Beverly Butler, Byron White and deponent the aforesaid George E. Satterthwaite said to Byron White as he was coming out of the house, 'I'll kill John Smith and Tom Martz, too'.

"Deponent further deposes and says that at the time the aforementioned threat was made he had one foot on the running board of the car and was leaning against the door. And further deponent saith not."

On January 24, 1939, the following affidavit was submitted by Byron H. White, and filed by the justice:

"Byron H. White, being first duly sworn, deposes and says: That on the 28th day of December, 1938, at approximately two (2) o'clock p. m., on the porch of the home of George Satterthwaite, said George Satterthwaite threatened to kill one John Smith, in the language following, to-wit: 'I'll kill that John Smith and Tom Martz'.

"That said home of said George Satterthwaite is in the Township of Calistoga, County of Napa, State of California. That present at said time and place were said Byron H. White, Ed. Wilkins, Beverly Butler and said George Satterthwaite. And further deponent saith not."

On January 24, 1939, a judgment was rendered by the justice of the peace, ordering George E. Satterthwaite to furnish a peace bond.

Petitioner, seeking this writ, contends that the court failed to follow the code prescribing the procedure in such cases.

The complaint upon which these proceedings were based was in the form of an affidavit setting forth the making of the threat by Satterthwaite against the life of Smith, and the time and place thereof.

[1] This affidavit, filed at the time of making the complaint and before the issuance of the warrant substantially complied with the conditions laid down in section 702. Thereupon the warrant issued and the accused arrested.

The hearing thereon was set for January 24, 1939. On that day there was received and filed an affidavit by Byron H. White. The day prior thereto an affidavit by Edwin C. Wilkins had been received and filed. We do not have any evidence of what transpired in the justice's court on January 24th. It does not appear that the defendant was confronted with his accuser or his witnesses, or that any testimony was taken as required by section 704, or that the evidence there propounded was reduced to writing.

We have the affidavit of the complaining witness, which was filed January 14th. The affidavit of Edwin C. Wilkins was filed January 23d, and on January 24th, the day of the trial, was filed the affidavit of Byron H. White. Nowhere does it appear these affiants were sworn as witnesses or that they confronted the accused, or that their testimony was reduced to writing.

[2, 3] The procedure under which this action was taken is purely statutory, and the steps therein set forth must be closely followed. Also the justice's court being a court of limited jurisdiction, there is no presumption in favor of the validity of its judgment.

[4] Therefore, in view of the showing before us, we are forced to the conclusion that the procedure prescribed in sections 701 to 714 of the Penal Code, was not followed. The writ is granted and the petitioner discharged.

We concur: TUTTLE, J.; THOMPSON, J.

32 Cal.App.2d 643

TRAVELERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 11077.

District Court of Appeal, First District, Division 1, California.

May 12, 1939.

1. Workmen's compensation ⇐1939

Finding of the Industrial Accident Commission that employee while kneeling and removing an axle from a truck sustained a knee injury was conclusive where supported by substantial evidence.

2. Workmen's compensation ⇐1279

As respects employee's right to compensation, prescriptive date runs from the date of the culmination of the injury, and not from the date the employee determines kind or system of treatment he desires. St.1917, p. 841, § 11; St.1937, p. 295, §§ 5404, 5405.

3. Workmen's compensation ⇐1279

Where employee sustained knee injury and waited five months before he visited a physician, who informed him he had loose cartilage in the knee and gave treatments, and employee six months later made claim for compensation, and within statutory period visited second physician who advised a different treatment, claim for compensation was barred by limitations, as against contention that claim was filed within six months of the occurrence of the injury, on theory that prescriptive period ran from second physical examination which resulted in recommendation of surgical intervention and disproved conservative method of treatment prescribed by original physician. St.1917, p. 841, § 11; St.1937, p. 295, §§ 5404, 5405.

Proceeding under the Workmen's Compensation Act by Walter Lindsay, employee, opposed by the Travelers Insurance Company, a corporation. From an order of the Industrial Accident Commission granting an award, the Travelers Insurance Company applied for writ of review to annul the order.

Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

WARD, Justice.

This is a petition for a writ of review of the findings and award rendered by the Industrial Accident Commission in favor of Walter Lindsay, one of the respondents herein.

On May 19, 1937, respondent Lindsay filed a petition with respondent commission for adjustment of a claim for injuries arising out of and in the course of his employment by Plat & Weber operating an automobile repair shop. The case was submitted before the commission but no decision was rendered until January 1939, at which time findings and award were made in which the commission held that the injury occurred on June 26, 1936. Petitioner herein, Travelers Insurance Company, requested a rehearing, contending that the findings did not support the award and that the claim was barred by the statute of limitations. Thereafter respondent commission granted the petition for rehearing and the case was resubmitted without further evidence.

[1] The finding that Lindsay "while kneeling and removing an axle from a truck * * * sustained an injury to his left knee" may not be disturbed. Competent and substantial evidence appears to support this finding. Tartar v. Industrial Accident Commission, 191 Cal. 703, 218 P. 39; Newton v. Industrial Accident Commission, 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279.

In the findings on rehearing, the commission found as follows: "The first and only treatment was a strapping of the knee done by Dr. S. B. Van Dalsem upon instruction of the employer on February 12, 1937. It is found that the injury herein, within the connotation of that word as used in the Labor Code, occurred on date of first examination, December 7, 1936, and that the injury arose out of and occurred in the course of the employment." This finding is incorrect. December 7, 1936 was the date of the first examination by Dr. Lionel D. Prince. However, an examination by Dr. S. B. Van Dalsem was admittedly made prior to that date, hence could not have been on February 12, 1937. The application of Lindsay for adjustment of claim designates November 15, 1936 as the date of "medical or surgical treatment" rendered by Dr. S. B. Van Dalsem. During oral argument it was conceded that this last date was correct. If this is true, the claim is barred by the

provisions of section 11 of the Workmen's Compensation, Insurance and Safety Act, St.1917, p. 841, and sections 5404 and 5405 of the Labor Code, St.1937, p. 295. Subsequent to the accident, wages were paid, but not as compensation nor in lieu thereof, nor was any agreement made sufficient to extend the statute.

Respondent commission contends that the facts of the case bring it within the rule of Continental Casualty Co. v. Industrial Accident Commission, 11 Cal.App. 2d 619, 54 P.2d 753, often referred to as the Glantz case. The claimant in that case, suffering from a wrist disability, had no idea that he had a broken bone in his wrist. He believed he had suffered a sprain and that physical recovery was near. Subsequently Glantz, in a second accident, received a cut to the bone on the same wrist. X-ray pictures disclosed a fracture. It was admitted the fracture was due to the first accident and that it required a surgical operation. In the Glantz case appears a review of decisions upon the subject of the limitation imposed by law in filing claims before the Industrial Accident Commission. "Injury", "latent injury", "compensable disability", "date of accident" and "date of injury" are subjects treated in an extended research. The conclusion is that the limitation runs from the time the exact nature of the injury is reasonably ascertained. In determining this question, the activity and conduct of the employee is worthy of great consideration.

In the instant case the accident occurred on June 26, 1936. Assuming that Lindsay could not diagnose his own physical condition or definitely determine the exact nature of the ailment, he knew that an injury had occurred from the "snap" in his knee, after which he was unable to straighten his leg. The injury was manifest and not latent. He testified: "It stayed that way five or six days and swelled up about twice its normal size and I used hot and cold compresses and I thought it was only a wrench and a couple of weeks later I happened to turn and the same thing occurred again." "Q. Did you have any trouble after that? A. Yes, in periods of two, three or four weeks it occurred again. Any particular movement did not seem to cause it; in taking a step or turning it occurred again but the operation of the catch each time would vary. Sometimes it would go back into place the same day and sometimes it would be a week." Lindsay waited five months before he visited a physician. At this examination he was told he had a "loose cartilage in the knee" and treatment was given by the method known as "strapping". More than six months later the claim was filed with the Industrial Accident Commission. Within the statutory period Lindsay visited the second physician and the diagnoses of the two physicians were the same. The second physician recommended a surgical operation by removal of the internal semilunar cartilage, which would necessitate piercing the tissue and penetrating to the bone.

[2, 3] Respondent commission seeks to justify the finding that the claim was filed within six months of the occurrence of the injury upon the theory that the second examination resulted in a recommendation of surgical intervention. The second physician also disapproved the conservative method of treatment. Accordingly it is argued that Lindsay did not know until the second examination that "operative surgery" would be necessary. The answer to this contention is that on the first examination Lindsay knew or by the exercise of reasonable care and diligence should have known that the accident had resulted in a compensable injury. The statute started to run from that date. Marsh v. Industrial Accident Commission, 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. The prescriptive date runs from the period of the culmination of the injury and not from the date the employee determines the kind or system of treatment he desires. This is not to be construed as a prohibition against an application for good cause to change the form of treatment, if the claim is filed within the statutory period.

The award is annulled.

I concur: KNIGHT, Acting P. J.

32 Cal.App.2d 611

BRAGG v. BRAGG.

Civ. 11021.

District Court of Appeal, First District, Division 2, California.

May 11, 1939.

Hearing Denied July 10, 1939.

1. Divorce ⇐62(6)

Under statute prohibiting the granting of a divorce unless plaintiff has been a resident of the county in which the action was brought for three months before commencement of action, a plaintiff who left his home, lived and voted in a foreign county for more than three years, and who never returned, but who intended at some future time to return to his former home, was not a resident of the county of his former home for purpose of commencement of a divorce proceedings. Civ.Code, § 128.

2. Domicile ⇐4(2)

A residence can be gained or lost only by the union of act and intent, but neither the act alone or the intent is sufficient.

3. Domicile ⇐10

An intent to establish a residence in a county may be inferred from the act of being physically present in the county.

4. Domicile ⇐10

Evidence of actual residence within a county cannot be contradicted by an undisclosed intention to live in or to return to another county.

5. Domicile ⇐4(2)

A person who moves to another place, intending to remain there an indefinite time, and as a place of fixed present domicile, has established his "domicile" there, although he harbors a floating intention to return to his former abode at some future date.

[Ed. Note.—For other definitions of "Domicile," see Words & Phrases.]

6. Divorce ⇐124

A plaintiff in a divorce proceedings could not establish his residence within a county by his uncorroborated testimony of his intention to live within the county, where he had not been physically present in the county for more than three years as required by statute. Civ.Code, §§ 128, 130.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Divorce proceedings by George H. Bragg, Sr., against Katherine Bragg in which the defendant filed a cross-complaint asking for a divorce. From a judgment granting plaintiff a divorce, defendant appeals.

Judgment reversed.

J. E. McCurdy, of San Mateo (J. W. Coleberd, of South San Francisco, of counsel), for appellant.

Kirkbride & Wilson, of San Mateo, for respondent.

NOURSE, Presiding Justice.

In an action for divorce plaintiff had judgment from which the defendant has appealed citing, among other grounds, that the plaintiff was not a bona fide resident of the county in which the proceedings were held and that his testimony concerning acts of cruelty was not corroborated.

The parties were married in 1926. The plaintiff was then seventy-six years of age and defendant was fifty-five. The plaintiff was a widower and had four adult children. The defendant was a widow and had a married daughter. All maintained their own homes—the defendant's daughter in San Mateo county near where the parties lived, the plaintiff's children each in other counties. On September 14, 1930, the plaintiff left the domicile in Lomita Park, San Mateo county, and informed her by letter that he could not live with her longer. She replied in the same manner "your decision suits me perfectly". Thereafter, in November, 1930, this plaintiff commenced two actions against the defendant—one for divorce, the other for cancellation of deeds on the grounds of fraud. He was nonsuited in the first case because there was not sufficient corroboration of his testimony. He had judgment in the second case which was reversed on the ground that there was no evidentiary support for the findings and judgment. Bragg v. Bragg, 219 Cal. 715, 28 P.2d 1046. In May, 1934, this action was commenced for separate maintenance. In June following, an amended complaint was filed seeking a divorce. In January, 1935, the defendant filed a cross-complaint asking for a divorce, and this was followed by a second amended complaint to which an answer was filed. The cause was heard upon these pleadings and an interlocutory decree was entered February 1, 1937.

The charges of cruelty upon which this decree was based covered the same evidentiary matters upon which the fraud action of 1930 was founded and which are outlined in full in the opinion of the Supreme Court reversing the judgment in that action. The answer denied all these charges, and the proof is as unsatisfactory here as it was in the former action, and is without any corroboration when viewed in the light of the former opinion. In addition to these denials the defendant pleaded that the plaintiff had been for many years prior to the filing of the original complaint, and still was, a resident of Santa Clara county.

We confine our discussion to this point. It is one which must be determined upon settled principles. Section 128 of our Civil Code provides that: "A divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action." Section 130 of the same code provides: "No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties."

When the respondent left the appellant in September, 1930, he made his home with his daughter in San Jose, Santa Clara County. He has lived with her continuously since that time. He was a registered voter in San Jose, and participated in the general election of 1934. He was without funds, and was supported by his daughter and three sons. The only property of the two parties is their former home in San Mateo county in which the appellant has resided continuously. This was held in joint tenancy, and was homesteaded by the wife. Since leaving in 1930, the respondent had made no effort to return to his former home. In his own behalf he testified that he intended to spend the rest of his years with his children, one of whom lives in San Jose, one in Fresno, one in Piedmont, and one in Vallejo. He would not return to San Mateo county to live alone, but said there had been some talk of having his daughter move with him to Lomita Park, if he could get his "affairs straightened out". In this connection he said: "I was trying to arrange it that way, that was our intentions some years ago." If by this testimony he meant that he intended to return to his former home when he recovered that property from his wife, his intentions were dispelled by the decision of the Supreme Court in the case above referred to.

[1-5] The case thus presents the admitted facts of physical residence and domicile in a foreign county, which the respondent seeks to offset by his declaration that he did not intend his residence to be where he lived and voted, but that he intended it to be in the county where the litigation was pending. The conclusion that a party can thus, by mere swearing, nullify the provisions of the statute requiring residence in the county where the proceedings are maintained is contrary to all the decisions cited to us by both parties. Of course, a residence can be gained or lost only by the union of act and intent, but as the act alone is insufficient, so the intent alone is insufficient. The authorities agree that the intent may be inferred from the act, but none hold that evidence of actual residence can be dispelled by the undisclosed intention of the individual in the face of the admitted facts. The true rule is found in Felker v. Henderson, 78 N.H. 509, 102 A. 623, 624, L.R.A.1918E, 510, where the court, citing Jacobs Domicil, section 184, said: "Mere intention cannot effect the change, but the intention to remain, coupled with the act of actual residence, establishes the domicile, notwithstanding a floating intention to return at some future time." In the same case the following statement from Story, Conflict of Laws (7th ed.) sec. 46, is quoted with approval: "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future time."

[6] But, aside from this, the testimony of the respondent as to his "intentions" is without semblance of any corroboration, either direct or circumstantial. That such proof of a bona fide residence, and corroboration thereof, is necessary in proceedings of this nature, see Bennett v. Bennett, 28 Cal. 599, 602; Flynn v. Flynn, 171 Cal. 746, 748, 154 P. 837; Bullard v. Bullard, 189 Cal. 502, 505, 209 P. 361; Warren v. Warren, 127 Cal.App. 231, 242, 15 P.2d 556; Ryder v. Ryder, 2 Cal.App.2d 426, 432, 37 P.2d 1069.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

32 Cal.App.2d 623

PEOPLE v. McKIBBEN et al.

Cr. 3211.

District Court of Appeal, Second District, Division 2, California.

May 11, 1939.

Criminal law ⇐1131(4)

Where no appearance was made by defendant after due notice of hearing was given, appeal would be dismissed on motion. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding between the People of the State of California and John L. McKibben and others. From the judgment, Joe W. Yurgy appeals.

Appeal dismissed.

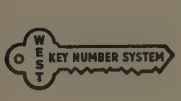
Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for the People.

PER CURIAM.

This case comes before us on the motion of the attorney general to dismiss the appeal under section 1253 of the Penal Code on the ground that no appearance has been made herein by the defendant. Due notice of the hearing on this date has been given. The motion is good.

Appeal dismissed.



32 Cal.App.2d 543

PEOPLE v. SCHRADER et al.

Cr. 3151.

District Court of Appeal, Second District, Division 1, California.

May 5, 1939.

Rehearing Denied May 17, 1939.

Hearing Denied June 2, 1939.

1. Gaming ⇐98(5)

Evidence that accused visited place maintained for receiving bets of horse races and noted bets made by himself on a memorandum was insufficient to sustain conviction of maintaining or occupying a place for the purpose of receiving and recording bets. Pen.Code, § 337a, subd. 2.

2. Criminal law ⇐568

The intent with which an act is done may be gathered from all circumstances shown in evidence.

3. Gaming ⇐98(5)

Where accused did not take witness stand in his own behalf, or deny incriminating admissions made by him, evidence was sufficient to warrant conviction of maintenance or occupancy of place for the purpose of recording or registering bets on race horses. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Louis Schrader, Leonard Gordon, Albert Jackler, Nat Sperling, Saul Luboff, William McFarland, Harry Rubin, Nathan Klitnick, and Paul Rubin, were charged by information with violation of the statute denouncing the maintenance or occupancy of a place for the purpose of recording or registering bets on race horses. From a judgment of conviction, Louis Schrader and Leonard Margolis, alias Leonard Gordon, appeal.

Affirmed as to Leonard Gordon, and reversed and remanded as to Louis Schrader.

Ben Van Tress, of Los Angeles, for appellant Schrader.

Maurice Gordon, of Los Angeles, for appellant Gordon.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, Presiding Justice.

By an information the appellants and seven codefendants were charged with violating subdivision 2 of section 337a of the Penal Code which denounces as a crime the maintenance or occupancy of a place for the purpose of recording or registering bets on horse races. The case was tried by the trial court sitting without a jury, and upon the evidence taken at the preliminary examination, resulting in the conviction of all defendants as charged in the information.

Appellant Schrader prosecutes an appeal from such judgment of conviction, as well as from the order by which his motion for a new trial was denied; appellant Gordon appeals from the order denying his motion for new trial.

The record reveals that the premises here involved were located on the second floor of a building at the corner of Sixth street and Western avenue in the city of Los Angeles, consisting of a suite of three rooms: a large room, described at the trial as the "main room"; a small room referred to as room No. 2, which adjoined the main room on the west and paralleled the southern part thereof; and another small room referred to as room No. 3, which also adjoined the main room on the west and paralleled the northern half thereof. Entrance to room No. 2 was through a door leading from the main room, while the entrance to room No. 3 was through a door in the north wall of room No. 2. Defendants Sperling, Luboff and McFarland, together with some forty or fifty people, were congregated in the main room; defendants Harry Rubin, Paul Rubin and Nathan Klitnick were in room No. 2, and the two appellants and defendant Jackler were in room No. 3. The evidence for respondent consists entirely of the testimony of the three arresting officers.

With reference to the main room, officer St. Charles testified in substance that on March 19, 1938, he saw defendants Sperling, Luboff and McFarland in the main room; that Sperling and Luboff were sitting within an enclosure and that McFarland was standing by the west wall where rundown sheets were tacked on a board; that he saw McFarland mark a race on the rundown sheets and that he, the said officer, gave Luboff some money and told him to place a bet on a horse; that Luboff accepted the money and recorded the bet on a slip of paper, whereupon Luboff put the money in a drawer and handed a slip of paper to Sperling, who filed it in front of him. Officer St. Charles also testified that he found a loud speaker in the main room which was connected with a teleflash located in room No. 2, and that he entered room No. 2 and saw six telephones on a table.

With reference to room No. 2, officer Mulligan testified that he saw therein the defendants Paul Rubin, Harry Rubin and Klitnick sitting at tables upon which were certain betting markers; that he did not see them do anything with the papers which were in that room; that he saw a telephone bill upon which was shown the name of Harry Rubin and the address of the said premises; that he had a conversation with defendant Harry Rubin, who stated that he did not rent the entire place; that he rented a space on the floor and that Paul Rubin and defendant Klitnick were in his employ.

With reference to room No. 3, officer Ingham testified that he saw betting markers (exhibit F) on a table in said room which were placed directly in front of appellant Gordon; that he saw overnight entry sheets and some betting markers (exhibit G) lying on a table in front of defendant Jackler; and that he also saw some overnight sheets and betting markers (exhibit H) on the center table in front of appellant Schrader (or Weber); that he did not see anyone do anything with the papers (exhibit F) which were lying in front of appellant Gordon; that defendant Jackler "was writing that 314 on line 3 while he had the French phone to his head as I entered the room", referring to the betting marker exhibit G; and that he saw appellant Schrader writing on the betting marker which was in front of him (exhibit H). Officer Ingham then testified that he observed appellants and defendant Jackler for a minute or two and then showed them his badge and said: "Leave everything just where it is, because you are under arrest"; that as he entered the room he noticed a speaker on the west end of the desk or table in front of appellants; "One was sitting on each side of the table"; that the speaker (exhibit I) was in operation; and he heard the results of the fourth race at the fair grounds on that speaker. In reply to the question, "Now did you later check to find out whether or not this speaker was connected with anything?", he replied: "I found the wires going into the other room", (where the teleflash was located). He also testified that after he arrested the appellants he walked over behind defendant Jackler and took the telephone away from him and listened to some telephone conversations, to-wit: "The party gave his initials E. W. and asked to place $1.00 to win on horse 641; * * * A party later gave the name of Edith Witt and asked to place a bet on horse 602, $2.00 to win; * * * While I was later in the room a man gave his name as Jack and $2.00 to win and $2.00 for second on horse number 602. The same party Edith Witt asked to place $2.00 to win on 665"; he also testified that he

made notations of these bets on betting markers, which four markers were introduced in evidence as people's exhibit J.

When asked if he had a conversation with the defendants, referring to appellants Schrader and Gordon and the Defendant Jackler, the following took place:

"A. I did.

"Q. When and where did you have the conversation? A. I had the conversation after the arrest was made in that small room in the presence of defendants Gordon, Weber (Schrader) and Jackler and myself.

"Q. And was there any force or violence used as to these three defendants? A. There was not.

"Q. Any offers of reward or immunity extended to them? A. No, sir.

"Q. State the conversation had with these three defendants."

To which objection was made on the ground the corpus delicti had not been established, and that the conversations would not be admissible.

"The Court: I think it is sufficiently established that is all one establishment, three rooms. * * * The objection is overruled, you may proceed. * * * A. The first defendant that I questioned was Louis Weber (Schrader). I asked him what his duties were there. He said he took bets over the phone as the announcements came over the teleflash and marked them on the overnight entry sheets. I asked him how much he received and he said $5.00 a day. Asked how long he had been working there, he said about a week. I questioned the defendant Jackler 'Did you make these notations on that betting marker', he said he had. 'Did you make the notations on the overnight entry sheet in front of you', for that date, and he said he had. I said 'Do you work here regularly and how much do you receive.' He said no, he just came up there to help out for the day. I questioned the defendant Gordon and asked him what he did. He said he figured out the amount after results came over that speaker there, he figured out the winners and the amount they paid on that long betting tab there, referring to the betting tab in front of him." He further said that he remained in room No. 3 for an hour and took notations and questioned people while he was waiting for officers and cars to take the defendants to Central Station.

Appellant Gordon did not testify, but appellant Schrader took the stand in his own defense and testified that he was in the restaurant and candy business in the Washington building, which fact was corroborated by the witnesses Hugh L. Dickson and O. B. Trompeter, who testified that for years they had been patrons of defendant Schrader's restaurant and candy business in downtown Los Angeles, where they saw him busily engaged approximately three days each week for a period of some ten years or more. Appellant Schrader further testified that he was not employed at the bookmaking establishment on Western avenue and that he did not tell officer Ingham that he received five dollars a day while working there; that on Saturday he usually took the day off, and it was his practice to meet his wife and daughter at the home of his mother-in-law in the vicinity of the Western avenue address and from there they went some place for the afternoon; that it was his custom to bet on horses and he had been placing his bets over the telephone, but was told he could go to the Western avenue address to personally place his bets and hear the results of the races; that he therefore dropped in at the bookmaking establishment at 11:30 a. m. on the particular Saturday in question; that since he did not pay for his bets as he placed them, he was keeping a record thereof on two small pieces of paper; that the main room was crowded and he asked if he could go some place where he might sit down and was shown into the small room No. 3, where he was arrested. In other words, he admitted that the premises in question were used as a bookmaking establishment and that he went there to place his individual bets upon races, but he denied that he was working there or that he recorded or registered bets for others.

Appellant Schrader, whose appeal will be first considered, urges that the evidence is insufficient to sustain a conviction of the crime charged in the information; and that a reasonable doubt has been raised as to appellant's guilt of the offense charged by the failure of the prosecution to show that he had written any of the betting markers, or that he was marking bets as a betting marker, and in view of his positive denial of the conversation testified to by officer Ingham that appellant had been employed at the address in question for about a week to record bets at a salary of five dollars per day.

[1] Without that conversation in the record the evidence against appellant

Schrader consists only of the fact that he was present in the bookmaking establishment and was sitting at a table in front of some betting markers upon which he was writing. With reference to the testimony of the police officer, who related his conversation with appellant Schrader as hereinbefore set out, it is noteworthy that the trial court was extremely dubious of the verity in part of this officer's testimony, because at the hearing on the motion for a new trial the court said: "I feel that probably this man (Schrader) was not getting five dollars a day for working there when he had his own business. I do not especially believe that part of the testimony." If we exclude that part of the testimony from consideration, then we have a conviction based on the fact that the appellant Schrader was present in the room where bets were being received; that he was writing on what the officer denominated "a betting marker"; coupled with appellant Schrader's alleged statement to the officer that he "took bets over the phone as the announcements came over the teleflash and marked them on the overnight entry sheets." So far as the alleged admission made to the officer by appellant Schrader is concerned, with a part of which the court was unimpressed, we have no hesitancy in saying that it is inherently improbable that a man conducting a legitimate business of his own of the size and caliber maintained by appellant Schrader in the Washington building, to which he had devoted his entire time for a period of some ten years, and in which he employed several helpers, would be working without compensation in a bookmaking establishment. We say "without compensation" because of the declared disbelief of the trial court in the officer's testimony that appellant Schrader told him he was receiving five dollars per day for his services. Further, appellant as a witness in his own behalf denied that he was marking any bets on any paper, except those bets placed by himself, and although one of the arresting officers seized the paper upon which appellant was writing and the same was introduced into evidence as part of exhibit H, no effort was made by the prosecution in rebuttal to show that such writing was anything but a recordation of appellant's own bets made by himself. Under familiar rules, therefore, we must assume that the exhibit in question was as described by appellant Schrader. The evidence against appellant Schrader falls far short of that quantum required to establish guilt beyond a reasonable doubt of the offense of maintaining or occupying a place for the purpose of recording bets on horse races. Manifestly, if a person not connected with but merely visiting a place maintained for receiving bets on horse races makes a bet himself and notes the same on a memorandum, he cannot be convicted of maintaining or occupying a place for the purpose of receiving and recording bets. That is all that is shown by the evidence against appellant Schrader. It is the maintenance or occupancy of a place wherein bets are received from others and recorded or registered which the law denounces as criminal under the statute with which we are here concerned.

[2] As was said in the case of People v. Tuttle, 27 Cal.App.2d 647, 649, 81 P.2d 571, 572, "The intent with which the act was done may be gathered from all the circumstances shown in evidence." The conduct and circumstances shown in connection with the activities of appellant Schrader are as compatible with innocence as with guilt, so far as the offense with which he is charged is concerned. As to the last-named appellant, it must be said as a matter of law that the judgment against him does not find ample support in the evidence.

[3] As to appellant Gordon, who did not take the witness stand in his own behalf, nor deny the incriminating admissions made by him, the evidence was sufficient to warrant his conviction. See People v. Tuttle, supra, and cases therein cited.

For the foregoing reasons, the order denying the motion for a new trial as to appellant Leonard Gordon is affirmed. The judgment and the order denying the motion for a new trial as to the appellant Louis Schrader are reversed, and as to him the cause is remanded for a new trial.

I concur: WHITE, J.

I concur in the judgment: DORAN, J.

32 Cal.App.2d 647

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. AMERICAN TRUST CO. et al.

Civ. 2256.

District Court of Appeal, Fourth District, California.

May 13, 1939.

Rehearing Denied June 5, 1939.

Hearing Denied July 11, 1939.

Banks and banking ⇐149
Limitation of actions ⇐28(1)

A bank's indorsement of words, "Pay to the order of any bank or banker, all prior endorsements guaranteed," on check deposited with it after forgery of payee's signature as indorser created obligation running in favor of drawee, so that drawee bank's action for amount of check was not barred by statute of limitations three years after discovery of forgery. Civ.Code, §§ 3144, 3147; Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Actions, consolidated for trial, by the Bank of America National Trust & Savings Association against the Security-First National Bank of Los Angeles and others, and by the Security-First National Bank of Los Angeles against the American Trust Company and another, for the amount of a cashier's check paid by first-named plaintiff after forgery of payee's signature thereon as indorser. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Mills, Hunter & Dunn, and C. R. Liljestrom, all of Los Angeles, for appellant Citizens Nat. Trust & Sav. Bank.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

BARNARD, Presiding Justice.

These two actions were consolidated for trial. From a judgment in favor of the respective plaintiffs the various defendants have appealed. For obvious reasons, the only defendant filing briefs here is the Citizens National Trust and Savings Bank, which will be referred to as the appellant. The only plaintiff filing a brief is the Bank of America National Trust and Savings Association, which will be referred to as the respondent.

On January 31, 1930, the respondent, at its Visalia branch, issued its cashier's check for $2,000 payable to the order of W. A. Patterson. This was issued at the request of W. A. Scott and delivered to him. Scott delivered the check to persons whom he believed to be agents of Patterson. On February 3, 1930, the check was deposited by one Cetty in his checking account with the appellant in Los Angeles. The check, when deposited, bore the purported indorsement of Patterson and the genuine indorsement of Cetty. After crediting the amount of the check to Cetty's account the appellant placed its stamp indorsement thereon, "Pay to the order of any bank or banker, all prior endorsements guaranteed," and forwarded the check to American Trust Company, which bank credited the appellant with the amount of the check, placed its similar indorsement thereon and forwarded it to the Visalia Branch of the Security-First National Bank of Los Angeles, which bank in turn credited the American Trust Company, placed a similar indorsement thereon, and on February 4, 1930, presented the check to the drawee, the respondent, and received payment. It was later discovered that the purported signature of Patterson was a forgery, and these actions followed. Respondent's action was commenced on December 18, 1933, within four years of appellant's indorsement of the check, but more than three years after the discovery of the forgery.

The main question presented is whether the action is barred by the statute of limitations. While the respondent contends that the action is one upon an obligation or liability founded upon a written instrument, with a four-year limitation, the appellant contends that it is one for money paid under mistake and is barred under the provisions of section 338, subdivision 4, of the Code of Civil Procedure.

In support of its contention the appellant argues that its liability can arise only from the fact that it became an indorser of the check as defined in section 3144 of the Civil Code; that the wording of the indorsement added nothing to the liability of the appellant as a general indorser, under that section; that as such indorser it warranted the matters set forth in section 3147 of that code, but only in

favor of those mentioned in that section, to-wit, "all subsequent holders in due course"; that the warranties of the indorsement are of no avail to the respondent which was the drawee, but not a holder in due course; that an action could be maintained by the respondent only as one for money paid under mistake; and that such an action must be brought within three years after the discovery of the forgery.

While sections 3144 to 3147, inclusive, of the Civil Code lay down general rules applying to a person who places his signature upon such an instrument otherwise than as maker, drawer or acceptor, nothing in these sections forbids the making or assuming of a different or additional obligation or forbids the making of a further contract by the use of appropriate written language. While under these code sections, which merely codify the general law, every unqualified indorser of such an instrument warrants that he has good title thereto, we have here a situation where an indorser not only places his signature upon the instrument but adds an express written guaranty of the prior indorsements. The question presented is whether or not this written obligation is one running in favor of the respondent drawee.

In Philadelphia Nat. Bk. v. Fulton Nat. Bk., D.C., 25 F.2d 995, 996, an insurance company drew drafts upon itself in favor of named payees, the drafts to be presented through the Philadelphia National Bank. The Fulton National Bank paid these drafts upon forged signatures of the payees and after indorsing them "Pay to the order of any bank, banker, or trust company. All prior indorsements guaranteed" presented them to the Philadelphia National Bank, which paid them on the faith of the guaranty of the indorsements. In a suit brought by the latter bank for reimbursement the defendant bank contended, among other things, that the action was one for money paid by mistake and was barred. The court, while pointing out that the suit was barred "unless sustained by some obligation in writing", held that the "express guaranty of the prior indorsement is available". While in that case the action was brought by an indorsee, rather than by a drawee, the court pointed out that while the language of the instrument was addressed to the payee its effect usually involves the indorsee, that the natural intention of the indorsement was "to give confidence in that respect to all who should be called on to deal with the paper under the indorsement, and to be addressed to them all". The author of the opinion says: "I suspect the origin of this express guaranty of prior indorsements in indorsing to a banker for collection took its origin thus, to enable a presenting banker to make such a guaranty to a drawee who did not care to rely upon the liability of a distant forwarding bank." While the question in that case was as to whether such a written guaranty ran in favor of an indorsee, the reasoning there used supports the conclusion that such a guaranty is addressed to and runs in favor of the drawee, as well.

In Real Estate Land Title & Trust Co. v. United Security Trust Co., 303 Pa. 273, 154 A. 593, 595, the plaintiff's banking department, as drawee, paid a check in favor of parties whose signatures were forged. The defendant bank had paid the check to one of their depositors who had forged the name of the payees and then indorsed it guaranteeing prior indorsements, and it was then paid by the plaintiff bank as drawee. The plaintiff bank sued the guaranteeing bank on its guaranty. The court said: "When the defendant indorsed the check and guaranteed all previous indorsements, including that of Malnick and his wife, plaintiff was entitled to rely upon defendant's warrant that it had valid title and upon its guaranty of the genuineness of all previous indorsements. It follows that plaintiff is entitled to recover from defendant the money paid in reliance upon that warrant and guaranty." In Merchants Nat. Bk. v. Continental Nat. Bk., 98 Cal.App. 523, 277 P. 354, 356, the action was brought by a drawee bank against a collecting bank to recover money paid by the former in reliance upon the latter's clearing house indorsement. There was no written guaranty but the indorsement included the following: "Pay only through Los Angeles Clearing House". A rule of that clearing house provided that members clearing checks through the same guaranteed all prior indorsements. The court held that the drawee bank could recover from the collecting bank under its clearing house indorsement, although it could not have recovered upon the ground of mistake. While the guaranty in that case rested upon a clearing house rule, we have in the instant case a written guaranty of prior signatures.

While, under the statutes, this indorsement by the appellant may, as conceded by it, have run in favor of subsequent holders

in due course, the language used indicates no intention to limit the liability assumed to one in favor of such holders alone. The words "Pay to the order of any bank or banker", while also intended as a transfer or as authority to collect the money, are addressed to the drawee and are a direction to it to so act. The words "all prior endorsements guaranteed" are a part of this direction, may not be separated from it, and are as much addressed to the drawee as are the first words. No reason appears why one making such an indorsement does not bind himself to the very person whom he invites to act, and who does act, on the faith of his guaranty. In such a case a drawee bank, not having the opportunity possessed by the guaranteeing bank to examine into the genuineness of the signature, must and does rely on the written guaranty. Regardless of any effect on subsequent holders in due course, arising from the statute or otherwise, it must be held that such an indorsement creates an obligation or liability which runs in favor of the drawee. Being founded upon an instrument in writing, it follows that this action was not barred by the statute of limitations.

The views herein expressed make it unnecessary to consider the other points raised.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 586

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. STACK.

Civ. 11716.

District Court of Appeal, Second District, Division 1, California.

May 9, 1939.

Rehearing Denied May 31, 1939.

Hearing Denied July 7, 1939.

1. Executors and administrators ⇐55

That a safe deposit rental contract between deceased and a bank, which was deceased's executor, provided that upon death of either deceased or wife the survivor should be sole renter of box with exclusive right of access thereto and possession of contents did not affect title to contents of box as between executor and deceased's surviving wife.

2. Appeal and error ⇐840(1)

Question of alleged fraud and undue influence in connection with obtaining defendant's signature to a waiver and election to take under her husband's will could not be raised on defendant's appeal in proceedings between deceased's executor and defendant, in view of evidence, pleadings, and findings in trial court.

3. Wills ⇐797

In proceeding between deceased's executor and surviving widow to determine right to securities where widow claimed her signature to a waiver and election to take under the will was obtained by fraud and undue influence, a finding, reciting that widow executed the waiver implied that her signature was not obtained through fraud, undue influence, or misrepresentation.

4. Wills ⇐481

A will was effective as of date of testator's death.

5. Wills ⇐785

An agreement whereby deceased's wife, in substance, waived her claims to community property and elected to accept provisions of will declaring all property standing in testator's name or in name of testator and wife was community property, and showing intent to dispose of testator's property and entire community estate was effective from date of execution, and upon death of testator the agreement was as binding upon the surviving wife as the will was upon the executor.

6. Wills ⇐785

Where testator's will declared all property standing in his name or in name of himself and wife was community property and showed intention to dispose of testator's separate estate and also entire community estate, and testator's wife executed simultaneous agreement reciting she understood testator was disposing of his separate property and also community property, then owned or thereafter acquired, and that wife waived her rights and elected to take under will, joint tenancies did not exist in property upon death of husband, and hence wife did not acquire property rights as a survivor to a joint estate.

7. Joint tenancy ⇐3

Personal property acquired with funds held in joint tenancy retains the same character in the absence of any agreement indicating a different intention.

8. Wills ⇐785

Under a will whereby testator declared all property standing in his name or in name of himself and wife was community property and which showed an intention to dispose of his separate estate and the entire community estate and a simultaneous agreement whereby testator's wife, in substance, stated she understood that testator was disposing of his separate property and the community property, then owned or thereafter acquired, and that wife waived rights in community property and elected to take under will, instruments manifested parties' intent to dispose of the entire community estate.

9. Husband and wife ⇐265

The husband is owner and entitled to possession of all community property during his lifetime.

10. Wills ⇐785

Where testator executed will declaring all property standing in his name or in name of himself and wife was community property and testator's wife simultaneously executed agreement reciting that she understood testator was disposing of the community property, and that she waived her rights and elected to take under will, upon death of testator securities purchased after the execution of will and agreement with funds from joint bank account became part of the entire community estate disposed of by will, and hence executor was entitled to such securities as against the wife.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by the Security-First National Bank of Los Angeles, as executor of the estate of Bernard E. Stack, deceased, against Mary A. Stack (a widow), to recover certain securities from defendant. From an unsatisfactory judgment, both parties appeal.

Judgment affirmed in so far as favorable to plaintiff and otherwise reversed, with directions to enter judgment for plaintiff.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant Security-First Nat. Bank of Los Angeles, as executor.

Oscar J. Seiler and W. Ward Johnson, both of Long Beach, for respondent Mary A. Stack.

DORAN, Justice.

Plaintiff, Security-First National Bank of Los Angeles, hereinafter referred to as the bank, as executor of the will of Bernard E. Stack, deceased, commenced this action to recover from Mary A. Stack, widow of deceased, certain securities which, prior to the death of decedent, had been kept in a safe deposit box to which both decedent and his wife had access. The widow of deceased, hereinafter referred to as defendant, asserted title to the securities in herself as a surviving joint tenant by virtue of the fact that the securities had been purchased with funds drawn from joint bank accounts of the husband and wife. The bank, on the other hand, contended that by the provisions of the husband's will, and a "waiver and election to take" under the will, executed by the wife, both of which instruments were executed on June 8, 1932, the husband and wife intended to and did thereby terminate their joint tenancy not only in all property then owned by them but in all property thereafter acquired.

The trial court having concluded, and accordingly adjudged, that plaintiff bank as executor was entitled to possession of the property acquired prior to the date of the execution of the will and waiver, but that the defendant widow was the owner and entitled to the possession of those securities purchased with funds from the joint bank accounts subsequent to that date, both parties have appealed from those portions of the judgment adverse to each respectively.

The will, which devised and bequeathed the entire estate of decedent to the bank in trust, provided for the income therefrom to be paid to the widow during her lifetime and upon her death the principal to be paid to a relative of decedent. The pertinent part thereof is as follows: "I declare that all of the property in which at the date hereof I have any interest, or which at this date stands in my name or in the name of myself and my wife, is our community property, and it is my intention hereby to dispose not only of my separate estate and

my share of the community property, but of the entire community estate, and for this purpose my wife has elected to take under the terms of my Last Will and Testament and has executed an election and a waiver of her community property rights, which said election and waiver is attached to this my Last Will and Testament."

The election and waiver referred to is as follows:

"I, Mary A. Stack, wife of Bernard E. Stack, do hereby certify that I have read the foregoing Will of my husband and fully understanding said will and that my husband thereby disposes not only of his separate property but also of our community property now owned or hereafter to be acquired, if any, including my half thereof, and being fully convinced of its reasonableness and the wisdom of its provisions, I hereby elect to accept and acquiesce in the provisions of said Will, waiving all claims to my share of any community property and any and all other claims that I may have upon any of the property disposed of by said Will, including all of his property exempt from execution and my right to a probate homestead, but not including however and expressly excepting therefrom my right to a family allowance out of his estate during the probate administration thereon. This election and waiver is not a grant or release of right, title, interest or estate in any of our community property now owned or hereafter to be acquired, and shall be effective and valid for any purpose only after the demise of my husband and upon the conditions precedent that said Will shall be duly admitted to probate by a court of competent jurisdiction and that it shall not be successfully contested or probate thereof revoked. * * *."

As above indicated in substance, the action arises from a dispute as to the interpretation and legal effect to be given to the quoted portions of the will and waiver, as well as to the legal effect to be given to the purchase by the testator, after the execution of the will, of property with moneys from a joint bank account of the husband and wife and before the husband's death; also, the legal effect to be given to the contract for the rental of the safe deposit box hereinbefore referred to.

It appears from the record, as summarized in defendant's brief, that Bernard E. Stack and Mary A. Stack were married in 1885 and lived together thereafter until November 25, 1936, when Bernard E. Stack died. Shortly after their marriage they took up a homestead in Montana where they lived until 1919, at which time they moved to Long Beach, California, bringing with them some property, the exact amount of which is not known. After coming to Long Beach, Mr. Stack became interested in the National Bank of Long Beach, which later, by merger, became the Long Beach branch of the Security-First National Bank of Los Angeles, the executor and trustee named in decedent's last will. For many years prior to the death of Mr. Stack he had been a member of the advisory board of the Long Beach branch of the bank. Quoting from defendant's brief, "The evidence is uncontradicted that Mr. and Mrs. Stack were both hard workers and that the property belonging to them at the time of the death of Mr. Stack had been acquired through their joint efforts during the fifty-one years of happy married life that they lived and worked together, Mrs. Stack attending to the housework and Mr. Stack looking after the business affairs." They appeared to have had full and complete confidence in each other. Their bank account appears always to have been carried as a joint tenancy with right of survivorship.

Two days before the execution of the will and waiver, the joint tenancy ownership in certain real estate was terminated by deed of the parties.

The property contained in the safe deposit box, at the time of the death of Mr. Stack, which property consisted of stocks and bonds of the then value of approximately $200,000, represents the property subject to the within action.

Although in part they may be regarded as conclusions of law, nevertheless the court found, as facts, that at the time of the execution of the last will and testament of the decedent, and the waiver, election to take and consent of Mary A. Stack, "it was the intent of the parties to terminate any and all joint tenancies *then existing* between the respective parties" (italics added); that on the 8th day of June, 1932, they terminated the joint tenancy *theretofore* existing between them as to all property purchased with funds derived from their joint bank accounts prior to that date, and converted the same into community property; that the stocks and bonds in the safe deposit box which had been purchased with funds drawn from their

bank accounts *subsequent* to June 8, 1932, were owned by them as joint tenants prior to the death of Mr. Stack, and upon his death became the property of Mrs. Stack; and that the balance belonged to the estate.

[1] It is defendant widow's contention that none of the securities found in the safe deposit box at the time of the death of her husband belonged to his estate. In part, such contention is based on the terms of the rental contract with the bank for the use of the safe deposit box, executed September 25, 1936, the pertinent part of which is as follows: "Upon the death of either of us, the survivor is and shall for every purpose be the sole renter of said box, with the exclusive right of access thereto and possession of the contents thereof."

Such contention may be disposed of briefly with the observation that by the terms of the rental agreement the survivor acquired merely access to the box and possession of the contents. The title to the contents manifestly cannot be affected by such phraseology, under the circumstances here presented.

[2, 3] Although the complaint in the action was simple in form and the answer a general denial, defendant submits the issue on appeal "that her signature to this purported waiver was obtained through fraud, undue influence and misrepresentation". In the light of the pleadings, the evidence and the findings, it is too late to raise such question on appeal. Assuming, however, that the issue was raised by the evidence at the trial and that the trial court regarded such issue seriously, it is sufficient to note that the finding which, in substance, recites that defendant widow executed the waiver, also in effect implies that her signature was not obtained through fraud, undue influence or misrepresentation.

Giving consideration now, but with more particularity, to the legal effect of the will, and the waiver and election to take, as well as to the contract covering the rental of the safe deposit box, it should be noted that the questions raised pertain to an agreement between husband and wife, by the terms of which the husband disposed of all of their property by will, pursuant to the agreement between them. The evidence of the agreement is the will executed by the husband and the waiver executed by the wife. In that connection the legal status of the securities purchased with funds from the joint bank account necessarily must be taken into account.

The will declares: "that all of the property in which at the date hereof I have any interest, or which at this date stands in my name or in the name of myself and my wife, is our community property". After making this proposition the testator then proceeds as follows: "it is my intention hereby to dispose not only of my separate estate and my share of the community property, but of the *entire community estate* * * *". Then in the waiver and election to take attached to and made a part of the will and referred to in the will the defendant states, "* * * fully understanding said Will and that my husband thereby disposes not only of his separate property but also of our community property now owned *or hereafter to be acquired*, if any, including my half thereof, and being fully convinced of its reasonableness and the wisdom of its provisions, I hereby elect to accept and acquiesce in the provisions of said Will, waiving all claims to my share of any community property and any and all other claims that I may have *upon any of the property disposed of by said Will* * * *". In other words, the testator enters into an agreement and makes a statement of fact in which the defendant acquiesces, that all of the property standing in his name and her name, regardless of the manner of ownership, "is our community property", and that it is his intention to dispose of the "entire community estate". This statement acquiesced in and agreed to by the defendant, regardless of the manner of the prior ownership of property or in whose name or names it stood, constituted for the purposes of disposition under the will the community estate of the respective parties. To this statement the widow fully acquiesced and further affirmatively waived "any and all other claims that I may have upon any of the property disposed of by said Will". (All italics added.)

[4, 5] The conditions to which the waiver was subject have been fulfilled. The will was never revoked; the agreement was never terminated either by modification, rescission, performance or otherwise. The will was effective as of the date of death; the agreement was effective from the date of its execution. Upon the death of the testator, the agreement, a portion of which is referred to as the

waiver and election to take, was as binding upon the defendant widow as the will was upon the executor.

[6, 7] From the foregoing the conclusion is inevitable that as a matter of law no joint tenancies existed in the property of the parties upon the death of the husband. Therefore the finding, and in particular the legal conclusion, as well as the judgment of the trial court, to the effect that defendant widow acquired any property rights as "survivor" party to a joint estate, lack support in the record. In this regard defendant relies upon the authority of Estate of Harris, 169 Cal. 725, 147 P. 967. The Harris case sustains the doctrine, which has been followed in later decisions, that personal property acquired with funds held in joint tenancy retains the same character in the absence of any agreement indicating a different intention. However, the agreement of the parties herein definitely disposes of the joint tenancy issue on a basis unaffected by the doctrine enunciated in the Harris case. It is noteworthy that none of the securities involved herein were issued in joint tenancy but were either in decedent's name or were bonds payable to bearer.

[8-10] Construing as a whole the instruments here considered, with the view of determining the legal effect of each, and in that regard necessarily taking into account the circumstances surrounding their execution, it is clearly evident that the parties had but one object in mind, namely, the disposition of the "entire community estate" in a manner that in the judgment of each would best serve to protect, and by the same means, provide for the wants of the wife upon the death of the husband. The term "estate" is comprehensive, and as has been hitherto declared, "One of the most common uses in which the word 'estate' is used is to denote and describe in a most general manner the property composing the assets of a deceased," and, "During the lifetime of the husband, he is the owner and entitled to the possession of all the community property." In re Estate of Sayre, 114 Cal.App. 649, 300 P. 833, 834. It is likewise evident as heretofore noted in effect that upon the death of the husband the property purchased with funds from the joint bank account, by agreement of the parties, became and was a part of the "entire community estate" referred to in the will, and hence "property disposed of by said will" as provided in the election and waiver. Any other construction would in effect extend legal sanction to the unwarranted repudiation of a valid contract; and would as well defeat the obvious intent of the testator.

For the foregoing reasons that portion of the judgment which decrees that Security-First National Bank of Los Angeles, as executor of the last will and testament of Bernard E. Stack, deceased, is the owner of and entitled to the possession of certain stocks, bonds and other securities described in said judgment, is affirmed. That portion of the judgment which decrees that Mary A. Stack is the owner of and entitled to the possession of certain stocks, bonds and securities described in said judgment, is reversed with directions to enter judgment therefor, and with respect thereto, in favor of plaintiff as prayed.

We concur: YORK, P. J.; WHITE, J.



32 Cal.App.2d 601

McGILL v. FLEMING.

Civ. 12150.

District Court of Appeal, Second District, Division 2, California.

May 10, 1939.

Hearing Denied July 7, 1939.

1. Brokers ⇐54

Generally, a broker earns his commissions when he secures for lessor, a lessee who is willing, able and ready to lease property on terms on which broker is authorized to negotiate lease.

2. Brokers ⇐49(1)

The right of a broker employed to secure lease, to recover commissions, depends on terms of broker's employment.

3. Brokers ⇐52

Where owner of lot agreed to pay brokers commission for "consummating" leases on lots with named lessee, at time when brokers had knowledge of existence of lease forms providing that, if lessor and lessee did not mutually approve plans of buildings to be constructed on leased property, either

party could cancel lease, and where the parties signed the leases but failed to agree on plans, the leases did not become effective, and brokers did not "consummate" the leases and were not entitled to commission.

The word "consummate" means to bring to completion.

[Ed. Note.—For other definitions of "Consummate," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by R. M. McGill against Victor Fleming for services rendered by the plaintiff and another as real estate brokers. From judgment for the defendant, the plaintiff appeals.

Affirmed.

Shattuck, Davis & Story, of Los Angeles, for appellant.

Victor Ford Collins, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover a sum alleged to be due for services rendered by himself and M. E. McCreery as real estate brokers. He prosecutes this appeal from a judgment in favor of defendant.

Defendant, owner of two vacant pieces of real estate in Beverly Hills and in Los Angeles, employed plaintiff's firm to secure leases on the properties from the Great Atlantic and Pacific Tea Company, hereinafter referred to as the company. On May 18, 1936, defendant signed an agreement in the following words: "McGill-McCreery 9527 Santa Monica Blvd. Beverly Hills, California. Gentlemen: With reference to the Atlantic & Pacific Tea Co. leases on my properties located at the southeast corner of Wilshire Boulevard & Reeves Drive in Beverly Hills and the southeast corner of Los Feliz Boulevard & Brunswick in Los Angeles. I agree to pay you a commission for consummating these leases as follow: Wilshire & Reeves—sixteen hundred fifty ($1650.00) Los Feliz—Brunswick—eight hundred fifty ($850.00). It being understood and agreed that the total commission is to be paid within ninety days after each respective store opens for business, payable one third each month until paid. Very truly yours, Victor Fleming." This agreement, which was approved in writing by the brokers, is the basis of plaintiff's action.

At the time the agreement relied upon by plaintiff was signed by defendant there were already in existence two forms of leases, both dated May 14, 1936, in one of which it was set forth that defendant leases unto the company "for the purpose of a general merchandise business, a building with dimensions of 70 ft. by 100 ft. with basement 70 ft. by 25 ft. to be erected on lot 1844 and the easterly 20 ft. of lot 1843, of tract 6380, in the City of Beverly Hills, County of Los Angeles, in substantial compliance with a floor plan and specifications to be furnished by lessee and approved in writing by the lessor". The form of lease also contained this provision: "It is agreed by the lessor and lessee that in the event that the plans and specifications of the demised premises are not mutually approved in writing within thirty (30) days from the date of this lease, then either party can cancel same without obligation." The other form of lease contained similar provisions except that the lot involved is in the city of Los Angeles. Defendant signed the documents just referred to on May 18, 1936. Both documents bear the date of May 14, 1936, and were signed by the company, but the exact date on which they were signed by the company's representative is not clear from the evidence.

Defendant employed a firm of architects, Morgan, Walls & Clements, and thereafter the warehouse superintendent for the company furnished certain specifications to Mr. Clements but did not submit plans. No plans or specifications were ever submitted directly to defendant and no plans or specifications were ever approved in writing by a representative of the company or by defendant. No further action was taken by any of the parties until January 12, 1937, at which time the company wrote a letter to defendant in which demand was made that defendant proceed with the erection of the buildings and in which it was stated that if the company did not hear from defendant within three days it would be concluded that defendant had abandoned the leases. To this letter defendant's attorney sent a reply, pointing out that no one from the company had ever contacted defendant and stating further: "As a matter of fact, my understanding is that for many months, everyone connected with this transaction had felt that you had completely abandoned any further interest in the projects. It was a great surprise to Mr. Fleming to receive your letter of January 12th. May I call your attention to this clause that ap-

peared in both instruments, towit: 'It is agreed by the Lessor and the Lessee that in the event the plans and specifications of the demised premises are not mutually approved in writing within thirty (30) days from the date of this lease then either party can cancel same without obligation.' You will recall that Mr. Fleming insisted upon this clause being inserted in the leases, until he could determine from the actual inspection of the plans and specifications the cost and character of building. The leases are very clear and were accepted by your company with this provision. The plans and specifications were not approved by either party within the thirty days period."

The trial court found: "That at the time the plaintiff and M. E. McCreery and the defendant herein executed said letter of May 18, 1936, the said plaintiff and plaintiff's assignor well knew that said agreement in relation to lease contained the language above set forth, and knew and agreed that unless the plans and specifications were mutually agreed to that the building referred to in said agreement woud not be built and the stores therein could not open." The court further found that the leases were not consummated and that the failure to construct the building was not "the result of any wrongful or negligent acts of the defendant. * * * That said building was not built because the defendant and the Great Atlantic and Pacific Tea Company did not mutually agree upon the plans and specifications. * * * That it was not contemplated or agreed to between the defendant and the plaintiff and M. E. McCreery that the defendant be obligated to pay any commission to the plaintiff except and unless said plans and specifications be mutually agreed to and the building erected accordingly and the stores opened therein. That the payment of any commission to the plaintiff or plaintiff's assignor was conditioned and was made conditioned upon the opening of said store for business, and the court finds it did not open for business * * * That no lease, or any agreement for lease was entered into or accepted by the defendant, except the agreement for lease hereinafter referred to. * * * That said contracts did not constitute leases and were not intended to constitute leases except and until the parties thereto mutually agreed to plans and specifications for the erection of buildings on the respective properties."

[1-3] The trial court properly concluded that the parties contemplated the payment of the brokers' commissions only upon the effective consummation of the leases. We are not unmindful of the general rule that a broker earns his commission when he has secured an acceptable lessee for the lessor, one who is ready, able and willing to lease the property upon the terms on which the broker is authorized to negotiate the lease. The present case, however, is not the ordinary one in which a broker is employed to secure a lessee in the open market. In this case the prospective lessee was named in the form of lease which had been prepared and also in the agreement sued upon. In this agreement the lessor became bound to pay the commission "for consummating" the transaction. The right of the broker to recover commissions must of course depend upon the terms of his employment. The word "consummate" means to bring to completion. Connor v. Riggins, 21 Cal.App. 756, 132 P. 849. In order to consummate the transaction it was necessary that a binding and valid lease be secured, one which bound the lessee to comply with definite terms agreed upon by the parties. It is not reasonable to construe the words "for consummating the lease" as referring to the signing of the lease forms which had already been drawn up, for those documents were not binding upon either defendant or the company.

It will be noted that in the so-called leases the lessor purports to lease a building, one which was not then in existence. The floor plan and specifications were to be mutually agreed upon between the parties and approved in writing within thirty days, otherwise either party could be relieved from all obligations. The plans and specifications were naturally of great importance to defendant, since they might require a greater or lesser expenditure of funds in the erection of the building. Obviously they were also of importance to the company. Plaintiff's contention that he became entitled to his commissions upon the signing of the forms of leases does violence to a reasonable construction of the language used in the agreement, particularly in view of the circumstances surrounding the transaction. If the commission became due upon the signing of the instruments in question there would have been no need for employing the language "for consummating" the leases and for requiring that the

payment of the commissions be made after the erection of the buildings.

In Leventritt v. Cowell, 21 Cal.App. 597, 132 P. 627, the factual situation was very similar to that of the case under review. The litigation there involved "a contract for a lease to be executed in the future, and in which the lessees had not fully agreed to the terms of the lease, for the contract provided that the plans and specifications for the buildings were yet to be approved and 'O.K'd' by the lessees". It was held that the broker could not recover. See, also, Ball v. California Conserving Co., 189 Cal. 326, 207 P. 1011; Alison v. Chapman, 36 Cal.App. 759, 760, 173 P. 389; Peak v. Jurgens, 5 Cal.App.2d 573, 576, 43 P.2d 569.

We agree with the conclusions reached by the trial court that the leases never became effective on account of the failure of the parties to agree upon the plans and specifications, that the brokers did not consummate the leases and that they are not entitled to recover commissions.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



32 Cal.App.2d 609

PEOPLE v. DUMAS.

Cr. 383.

District Court of Appeal, Fourth District, California.

May 10, 1939.

Criminal law ⇐1130(4)

Where clerk's transcript was filed in Court of Appeal on March 8, 1939, and reporter's transcript on April 10, but no appearance was made and no brief filed on behalf of appellant, and no extension of time for filing of brief had been requested or granted, a motion made when cause was regularly calendared, for an affirmance of judgment, was granted. Pen.Code, § 1253.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Proceeding by the People of the State of California against John K. Dumas. From a judgment, defendant appeals.

Affirmed.

Willis O. Tyler, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The clerk's transcript herein was filed on March 8, 1939, and the reporter's transcript on April 10, 1939. No appearance has been made and no brief filed by or on behalf of the appellant, and no extension of time for the filing of such a brief has been requested or granted. The cause was regularly calendared for May 9, 1939, at which time the attorney general moved for an affirmance of the judgment under the provisions of section 1253 of the Penal Code. The motion is granted.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



WATERLAND v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.*

Civ. 6232.

District Court of Appeal, Third District, California.

May 5, 1939.

As Modified on Denial of Rehearing June 3, 1939.

See 91 P.2d 220.

Hearing Granted July 1, 1939.

1. Courts ⇐200½

The probate court did not possess jurisdiction to determine title to bank account in possession of former executor of estate of deceased as survivor of executed joint tenancy, since former executor was prima facie owner of account.

2. Courts ⇐200½

That claimant to bank account as survivor of executed joint tenancy was formerly executor of estate of deceased did not waive lack of jurisdiction of probate court to try title to property of which estate was

*For subsequent opinion see 98 P.2d 211.

not prima facie owner, since claimant's resignation terminated his fiduciary relationship to estate.

3. Executors and administrators ⇐59

Before an estate can require former executor of estate in possession of bank account as survivor of executed joint tenancy to account for such fund, it must affirmatively prove that joint tenancy was void because it was procured by fraud or undue influence.

4. Courts ⇐200½

In probate proceedings, title to property may not be tried or determined as between estate, or heirs and devisees, and a stranger to estate.

5. Courts ⇐200½

Where a controversy exists between heirs, devisees, or representatives of estate of a deceased and one who is not interested in such estate, regarding title to property, title cannot be determined by probate court, but it is necessary to resort to action in a court of competent jurisdiction to determine title to such property.

6. Courts ⇐200½

A probate court has jurisdiction to determine title to property claimed by representative of estate in his individual capacity, while he remains executor or administrator of estate, as a necessary incident to determination of what property is subject to administration in such estate.

7. Executors and administrators ⇐35(2)

The statute does not authorize removal of an administrator or executor merely because he claims title to property which is also asserted by heirs or creditors of estate. Probate Code, § 521.

8. Courts ⇐200½

Where former executor of estate of deceased, claiming title to bank account as survivor of executed joint tenancy, resigned and a successor was appointed and duly qualified, present executor could maintain suit in behalf of estate against former executor, in a proper court, to determine title to bank account, and hence probate court was without jurisdiction to determine title to bank account.

9. Executors and administrators ⇐85(9)

An administrator or executor may be cited by his successor to account for property of estate which he formerly represented after his resignation or revocation of authority, but authority to require representative to account to successor after his office terminates extends only to property belonging to estate, or in which estate has at least prima facie title. Probate Code, § 923.

10. Executors and administrators ⇐55

Property which prima facie belongs to estate of deceased should be retained under control of probate court until title is determined by proper proceedings designed to such end.

11. Prohibition ⇐10(1)

The function of a writ of "prohibition" is to arrest proceedings of a tribunal exercising judicial duties which proposes to act without or in excess of its jurisdiction. Code Civ.Proc. § 1102.

[Ed. Note.—For other definitions of "Prohibition (Writ of)," see Words & Phrases.]

12. Prohibition ⇐3(2)

A writ of prohibition will not ordinarily issue when certiorari affords a complete remedy, unless it appears that applicant for writ will be injured if tribunal sought to be prohibited proceeds with trial.

13. Prohibition ⇐3(1)

As respects issuance of writ of prohibition, question whether there is plain, speedy, and adequate remedy in ordinary course of law is largely dependent upon facts of particular case, the determination of which is within sound discretion of court.

14. Prohibition ⇐3(2, 5)

Although there may be appeal or right to review by means of certiorari of a judgment rendered in suit where inferior tribunal is without jurisdiction, prohibition may lie in sound discretion of court if it appears that such remedies are not adequate.

15. Courts ⇐200½
Prohibition ⇐3(2, 5)

Where probate court proposed to require former executor of estate of deceased to account for bank account, which was in his possession as survivor of executed joint tenancy, probate court lacked jurisdiction to determine title to bank account, and former executor was entitled to writ of prohibition to prevent probate court from taking further action, regardless whether he had appeal from, or right to review by certiorari, order of probate court, since such remedies would be inadequate, in that, by continuing with proceeding, executor would be deprived of right of trial by jury. Code Civ. Proc. § 592.

16. Jury ⇐19(7)

Trials by jury in settlement of accounts in probate are not allowed, in absence of statute so providing.

17. Jury ⇐12(1)

In a proper action brought in court of competent jurisdiction to recover bank account in possession of former executor of estate of deceased, as survivor of executed joint tenancy, the former executor might be entitled to submit to jury questions of fact regarding alleged invalidity of agreement of joint tenancy on ground of fraud and undue influence. Code Civ.Proc. § 592.

Original proceeding by Tyre H. Waterland against the Superior Court of the State of California, in and for the County of Sacramento, and the Honorable Peter J. Shields, Judge thereof, for a writ of prohibition to prevent the Superior Court, sitting as a probate court in the administration of the estate of Laura Antoinette Grafmiller, deceased, from determining title to a fund claimed by petitioner as the survivor of a joint tenancy therein which was created by deceased prior to her death.

Writ granted.

Busick & Busick and O. F. Meldon, all of Sacramento, for petitioner.

Johnson & Curtwright, Evan J. Hughes, and Chas. A. Bliss, all of Sacramento, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The petitioner seeks by means of a writ of prohibition to prevent the Superior Court of Sacramento County, sitting as a Probate Court in the administration of the estate of Laura Antoinette Grafmiller, deceased, from determining title to a fund of $9,052.47 claimed by him as the survivor of a joint tenancy therein which was created by the deceased prior to her death, on the ground that the probate court lacks jurisdiction to try title to property claimed by a stranger to the probate proceedings. The respondent demurred to the petition.

The petitioner qualified as executor of the will of said deceased person. He is the survivor of a joint tenancy in the fund and is therefore prima facie owner of the bank account. A dispute arose between the heirs regarding the ownership of the fund and the executor resigned before his inventory or account was filed. His resignation was held to be final. Estate of Grafmiller, 27 Cal.App.2d 253, 81 P.2d 181.

After his resignation, and before his successor was appointed or qualified, he filed two purported final accounts, neither of which was settled or approved. In neither of those accounts did he return the joint tenancy fund as property of the estate. Numerous exceptions to those accounts were filed by the heirs of the deceased. His successor, as executor of the estate, was duly appointed and qualified. Thereafter this petitioner was cited in the Grafmiller estate to show cause why he should not account to the estate for said fund of $9,052.47. A petition was filed in the estate for that purpose, alleging that the execution "of a certain purported joint tenancy agreement", by means of which Tyre H. Waterland gained possession of the fund, was procured by fraud and undue influence and is therefore void. The petition then prayed for an order of the probate court determining that the fund belongs to the estate and requiring the holder thereof to pay it to the present executor, together with interest thereon from March 24, 1937. To that petition Mr. Waterland demurred on the ground that the probate court was without jurisdiction to determine title to the fund as against a stranger to the estate. The demurrer was overruled and he was ordered to show cause why he should not pay the money to the representative of the estate. Mr. Waterland then filed in this court a petition for a writ of prohibition to preclude the probate court from proceeding to try the title to said fund on the ground that it lacks jurisdiction.

The only issues in this proceeding are whether, under such circumstances, the probate court possesses jurisdiction to determine title to a fund in the possession of a former executor of the estate as survivor of an executed joint tenancy thereof, and whether the writ of prohibition will lie.

[1-3] We are of the opinion the probate court lacks jurisdiction to determine the title to the bank account since the claimant is the prima facie owner of the fund and his resignation occurred prior to the filing of the petition in the probate proceeding. With respect to that particular money Mr. Waterland is a stranger to the estate. There is no longer a privity existing between him and the estate with respect to that fund. It was never returned in the inventory as property belonging to the estate. The facts are undisputed that he became possessed of the money as the survivor of an executed joint tenancy therein. The mere fact that the claimant to that fund formerly qualified as executor

of the estate did not have the effect of waiving the lack of jurisdiction on the part of the probate court to try the title to property in which the estate is not even the prima facie owner, since his resignation terminated his fiduciary relationship to the estate. Before the estate may require the petitioner to account for that fund, it must first affirmatively prove that the joint tenancy of the account is void because it was procured by fraud or undue influence. In view of the execution of the joint tenancy agreement, the presumption is that Mr. Waterland owns the fund. Under such circumstances it appears to be clearly within the well-established rule that a probate court may not try title to property as between the estate and a stranger thereto.

[4-7] The rule is well established in California that in probate proceedings title to property may not be tried or determined as between the estate, or the heirs and devisees, on the one hand, and a stranger to the estate upon the other hand. McCarthy v. McCarthy, 205 Cal. 184, 270 P. 211; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Wenks, 171 Cal. 607, 154 P. 24; Estate of Klumpke, 167 Cal. 415, 139 P. 1062; Guardianship of Vucinich, 3 Cal.2d 235, 243, 44 P.2d 567; 11a Cal.Jur. 94, sec. 41. When a controversy exists between the heirs, devisees or representatives of the estate of a deceased person and one who is not interested in that estate, regarding the title to property, it is necessary to resort to an action in a court of competent jurisdiction to determine the title to such property. It is true that a probate court has jurisdiction to determine the title to property claimed by the representative of an estate in his individual capacity, while he remains executor or administrator of the estate, as a necessary incident to the determination of what property is subject to administration in that estate. (Stevens v. Superior Court, supra.) The reason assigned for that rule is that the executor or administrator of an estate occupies a relationship in privity with the interests of the estate, and therefore is not in a position to maintain an action against himself to determine the title to the property which he personally claims. In other words, his individual interests and those which he represents in a fiduciary capacity as executor or administrator of the estate are in absolute conflict. Nor does section 521 of the Probate Code authorize the removal of an administrator or executor merely because he claims title to property which is also asserted by the heirs or creditors of the estate. It is apparent the very reasons assigned for vesting jurisdiction in the probate court to determine title to property under the above-mentioned exception to the general rule fails when the representative resigns his office or is removed for cause under the provisions of section 521, supra.

[8] In the present proceeding it appears that Tyre H. Waterland resigned as executor of the estate of Laura Antoinette Grafmiller, deceased, March 4, 1937. This court determined that his resignation, pursuant to section 520 of the Probate Code, was final and conclusive. His fiduciary relationship then ceased. That decision became the law of this case with respect to his relationship to the estate. His successor was appointed and qualified August 26, 1938. There is no reason why Albert E. Stearns, the present executor of the will of said deceased, may not maintain a suit in behalf of the estate against the former executor, in a proper court, to determine the title to the bank account in question. The reason for the application of the exception to the general rule recognizing jurisdiction in the probate court to determine the title to property claimed by one who is actually serving as executor or administrator of an estate no longer exists in the present case. It follows that the probate court is without jurisdiction to try and determine the title to the bank account under the circumstances of this case.

[9, 10] It is true that an administrator or executor may be cited by his successor to account for property of an estate which he formerly represented after his resignation or revocation of authority occurs. Sec. 923, Probate Code; Estate of Radovich, 74 Cal. 536, 16 P. 321, 5 Am.St.Rep. 466. It is said in 1 Bancroft's Probate Practice, page 609, section 320: "Property which prima facie belongs to the estate should be retained under the control of the probate court until title is determined by proper proceedings designed to that end."

The authority to require a representative of an estate to account to his successor after his office is terminated extends only to property belonging to the estate, or in which the estate has at least a prima facie title. It does not extend to property which

never came into the possession of the former administrator or executor, and of which, on the contrary, he appears to be the prima facie owner and which is actually claimed by him in his individual capacity. The probate court has no jurisdiction to determine the title to such property or to charge it to the account of the former representative until its ownership has first been determined in a court of competent jurisdiction.

In the Radovich case, supra, upon which the respondent relies, the property which the executor was required by the probate court to account for after his resignation, consisted of certain shares of stock in a railroad company, which he had regularly included in his inventory as property belonging to the estate of the value of $250. He made no claim to the stock in his personal capacity. He merely sold it for $450 without an order of court and failed to account for the proceeds of that sale. Clearly, the proceeds of that sale of stock belonged to the estate. The order of court enforcing the former executor to account for the proceeds of sale of stock in that case did not require the probate court to first determine its title. The title to the stock was conceded. That case is not in conflict with what we have previously said regarding that question.

[11] We are of the opinion the writ of prohibition is the proper remedy in this case. The function of a writ of prohibition is to arrest the proceedings of a tribunal exercising judicial duties which proposes to act without or in excess of its jurisdiction. Sec. 1102, Code Civ.Proc.; 21 Cal.Jur. 583, sec. 4; County of Sutter v. Superior Court, 188 Cal. 292, 204 P. 849. The Supreme Court accepted jurisdiction and considered the same question which is involved in this proceeding, upon a petition for a writ of prohibition, in the case of Stevens v. Superior Court, supra.

The real issue in the probate court in this case, as specifically set out in the petition which was filed therein, is whether that court may proceed to try and determine title to personal property held and claimed by a stranger to the estate by virtue of a joint tenancy agreement. That fact was alleged therein. Since that issue clearly appears of record the probate court is without jurisdiction to proceed. The determination of title to that property is not a proper part of the proceeding to enforce a former executor to account for property belonging to the estate under section 923 of the Probate Code. The determination of title to property under such circumstances may not be said to be merely incidental to a general accounting under that section.

[12-14] It is suggested the writ of prohibition will not lie because there is a speedy and adequate remedy by means of appeal or certiorari from the order of the probate court determining the title to the bank account. It is true that a writ of prohibition will not ordinarily issue when certiorari affords a complete remedy, unless it appears that the applicant for the writ will be injured if the tribunal sought to be prohibited proceeds with the trial. Hill v. Superior Court, 21 Cal.App. 424, 131 P. 1061; 21 Cal.Jur. 585, sec. 5. The question as to whether there is a plain, speedy and adequate remedy in the ordinary course of law is largely dependent upon the facts of a particular case, the determination of which is within the sound discretion of the court. Even though there may be an appeal or a right to review by means of certiorari a judgment rendered in a suit where the inferior tribunal is without jurisdiction, prohibition may lie in the sound discretion of the court if it also appears that those remedies, under the circumstances of the particular case, are not adequate. In the concurring opinion of Mr. Justice Shaw, in the case of Glide v. Superior Court, 147 Cal. 21, at page 29, 81 P. 225, at page 228, it is said: "The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court, upon the particular circumstances of each case."

[15-17] We therefore conclude the remedy of the petitioner in the present proceeding is not adequate, and that prohibition will lie to prevent the probate court from trying and determining title to the bank account in question. If the probate court lacks jurisdiction to determine title to that property under the circumstances of this case, it would be an idle, useless and expensive procedure to be compelled to account for property of which he is the prima facie owner under an executed agreement, even though that order might be reversed on appeal from the order settling the account or upon certiorari. It is apparent that on such an accounting by the probate court the petitioner in this proceeding would be deprived of the

right of trial by jury. No right of trial by jury is allowed in the settlement of accounts. It is said in Estate of England, 214 Cal. 298, 5 P.2d 428, 429, in that regard: "It has several times been expressly held that, in the absence of a statute so providing, trials by jury in the settlement of accounts in probate are not allowed."

On the contrary, in a proper action brought in a court of competent jurisdiction to recover that particular fund, the petitioner might be entitled to submit to a jury the questions of fact regarding the alleged invalidity of the agreement on the ground of fraud and undue influence. Sec. 592, Code Civ.Proc.

What we have previously said does not preclude the probate court from requiring the former executor of the estate of Laura Antoinette Grafmiller, deceased, from accounting for all other property of the estate except the bank account in controversy.

The writ is granted as prayed for and the probate court is hereby restrained from proceeding to try or determine title to the funds in the bank account.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 594

In re WATSON'S ESTATE.

EDWARDS v. HUTCHINGS et al.

Civ. 12172–S.

District Court of Appeal, Second District, Division 1, California.

May 10, 1939.

1. Wills ⇐619

In determining whether provisions of will establishing testamentary trust created an annuity, the court must determine what was the intention of testatrix, and such intention must be sought for in language of will. Probate Code, §§ 101, 162; § 161, subd. 3.

2. Wills ⇐439, 440

Presumptions and auxiliary rules applicable to probate matters are subordinate to cardinal rule in construction of will that court must determine what was intention of testatrix, and that such intention must be sought for in language of will. Probate Code, § 101.

3. Wills ⇐619, 733(9)

Where will bequeathed residue of estate to trustee and provided that income from trust was to be paid monthly by trustee to testatrix' brother, beneficiary's interest was uncertain in amount, and hence was not an "annuity" so as to be payable commencing at death of testatrix, under statute, but was payable upon final distribution of court determining what constituted residue of estate and distributing it to trustee. Probate Code, § 161, subd. 3; § 162.

[Ed. Note.—For other definitions of "Annuity," see Words & Phrases.]

4. Wills ⇐619, 733(9)

Where will bequeathed residue of estate to trustee and provided that income from trust was to be paid monthly by trustee to testatrix' brother, a grant of power to trustee to resort to general assets of trust estate if income therefrom was insufficient to pay beneficiary a minimum of $200 each month did not of itself create an "annuity," so as to be payable at death of testatrix, since the test of an "annuity" was whether a certain specified sum periodically was bequeathed. Probate Code, § 161, subd. 3; § 162.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Minnie H. Watson, deceased, wherein Lucy Edwards, as administratrix of the estate of William Walter Watson, deceased, filed a petition against Herbert Hutchings and others, and the Security-First National Bank of Los Angeles (Pasadena Branch), executor of the estate of Minnie H. Watson, deceased, to construe the will of Minnie H. Watson, deceased. From an adverse decree, the petitioner appeals.

Affirmed.

Randall J. Hood, of Los Angeles, for appellant.

Richard A. Grant, of Los Angeles, for respondents Herbert Hutchings, Nelle Walter, and Alta R. Kalley.

Walter H. Odemar, of Los Angeles, for respondent Los Angeles Orthopaedic Foundation.

WHITE, Justice.

Lucy Edwards, as administratrix of the estate of William W. Watson, deceased, appeals from a decree of the superior court made during probate, construing certain provisions of the will of Minnie H. Watson, deceased, setting up a testamentary trust and naming William W. Watson sole beneficiary thereunder. By her petition appellant sought to recover payments of $200 per month from the period between the date of death of Minnie H. Watson, creator of the trust, and the date of death of the beneficiary, William W. Watson, basing her claim upon the contention that the bequest in the will of Minnie H. Watson to her brother, William W. Watson, was an annuity, or what is frequently called "a bequest for maintenance", and that, under the code (Probate Code, § 162), annuities commence at the date of death of the testatrix.

Respondents contend that the disputed provisions of the will did not create either an annuity or a bequest for maintenance, and that if either an annuity or a bequest for maintenance was created, it was expressly provided in the will that the same should be payable out of the trust estate to be established from the residuum of the estate of Minnie H. Watson, and that no payments were to be made from any fund other than the said trust estate; that the intention of the testatrix as expressed in the language of her will was that the trustee appointed by the probate court to administer the trust should pay all of the net income derived from said trust estate to decedent's brother, William W. Watson, as beneficiary; that if the trustee deemed it necessary, it could make extraordinary payments out of the trust estate during periods of illness or of want on the part of the beneficiary; and that should the net income of the trust be less than $200 per month, the trustee was directed to take sufficient money from the principal sum of said trust to pay the beneficiary not less than $200 per month; and finally, that since the beneficiary died prior to the decree of final distribution and consequent establishment of the trust, and since there are no other beneficiaries named in the trust, the devise and bequest to the trustee wholly lapsed and failed, by reason of which the residuum of the testatrix' estate should be distributed to respondents.

The pertinent facts are these: Minnie H. Watson died testate on August 19, 1931. Thereafter her will was admitted to probate and her estate was about ready for final distribution when the petition now before us was filed in the superior court. After making several specific bequests, including $10,000 to her brother, William W. Watson, whose executrix is appellant herein, and disposing of her personal effects and belongings, the testatrix by the tenth paragraph of her will devised and bequeathed all the rest, residue and remainder of her estate to Security-First National Bank of Los Angeles "as Trustee, in trust, nevertheless, for and upon the following uses and trusts, with full power and authority, subject to the express conditions hereinafter set forth, to manage, sell, lease, mortgage, transfer and convey any or all of the property of said trust estate, and to hold, apply, invest, reinvest, and dispose of the proceeds in accordance with the trust herein contained; to keep the corpus or principal of said trust invested in bonds, mortgages or real estate, or in other good income producing property and securities, and to collect and receive all interest and income arising therefrom; and out of the income from said trust estate, or out of the principal thereof in the event said income should be insufficient, to pay all necessary and proper charges and expenses, including reasonable compensation payable to said Trustee in the care, management and conservation of said trust estate; to convey, transfer, distribute and allot the property belonging to said trust estate, both as to principal and interest, at the times, in the manner and to the person entitled thereto, as hereinafter specifically provided. After deducting from the income derived from said trust estate all the charges and expenses in the administration of said trust as hereinbefore provided, I direct said trustee to pay the balance of the income derived therefrom to my brother, William Walter Watson, for and during his lifetime."

The will then provides that upon the death of the testatrix' brother, the trust should terminate, and makes disposition of the entire corpus thereof remaining, following which it is provided in the will that:

"Said Trustee shall have full power and authority to invest said trust funds, to sell, transfer and convey any real or personal property which shall become a part of said trust funds, and to do any and all acts necessary in caring for said trust fund

and property without first securing any order of Court therefor.

"All income payable under the provisions of this my Will shall be paid to each beneficiary named therein only upon his sole and separate receipt or written order, given at or about the time of payment, never in accordance with the sale, pledge, transfer or assignment therefor, and free from any liability for the debts of the beneficiary and from the control or interference of any third person.

"I authorize and empower my said Trustee to retain, subject to the provisions hereof, any and all of the property and securities comprising a portion of the trust estate received by said Trustee upon distribution to it, without liability for any decrease in value of said property and securities. Subject to the aforesaid provision, all investments and re-investments by said Trustee shall be in securities of the character authorized by the laws of the State of California for trust investments.

"If, in the sole, absolute and uncontrolled discretion of said Trustee the net income from the trust estate should not be adequate or sufficient to provide for the reasonable needs and comforts of my said brother, William Walter Watson, during any period or periods of his illness or other want or necessity, said Trustee may, and it is hereby specifically authorized and empowered, but it shall in no event be so required to do, and as often as it shall deem necessary, pay to or use, apply or expend for the use and benefit of my said brother, William Walter Watson, such portions of the principal of the trust estate, up to and including the whole thereof, as said Trustee may determine to be adequate or sufficient to provide for my said brother, William Walter Watson, during any such period or periods.

"It is my Will that my brother, William Walter Watson, should receive at least Two Hundred ($200.00) Dollars per month by virtue of this trust, and in the event the net income from my trust estate is not equal to the sum of Two Hundred ($200.00) Dollars per month, I hereby direct and authorize my Trustee to take from the principal fund of said trust such amounts from time to time as may be necessary to pay my said brother, William Walter Watson, a monthly sum of not less than Two Hundred ($200.00) Dollars."

The probate court found that it was the intention of decedent, Minnie H. Watson, as expressed in her last will and testament, that her brother, William W. Watson, was to receive the sum of "at least $200.00 per month, commencing from the date of death of deceased but to become due and payable from said trust alone and only in the event said trust was established by the distribution of her estate to the trustees and not otherwise." The court further found that by reason of the death of said beneficiary, William W. Watson, no trust could be set up or established.

Pursuant to the foregoing findings, the probate court entered its decree that William W. Watson, beneficiary under the trust, at the time of his death prior to the distribution of the estate in which the trust was created, had no interest in or to the residue of such estate, and directing that when the estate of Minnie W. Watson is distributed the entire residue thereof be distributed to the remaindermen.

[1, 2] So far as applicable to the case at bar, subdivision 3 of section 161 of the Probate Code defines an annuity as "a bequest of *certain specified sums periodically*", and section 162 provides in part that "annuities commence at the testator's death". In passing upon the claim of appellant that the provisions of the will establishing the testamentary trust created an annuity, we must determine what was the intention of the testatrix (sec. 101, Probate Code), but such intention must be sought for in the language of the will. Courts cannot speculate as to what was in the mind of the testator, what he intended to do, or what he intended to declare in his will, but our task herein is to determine what was meant by what the testatrix did declare in her will by the words she actually used therein. Estate of Major, 89 Cal.App. 238, 264 P. 542; Estate of Ogden, 78 Cal.App. 412, 248 P. 680; Estate of Blake, 157 Cal. 448, 458, 108 P. 287; Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193. Presumptions and auxiliary rules applicable to probate matters are all subordinate to the cardinal rule just enunciated.

[3] Examining the language of the will, we have no hesitancy in saying that the bequest to William W. Watson is not an annuity, for the reason that the amount to be paid monthly is not certain. The

bequest in this case was not of a certain or definite sum to be paid by the executors of the will; but painstakingly and unequivocally the testatrix bequeathed only the residue of her estate to a trustee, and the income therefrom was to be paid monthly by the trustee, and not by the executor. The trustee of necessity could not disburse the income of the residue until upon final distribution the court determined what constituted the residue and distributed it to the trustee. The intention of the testatrix must therefore have been that payments were not to begin until the fund or property from which such income was to be produced was determined by the probate court and was distributed to the trustee, who was to make the payments. The use by testatrix in the particular provisions of her will with which we are here concerned of such terms as "in trust", "property of said trust estate", "corpus or principal of said trust", "income arising therefrom", "from said trust estate", "net income from the trust estate", and "authorize my trustee to take from the principal of said trust", all are indicative of an intention expressed in her will to have a trust established or set up before any benefits therefrom were to enure to the beneficiary. Such an interpretation is strengthened by the fact that in paragraph IV of her will the testatrix specifically bequeathed the sum of $10,000 to her brother, who was also the sole beneficiary under the trust. The tenth paragraph of the will further authorized the trustee to use such portion of the principal as might be necessary in the uncontrolled discretion of the trustee during any period of illness, want or necessity of the beneficiary. Manifestly it cannot be successfully contended that such power delegated to the trustee could have been exercised prior to the latter's appointment by the probate court and distribution to such trustee of what was determined by the court to constitute the residue of the estate which was to be the corpus of the trust. Estate of Brown, 143 Cal. 450, 77 P. 160; Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870; Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397.

[4] Appellant next makes the claim that the provisions of the will "constitute an annuity" because of the direction to the trustee to have recourse to the general assets of the trust estate when and if the income therefrom is insufficient to pay the beneficiary at least two hundred dollars per month. In this contention appellant cannot be upheld. A grant of power to a trustee by the testatrix to resort to the general assets of the trust estate if the income therefrom is insufficient to pay the beneficiary a minimum of two hundred dollars each month does not of itself create an annuity. The test is whether a certain specified sum periodically is bequeathed. Probate Code § 161, subd. 3. In Estate of Brown, supra, it is held that even though it appear from the will that the intention of the testator was that resort was not to be had to the general assets and that such intention must prevail, nevertheless such prohibition does not destroy the character of the annuity, and the annuitant is entitled to the payment of the annuity so long as the annuity fund created for such purpose is adequate to that end. It is the first clause of subdivision 3 of section 161 of the Probate Code which defines an annuity. The remaining portion of the subdivision merely provides that when an annuity exists in accordance with the definition thereof contained in the first clause, then resort may be had to the corpus or principal fund of the trust.

The foregoing conclusions at which we have arrived make it unnecessary to discuss other points raised by appellant, because if, as we hold, no payments had accrued or were payable at the time of the death of William W. Watson prior to distribution of the estate of his sister for the reason that the trust fund had not up to that time come into existence, it of necessity follows that there was nothing to descend to the heirs of William W. Watson.

The decree from which this appeal was taken is therefore affirmed.

We concur: YORK, P. J.; DORAN, J.

BROCK & CO. v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

Civ. 11749.

District Court of Appeal, Second District, Division 1, California.

May 8, 1939.

Hearing Denied July 7, 1939.

1. Taxation ⇐98

Under statute providing that taxable property shall be assessed in place in which it is "situated," the quoted word connotes a more or less permanent location or situs, and the requirement of permanency must attach before tangible property which has been removed from the domicile of the owner will attain a situs elsewhere. Pol.Code, § 3628.

2. Taxation ⇐98

Tangible personal property is taxable in the locality where it has an established permanent situs, irrespective of owner's domicile.

3. Taxation ⇐98

Personalty was taxable at its permanent situs even if removed therefrom, if removal was intended to be temporary only.

4. Taxation ⇐98

Jewelry stock withdrawn on February 21, 1936, from the stock of a merchant located in Los Angeles county and shipped to a jewelry firm outside the state where it remained on display for purposes of sale until March 15, when it was returned to Los Angeles county, was taxable in Los Angeles county for the fiscal year of 1936–1937, where parties had contemplated a return of unsold stock, although date thereof was uncertain; the absence from the state being only a "temporary absence" ineffective to change situs of taxation. Pol.Code, §§ 3628, 3804a.

[Ed. Note.—For other definitions of "Temporary Absence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in mandamus by Brock & Co. against the Board of Supervisors of Los Angeles County and another to cancel an assessment upon a portion of plaintiff's jewelry stock. From an adverse judgment, plaintiff appeals.

Affirmed.

Holbrook & Tarr, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

YORK, Presiding Justice.

Appellant is a corporation engaged in the wholesale and retail jewelry business and by a proceeding in mandamus directed against the Board of Supervisors and the County Counsel of Los Angeles County, pursuant to section 3804a of the Political Code, sought to have canceled an assessment for the purpose of taxation made by the county assessor upon a portion of its merchandise of diamonds, jewels and jewelry valued at $127,855, which merchandise at noon on the first Monday of March, 1936, was on display in the city of Honolulu, T. H.

The trial court concluded that the taxable situs of the said merchandise was in Los Angeles county and that appellant was not entitled to the cancellation. From the judgment which followed, this appeal is taken.

The record reveals that on February 21, 1936, appellant withdrew from its stock of diamonds, jewels and jewelry maintained at its Los Angeles and Beverly Hills establishments certain pieces thereof and shipped the same in charge of its vice-president, George C. Brock, to Honolulu. On February 29th, Mr. Brock delivered the jewelry and diamonds into the possession of the Honolulu jewelry firm of H. F. Wichman & Company, who put it on display with their own merchandise, and advertised in the Honolulu newspapers that such display of jewelry was from the collection of appellant. Said merchandise was left with Wichman & Company by appellant with the option to retain or to sell any of said jewels, jewelry and diamonds upon payment to appellant of the retail price thereof, less twenty per cent. The said jewelry was on display in the store of Wichman & Company during the period from February 29, 1936, to March 15, 1936, with the exception of four pieces of jewelry which were returned to appellant's stock upon Mr. Brock's arrival in Los Angeles from Honolulu on March 12, 1936. Wichman & Company did not exercise their option to purchase any of the said merchandise and on March 16th shipped it back to appellant. Upon its arrival in Los Angeles on March 23d, it was returned to

appellant's stock in trade and merchandise for sale at its stores in Los Angeles and Beverly Hills.

It is urged by appellant that this case "squarely presents for decision by this court the question as to whether gem merchandise, regularly consigned in accordance with trade practice, prior to the first Monday of March, can still be taxed in California simply because the wholesaler's place of business is located in this State".

Respondents submit that the questions presented by this appeal "are rendered easy of determination and the correct answer thereto rather definitely indicated by the decision of the Supreme Court upon the like question in the action attempting to call in question appellant's taxes for the year before. (Brock & Co. v. Board of Supervisors, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R. 700.)"

It was found by the court in the instant proceeding that in 1934, just a few days before the tax date, appellant withdrew from its stock at Los Angeles and Beverly Hills, jewels and jewelry of an assessed value of $153,415 and shipped the same to Honolulu, where they were placed on display but not advertised, and within thirty days from the date of such withdrawal were again returned to appellant's stocks for sale. Upon petition made by appellant for cancellation of an assessment thereon for the purpose of taxation, on the ground that said merchandise was in the course of interstate commerce between the state of California and the territory of Hawaii on the first Monday of March, 1934, such cancellation was granted.

Again in 1935, according to the finding of the court herein, a few days before the tax date, appellant withdrew from its stock at Los Angeles and Beverly Hills, jewels and jewelry of an assessed value of $143,454 and shipped them to Honolulu in charge of its vice-president, who upon arrival in Honolulu placed such merchandise on display in the vault and showroom of the Hawaiian Trust Company. This display was not advertised but was brought to the attention of a selected list of wealthy persons by telephone. None of the jewelry was sold in Honolulu, and except for a bracelet which was left with a jeweler in Honolulu, all of said jewelry was returned within thirty days to the stocks in appellant's stores at Los Angeles and Beverly Hills. Again appellant petitioned the Board of Supervisors of Los Angeles County to cancel the assessment of and the taxes thereon, which petition was denied; whereupon appellant filed action to compel such cancellation. The judgment denying such petition was affirmed on appeal to the Supreme Court in Brock & Co. v. Board of Supervisors, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R. 700, herein referred to as the Brock case.

[1, 2] In the said Brock case appellant, as it does here, invoked the language of section 3628 of the Political Code to the effect that "* * * all taxable property shall be assessed in the county, city * * or district in which it is situated". The court held that the term "situated" as used therein in its application to personal property had a broader concept than that urged by appellant, and stated 8 Cal.2d at page 290, 65 P.2d at page 793, 110 A.L.R. 700: "It connotes a *more or less permanent* location or situs, and the requirement of permanency must attach before tangible property which has been removed from the domicile of the owner will attain a situs elsewhere." In other words, the Brock case holds that tangible personal property is taxable in the locality where it has an *established permanent situs,* irrespective of the owner's domicile, and that the jewelry there involved was merely temporarily removed outside the state with the intention of presently returning it; hence it was not beyond the jurisdiction of the state to tax. (Italics added.)

[3] It is therefore obvious that if the merchandise here involved acquired only a temporary abiding place in Honolulu, the assessment of the taxing authority of Los Angeles county was proper. On the other hand, if, as is asserted by appellant, the jewelry acquired a permanent situs in Honolulu when it was consigned to Wichman & Company, its taxation in Los Angeles county constitutes a violation of the due process clause of the federal Constitution, under the holding in the said Brock case, supra, 8 Cal.2d page 290, 65 P.2d page 793, 110 A.L.R. 700.

The record discloses that this was the third annual expedition made by appellant to Honolulu, each under slightly different circumstances, the court finding that all of the parties thereto believed that the instant transaction constituted a consignment for sale to H. F. Wichman & Company by appellant. From the evidence adduced at the trial it appears that after the

delivery of the jewelry to H. F. Wichman & Company, a receipt was taken for all the merchandise so delivered with the exception of some loose diamonds contained in a box. This receipt recited that it was "merchandise on memorandum from Brock & Company". In accordance with the usual jewelry practice, no time was set for the redelivery of any unsold merchandise, but there was an understanding that Wichman's would not keep it longer than there was any definite prospect of sale. Upon cross-examination, Mr. Brock testified that he frankly had no idea at the time he left Honolulu exactly when the merchandise would be returned, but that it was left with Wichman's with the understanding that when interest waned it would be returned to appellant. After finding such facts to be true, the court made the following findings:

"That said jewels and jewelry involved herein were so sent to Honolulu just prior to the tax date in 1936 for said short period of time, with the purpose of present return to Los Angeles, in part so as to avoid all taxation thereof, as far as legally possible, and also with the idea of exhibit of said jewels and jewelry and of advertisement thereby of petitioner and petitioner's jewels and jewelry and merchandise for sale in Los Angeles County. That petitioner and H. F. Wichman & Co. expected and intended to allow said jewels and jewelry, or any thereof, to remain in Honolulu for only a short time except such, if any, as H. F. Wichman & Co. might buy or might sell at the retail price thereof, less twenty per cent (20%); that it was the plan of petitioner, in arranging said expedition to have its said jewels and jewelry returned within a short period of time to its said Los Angeles and Beverly Hills stores and into its regular stock of jewels and jewelry and merchandise for sale from which removed, except such, if any, as H. F. Wichman & Co. might buy or sell during such short time. * * * That the jewels and jewelry herein assessed were not known as, and in fact were not, at any time, display merchandise but were part and parcel of petitioner's merchandise and stock in trade for sale at its Los Angeles and Beverly Hills stores in the County of Los Angeles."

As conclusions of law, the court found that "said jewels and jewelry so assessed were, on the first Monday of March, 1936, situate and assessable for taxes in the cities of Beverly Hills and Los Angeles and the County of Los Angeles, and were there taxable for the fiscal year 1936-1937. * * That said jewels and jewelry so assessed were not by petitioner consigned to said H. F. Wichman & Co. * * * That the assessment of said jewels and jewelry and the taxes thereon were not violative of the due process of law or the equal protection of the law provisions of the Fourteenth Amendment to the Constitution of the United States, U.S.C.A., or contrary to petitioner's rights and immunities of national citizenship, nor violative of petitioner's rights under Article I, section 14 of the Constitution of the State of California."

[4] While it is urged by appellant that the delivery of the jewelry and its display on tax day in Honolulu as part of Wichman & Company's stock of goods, established a permanent situs in Honolulu and without the jurisdiction of the taxing authority of Los Angeles county, such contention is not supported by the evidence. The evidence clearly shows that appellant intended that the jewelry should be displayed during the height of the winter season in Honolulu with the hope of making sales thereof to wealthy residents to whom it was shown, and that both appellant and Wichman & Company expected that the merchandise should be presently returned to California, although they were all uncertain as to the exact date. As a matter of fact, within thirty days of its withdrawal from appellant's stock in California, the entire collection was returned, apparently without one sale having been made, and was again placed by appellant in its stock for sale at its stores in Los Angeles and Beverly Hills.

In view of the conclusion of this court that appellant failed to establish a permanent situs of the jewelry in Honolulu, but that on the contrary the evidence tends to prove only a temporary absence of the merchandise from the state of California, it is deemed unnecessary to pass upon the various points raised by appellant in its briefs.

Upon the authority of the holding in Brock & Co. v. Board of Supervisors, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R. 700, the judgment of the trial court is affirmed

We concur: DORAN, J.; WHITE,

32 Cal.App.2d 615

MOORHEAD v. SHAFER.

Civ. 11041.

District Court of Appeal, First District, Division 2, California.

May 11, 1939.

1. Husband and wife ⇐279(4)

Where wife in property settlement assigned to husband all interest in note except certain monthly interest payments, which husband was to direct makers of the note to pay to her, and she was paid the interest monthly until date that note was payable and after renewal of loan, until her death, no payments were thereafter required to be made to wife's estate, as against executrix' contention that interest should be paid until payments should equal sum amounting to face value of the note, notwithstanding that agreement contained provision that in case of contingency, which never arose, that makers of note should refuse or fail to make payments to wife, husband would pay a sum "equal to the total amount due by the terms of said note and deed of trust." Civ.Code, §§ 1639, 1648, 1652.

2. Husband and wife ⇐279(1)

If husband and wife, in entering into property settlement agreement, intended to use a certain phrase in the agreement rather than the phrase which they actually used, it was the duty of the court to construe the instrument in accordance with the intention of the parties. Civ.Code, §§ 1648, 1652.

3. Husband and wife ⇐279(1)

Where the terms of a property settlement agreement between husband and wife were conflicting, question for determination was what was paramount purpose or paramount provision of the instrument. Civ. Code, §§ 1648, 1652.

4. Husband and wife ⇐279(1)

The question what was the paramount purpose of a property settlement agreement between husband and wife, which contained conflicting expressions, was required to be answered, if possible, by an examination and comparison of the several covenants contained in the agreement. Civ.Code, § 1639.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Hazel E. Moorhead, as executrix of the last will and testament of Lillie May Shafer, deceased, against Frank H. Shafer for declaratory and affirmative relief predicated on a written agreement executed by Frank H. Shafer and Lillie May Shafer, deceased. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Otto G. Foelker, of Oakland (J. H. McKnight, of Oakland, of counsel), for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

STURTEVANT, Justice.

As executrix of the estate of her mother, the plaintiff commenced this action in declaratory and affirmative relief predicated upon a written agreement executed by Frank H. Shafer and Lillie May Shafer. The agreement was executed April 1, 1933. Lillie May Shafer died August 17, 1936, and the plaintiff was appointed executrix of her estate. The plaintiff contends that under the terms of the said written agreement defendant agreed to pay to his wife, or the estate of his wife, the sum of $32.08 per month until the sum of $5,500 had been paid. The trial court made findings to the effect that by the terms of said written agreement all promises by the defendant were solely to pay $32.08 per month, the interest due on a certain promissory note, to his wife, the decedent, and that such payments had been made. From the judgment based on those findings the plaintiff has appealed.

On or before April 1, 1933, marital troubles arose between Mr. and Mrs. Shafer and she was about to apply for a divorce. They had accumulated and were possessed of properties including cash on hand, promissory notes secured by deeds of trust, and a parcel of real estate known as their home. On that date they executed and delivered deeds and assignments. They also executed a formal written agreement. Omitting descriptions not necessary to an understanding of the controversy that instrument provided as follows:

"This Agreement made and entered into this 1st day of April, 1933, by and between Frank Shafer, party of the first part, and Lillie May Shafer, his wife, party of the second part, both of Oakland, California. Witnesseth:

"That said parties are husband and wife, and unhappy differences have arisen between them and they have been living separate and apart from each other for a period of several months last past, and there are no children, the issue of said marriage, and said parties are mutually desirous of equitably settling and adjusting all property rights between them, and for the better support and maintenance of each of said parties and so that each of the parties hereto shall henceforth have no claim or demand against the other, either as to the present property of the respective parties, or as to any property which they may hereafter acquire.

"Now, therefore, in consideration of the mutual promises and agreement herein set forth, it is mutually agreed by and between the parties hereto, as follows:

"1. That said first party gives to said second party the sum of $1700.00 in cash, the receipt whereof is hereby acknowledged.

"2. It is further agreed by and between the parties hereto *that said first party will pay, or cause to be paid to said second party the sum of $32.08 per month,* said payment to be secured by that certain $5500.00 promissory note, secured by a deed of trust, said note and deed of trust dated, Oakland, California, December 5th, 1929, executed by Addie M. Hutchinson and C. C. Hutchinson, her husband, * * * Said second party assigns all her right, title and interest in and to said $5500.00 promissory note and deed of trust to secure the same, *saving and excepting interest payments thereon, as provided by said note and terms of this agreement, in the sum of $32.08 per month.* * * *

"3. It is further agreed by and between the parties hereto that said first party shall direct the makers of said $5500.00 note, towit: Addie M. Hutchinson and C. C. Hutchinson, *to pay directly to said second party, or order, instead of the said first party the monthly interest payments therein provided to be paid,* and in the event that said payments are not so made said first party promises to pay to said second party the sum of $32.08 per month and to continue said payments until said first party has paid to said second party *a sum equal to the total amount (of interest) due by the terms of said note and deed of trust.* Nothing herein shall be construed by said first party, his heirs or assigns, in relieving him or them from paying to said second party *a sum equal to the total interest payments provided in said note and deed of trust.* In the event that there should be a default in said note and deed of trust, or default in the payments to said party by said first party, or non-payment of said $32.08 per month to said second party said first party hereby promises to pay to said second party *the total sum of interest payments provided by said note and deed of trust.*" (Note: The words "of interest" inserted by us.)

"4. It is further agreed by and between the parties hereto that said first party has assigned to said second party all his right, title and interest in and to that certain $3000.00 promissory note secured by deed of trust said note and deed of trust dated, Berkeley, California, May 5th, 1930, executed by C. O. Dull, Gretchen E. Dull, J. L. Bredchoft and Hannah D. Bredchoft, * * *

"5. It is further agreed by and between the parties hereto that said second party shall permit said first party to collect and have for his own use and benefit the interest provided to be paid in said $3000.00 promissory note executed by C. O. Dull, Gretchen E. Dull, J. L. Bredchoft and Hannah D. Bredchoft so long as he shall live, or until the maturity of said note, except on failure to pay second party said $32.08 per month. *In that event interest payments on said note shall be paid by maker direct to second party.* Nothing herein shall be construed by said first party, his heirs or assigns, as ownership in and to the principal sum of said promissory note, and in the event of default in the terms of said promissory note and/or said deed of trust said second party shall exercise all the right of ownership and said first party, his heirs and assigns, hereby waives any and all claim in and to said principal sum of said promissory note, and in the event that said second party shall exercise ownership by declaring default, according to the terms of said note and deed of trust, then and in that event all interest payments to said first party, his heirs and assigns, shall forthwith cease.

"6. It is further agreed by and between said parties that said first party shall by deed transfer all his right, title and interest in and to the following described property, including all the contents of the house thereon, said property situate at 5116 Grove Street, in the City of Oakland,

County of Alameda, State of California. * * *

"8. It is further agreed by and between the parties hereto, as follows, towit:

"(a) That said second party hereby waives all her right, title and interest in and to that certain Studebaker automobile now in the possession of said first party.

"(b) Said second party hereby waives all her right, title and interest in and to the following described promissory notes and deeds of trust securing the payments of said promissory notes:

"1. That certain $2500.00 promissory note secured by deed of trust, said note dated, Berkeley, California, January 25th 1932, executed by American Trust Company, a corporation, Trustee under the Last Will and Testament of Anna C. Thompson, deceased, by W. S. Wood, Vice-President and W. S. Schenck, Assistant Secretary, said note bearing interest at the rate of 7% per annum, interest payable monthly in advance. * * *

"2. That certain $3000.00 promissory note secured by deed of trust, said note and deed of trust dated, Berkeley, California, April 6th, 1929, executed by E. C. Thompson and Isa D. Thompson, said note bearing interest at the rate of 7% per annum, interest payable monthly in advance, and said deed of trust of even date, between E. C. Thompson and Isa D. Thompson, his wife, Trustor, wherein Frank H. Shafer is called the lender and American Trust Company, a corporation, trustee, conveying the following described property. * * *

"3. That certain $3000.00 promissory note secured by deed of trust, said note dated Berkeley, California, July 30th, 1928, executed by Zula May Wood, and said note bearing interest at the rate of 7% per annum, interest payable monthly in advance * * *.

"9. It is further stipulated by and between the parties hereto that said assignments are evidenced by separate documents executed and delivered by the said parties and designated as 'Assignment of Note and Deed of Trust'.

"10. *It is further understood and agreed by and between the parties hereto that* neither of said parties hereto shall have any claim or demand upon the other, whether for support, maintenance or alimony, or to claim or receive as an heir at law, or otherwise, any of the property of the other party hereto, or to claim or receive family allowance from, or to administer upon the estate of the other, and *this document is the full measure of the property rights of the parties hereto* as against each other, and in the event a divorce should be filed by either of the parties hereto, it is hereby stipulated by and between the parties hereto that the Court shall take this contract as the measure of the property rights of the parties hereto, and nothing herein shall be construed, or the fact that a property settlement has been made between said parties, as giving the other encouragement or basis for a divorce. * * *" (Emphasis ours.)

[1–4] In support of her contention the plaintiff stresses and relies on the covenants contained in paragraph three. Neither that paragraph nor any other part of the agreement supports her. In particular that paragraph does not support her for several separate and distinct reasons. In the first place the first part of said paragraph is addressed to the contingency of the refusal or neglect of the Hutchinsons to comply with the directions of Mr. Shafer to make payments of interest directly to Mrs. Shafer. But the Hutchinsons never refused to make said payments directly to her and the contingency never arose. In the next place the covenant as written was to pay "a sum equal to the total amount due by the terms of said note and deed of trust". The principal stated in the note was $5,500. The note was payable in one year. The interest was fixed at 7 per cent. The amount was therefore $5,885. But even the plaintiff disclaimed asking that sum. She thereby admitted that said clause was ambiguous. Indeed it was, because if it had any such meaning why did Mrs. Shafer assign her interest in the note to Mr. Shafer? Such act was worse than an idle act. But, taking the agreement up by its four corners, it is obvious it had no such meaning as will hereinafter appear. Finally, there was undoubtedly an error in writing said covenant. Clearly the parties did not mean to enhance ten-fold the obligation of Mr. Shafer because the Hutchinsons refused to make their payments to Mrs. Shafer instead of to Mr. Shafer. However, in writing said paragraph they neglected, in stating the amount of the obligation of Mr. Shafer, to use the same words repeatedly employed by them. They wrote "total amount due by the terms of said note and deed of trust", whereas they intended

to write "total amount of interest due by the terms of said note and deed of trust", the expression used in other parts of their agreement. If such was the intention of the parties, it is our clear duty to so construe the instrument. Civ.Code, §§ 1648 and 1652; 12 Am.Jur. 775; Coast Counties Real Estate, etc., Co. v. Monterey County Water Works, 96 Cal.App. 269, 278, 274 P. 415. The question presented for determination in such cases being "What is the 'predominant purpose' or 'paramount provision' of the instrument?" Todd v. Superior Court of City and County of San Francisco, 181 Cal. 406, 418, 419, 184 P. 684, 689, 7 A.L.R. 938. That question should be answered, if possible, by an examination and comparison of the several covenants contained in the agreement. Civ.Code, § 1639. We will turn then to the various covenants contained in the agreement for additional light.

In no place did Mr. Shafer agree generally and by unlimited language to pay money in any amount except in paragraph one he agreed to pay $1,700 in cash. That paragraph is in no manner involved. Mrs. Shafer assigned all of her interest in the Hutchinson loan "* * * saving and excepting interest payments thereon, as provided by said note and terms of this agreement in the sum of $32.08 per month." (Par. 2.) That sum out of that fund Mr. Shafer agreed he would direct the Hutchinsons to pay directly to Mrs. Shafer. (Par. 3.) If they did not do so he agreed to pay (ib.). "Nothing herein shall be construed * * * in relieving him * * * from paying a sum equal to the total interest payments provided in said note and deed of trust" (ib.). If there should be a default by the Hutchinsons, Mr. Shafer agreed to pay Mrs. Shafer "* * * the total sum of interest payments provided by said note and deed of trust (ib.). The first of the covenants recited in this paragraph immediately preceded and all others recited in this paragraph immediately following the covenant we have written "a sum equal to the total amount (of interest) due by the terms of said note and deed of trust". It follows that each promise was to pay out of the same fund in the same quantum. That was the "paramount purpose" of the agreement and the trial court did not err in so construing it.

Moreover, the parties so construed this agreement. Said instalments were paid down to the date of the termination of the 1929 note and were, so far as the record discloses, accepted without complaint. When the Hutchinson note was about to outlaw Mr. Shafer could have declared a default and terminated that loan and also his obligations under the agreement before us because he had then fully performed every covenant contained therein. The parties did not so construe their agreement. Mr. Shafer renewed the loan December 2, 1935, as the lender in his own name but continued the payments as though the note of 1929 was still in force. He so continued down to the date of the death of Mrs. Shafer.

After the death of Mrs. Shafer he made no payment to this plaintiff. He was not bound to do so. No covenant contained in the agreement called upon him to do so.

All matters, except making the payments provided in said agreement, were clearly intended to be executed covenants. All provisions were for a division of the properties and the support of each spouse. Each note, and the trust deed securing its payment, was unconditionally assigned to one spouse. From that instant either spouse could have served notice on the maker of any note held by such spouse and caused a sale in the event of a default. Furthermore, each spouse could have assigned any one of his or her notes and trust deeds. No covenant to the contrary was inserted. If Mrs. Shafer exercised her right and declared a default under the Dull loan, all rights of Mr. Shafer to collect interest thereon would ipso facto terminate. (Par. 5.) If Mr. Shafer did the same thing under the Hutchinson loan, the note dated December 5, 1929, he became liable to Mrs. Shafer to pay "* * * the total sum of interest payments provided by said note and deed of trust". (Par. 3.) Mr. Shafer's rights to participate in the Dull loan were limited to him and did not extend to his "* * * heirs and assigns". (Par. 5.) Mrs. Shafer's heirs and assigns were not expressly bound by any covenant nor did any covenant expressly run in their favor. The sole language used, except as hereinabove noted, was to the effect that all payments by Mr. Shafer would be made to Mrs. Shafer.

In the preamble it is said the parties were "mutually desirous of equitably settling and adjusting all property rights between them, and for the better support and maintenance of each of said parties hereto shall henceforth have no claim or

demand against the other * * *". That recital is inconsistent with and cannot be reconciled with the claim of the plaintiff. However, the conclusions stated above are in entire accord with the recital contained in said preamble. The last paragraph, number ten, is also helpful wherein it provides: "It is understood and agreed by and between the parties hereto that * * * this document is the full measure of the property rights of the parties hereto * * *."

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



32 Cal.App.2d 566

RUSSELL et ux. v. ZINK et al.

Civ. 2270.

District Court of Appeal, Fourth District, California.

May 8, 1939.

Rehearing Denied June 5, 1939.

Hearing Denied July 7, 1939.

1. Mortgages ⇐38(1)

Where owners to satisfy trust deed indebtedness against land conveyed property to grantee and as part of same transaction executed "agreement to convey real estate" under which grantee agreed to sell and owners agreed to buy one-third interest on certain terms, and which agreement provided that it should be consummated within three years, evidence warranted finding that "equitable mortgage" was intended and not an absolute sale with option to repurchase.

[Ed. Note.—For other definitions of "Equitable Mortgage," see Words & Phrases.]

2. Mortgages ⇐33(3)

Where owners to satisfy trust deed indebtedness against land conveyed property to grantee and as part of same transaction executed "agreement to convey real estate" under which grantee agreed to sell and owners agreed to buy one-third interest of land conveyed on certain terms, provision that if agreement to purchase was not consummated within three years it should be void was merely an ineffective attempt to waive in advance the right of redemption, and would not defeat the character of the transaction as an "equitable mortgage." Civ.Code, § 2889.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to quiet title by T. B. Russell and wife against Margaret Zink, also known as Margaret E. Zink, and others. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Harvey, Johnston & Baker, of Bakersfield, and F. E. Davis, of Hollywood, for appellants.

W. R. Bergman, of Bakersfield, H. J. Gwartney, of Los Angeles, and Claflin, Dorsey & Campbell, Brittan & Mack, and Borton, Petrini & Conron, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to 110 acres of land in Kern county.

In June, 1924, J. J. Fagan and C. F. Ramsey purchased this land for $5,500, paying half in cash and giving a note for $2,750, secured by a trust deed on the land. In July, 1924, for a cash consideration of $1,500, an undivided one-third interest in this property was conveyed to O. C. Zink and his wife, subject to the existing trust deed. In November, 1924, in consideration of $1,500, Ramsey and his wife conveyed to the plaintiffs herein their undivided one-third interest in this land, subject to said trust deed.

In February, 1931, the bank which held this trust deed began to press for payment, the note having become due. There was then no delinquency with respect to interest and taxes. After some negotiations concerning the best manner of taking care of the trust deed, including a suggestion that the property be divided between the three owners, Fagan and Zink and their wives conveyed their interest in the property to the plaintiffs by a grant deed dated April 7, 1931. As a part of the same transaction, an "agreement to convey real estate" was executed by the plaintiffs and Mr. and Mrs. Fagan, which provided that the plaintiffs "agree to sell" and the Fagans "agree to buy" an undivided one-third interest in this land. The agreement then

recited that the property was subject to a trust deed for $2,750, with accruing interest and taxes; that the sellers might pay this off or reencumber the property with a similar trust deed; that the price which the buyers "agree to pay" for the one-third interest in the land "is one-third of $2,750 cash and one-third of any additional expenses or charges in the way of interest on the $2,750 encumbrance, taxes, or other charges incurred"; that on receipt of these amounts, "together with charges incident to assignment or transfer", the sellers agree to convey a one-third interest in the property to the buyers; and that the buyers agree to pay the sellers "promptly as same are incurred, one-third of the interest on $2750 and one-third of the taxes, and other expenses incurred by the sellers on said property". It is then provided that "if this option to purchase or agreement to purchase is not consummated by the Buyers within three years from this date, that this agreement to purchase shall become null and void and that in the event Sellers shall not be required to issue deed". An identical agreement between the Zinks and the plaintiffs was executed at the same time. On April 20, 1931, the plaintiffs paid off the trust deed and the usual reconveyance was executed by the trustee and recorded.

An oil lease covering the property was executed by the plaintiffs on June 20, 1936, and on September 23, 1936, they brought this action seeking to quiet their title to the entire tract. Zink and his wife answered, alleging that the deed to the plaintiffs and the agreement to convey had been executed as security for sums to be advanced by the plaintiffs in paying off the trust deed and for further advances for interest, taxes and expenses, claiming to be the owners of an undivided one-third interest in the property, and asking the court to determine the respective interests of the parties. A similar answer was filed by Fagan. The court found that the plaintiffs are the owners of an undivided one-third interest in this property; that they paid the trust deed debt pursuant to an agreement with the other parties that they should be secured therefor by a deed conveying the interests of the other parties, respectively, which deed, though absolute in form, was intended as security for such indebtedness; that in pursuance of such agreement the respective agreements to convey were executed and the plaintiffs paid off the trust deed; and that this equitable mortgage constitutes a valid and subsisting lien on the undivided two-thirds interest in said land owned by the Zinks and the Fagans. The amounts owed to the plaintiffs by the Zinks and the Fagans, respectively, were stipulated and a judgment was entered decreeing that the plaintiffs were the owners of an undivided one-third interest in this property and that the Fagans and the Zinks each own an undivided one-third interest therein, subject to the respective amounts owed by them to the plaintiffs, and subject to certain interests owned by other parties which are not involved on this appeal.

From this judgment the plaintiffs have appealed. In asserting that the evidence is insufficient to support the finding that this was an equitable mortgage they argue that there was no surviving debt since the trust deed indebtedness was extinguished, that the amount paid by them was the full value of the property, that the parties considered the transaction a full conveyance with an option to repurchase and acted accordingly, and that the Zinks did not have title to a one-third interest in the property at the time of the transaction in question. Although the appellants paid off the original debt, which was a lien upon the interests of the respective parties, if the money so used was advanced as a loan, in so far as the other parties are concerned, and their interests in the land taken as security therefor, there was a surviving debt which could be the basis of an equitable mortgage. Assuming that there is a conflict in the evidence, a portion thereof would amply sustain a finding that the amount which the appellants claim to have paid for a two-thirds interest in this property was far less than its value at that time. The evidence relating to the intention of the parties with respect to the nature of this transaction is conflicting. The contention that the Zinks had no title at the time in question is based upon a technical defect in the original deed to them, which defect was later corrected. Not only is this matter immaterial here, but the evidence supports the finding that a one-third interest in this property belonged to the Zinks. The only question requiring consideration is whether the evidence sustains the court's findings and conclusion to the effect that the transactions in question constituted an equitable mortgage securing the appellants for advances made by them.

The testimony of Zink and Fagan, with letters written by Fagan and the appellant

T. B. Russell, both before and after the expiration of three years from the date of this transaction, abundantly support the court's findings. Among other things, Zink testified that when the bank demanded payment of the trust deed he and Russell endeavored to obtain a new loan without success; that while he and Russell were discussing the possibility of dividing the property Russell said: "I probably can take care of that loan myself"; and that he held a conversation with Russell in which it was said that a deed would be given him to secure any loan that might be made, that the rate of interest would be the same as the trust deed then on the property, 7 per cent payable quarterly, and that "we would carry on as we had in the past, pay our proportionate share of all expenses, interest and taxes and any kind of special assessments. It was to be carried on the same as it had in the past." He further testified that nothing was said at any time about Russell buying the whole property; that in his presence Russell told Fagan that when the deed and agreement to convey were signed he would see that the bank was paid off and loan the money on the property; that he and Fagan both said they were willing to pay Russell any expenses incidental to getting the money; that he subsequently paid Russell his share of the "charges on the loan", the abstract charges, and his share of certain taxes, and that he later paid Russell $25 to apply "on my account". He then testified that his intention was that the deed was to be given as security for the loan made by Russell.

Fagan testified to the same general effect. He identified a letter which he had written to Russell on September 10, 1934, more than three years after the deed and agreement were executed, in which he suggested that the land be divided, that there was a chance to sell thirty acres of it for $1,500, that he was in favor of doing this and applying the proceeds "to reducing indebtedness to you and holding the remaining 80, 3 ways, or you may consider this my ⅓rd and sell for that amount, deduct your bill against me and close out my account, or Zink may take my place in this transaction, or any other similar division you might care to make. You could pay me off on that basis or keep it all if you wish". He identified a letter written to him by Russell under date of September 13, 1934, in which Russell referred to his letter of September 10, and said he would do some figuring and see Fagan on September 16. He testified that they met on September 16; that he told Russell he was reluctant to be obligated to him for so much money for so long, and would prefer to make a sacrifice so that Russell could get his money; and that Russell objected to selling a part of the land, talked of the possibility of securing an oil lease and stated that "he would continue to carry the loan and go just the same as he had been". He further testified that during the negotiations which led to this transaction the word "sale" was never used by the parties, and that in discussing the matter they used the words "security" or "loan".

The testimony of Zink and Fagan is strongly corroborated by a portion of the testimony of Russell. He testified that Zink and Fagan came to his office in Los Angeles; that there was talk of dividing the property, which was not done; that he, as a part owner, had an interest in renewing the loan; and that he told them he would buy the property outright and give them three years in which to buy it back. He further testified that he charged Zink and Fagan with the expenses of the transfer, and that he charged them with a further amount based on interest he lost by taking his money out of a savings account. He identified a letter he wrote to Fagan on May 11, 1931, in which he set forth that Fagan owed him $12 as his share of "charge for a loan, $36.00", together with his share of taxes, interest and abstract charges totaling $61.88. He testified that the $36 charge for a loan was to reimburse him for the loss of interest he sustained by taking his money out of a savings bank during the middle of a six-months' period. He then identified a memorandum signed by him and sent to Fagan charging him with his one-third of interest due July 22, 1931, in the sum of $16.04, his one-third of interest due on October 22, 1931, $16.04, and his share of the 1931 taxes. It is significant that these items of interest are exactly one-third of the quarterly interest on $2,750 at 7 per cent and are for interest which accrued after the deed and agreement were delivered. In this connection he testified that he "expected them to continue to pay interest the same as we had been paying". He further testified that Zink paid his share of the transfer charges at the time of the transaction and at a later time "made a payment of $25.00", and that Zink had owed him no money except as arising from this transaction. On December 31, 1931,

Russell wrote Fagan, "I feel we are still all interested in the 110". He testified that he meant Fagan, Zink and himself. On August 14, 1933, Fagan, in a letter to Russell, said: "Whenever your load becomes too great to carry on mine and Zink's account I will do what I can to aid, and cheerfully, under any plan you might have." On January 19, 1934, Russell wrote a letter to Fagan relating to the leasing of the premises in which he said: "Anything we can get this year, to help carry on is worthwhile". On September 10, 1934, Fagan wrote Russell about a proposed sale of thirty acres for $1,500 and saying he was in favor of accepting the same and applying the proceeds "to reducing indebtedness to you and holding the remaining 80, 3 ways". On September 13, 1934, Russell wrote Fagan that he had been doing some figuring and would see him on the 16th. We have already referred to Fagan's testimony as to what occurred when they met on September 16th.

Russell's deposition was taken on October 30, 1937. He was then asked whether he had not discussed the leasing or selling of the property with Fagan, and conferred with Zink about the proposals or suggestions Fagan had made, during the period from April, 1931 to June, 1936. He replied: "Naturally. We were all in the deal together and we discussed the different angles, everything that came up. No question about that." Two months later he amended this answer by adding: "Up to the time the option expired I was willing to do anything I could that would help them take up their option." On May 17, 1935, Fagan wrote Russell about the proposed sale of part of the property at $70 per acre. Russell answered under date of May 21, 1935, saying that he agreed with Fagan that the property should not be so tied up that "you will not be able to take advantage of a good deal should such a thing show up". On July 31, 1935, Fagan wrote Russell that a certain party had offered $2,500 cash for forty acres of the property, stating that he would be glad if Russell would accept this "and apply on account and hold the balance of the land, 70 acres, for the balance of your account, including all expenses, and compound interest to date". Russell wrote Fagan on August 2, 1935, thanking him for his letter of July 31, saying he was not interested in the sale proposition, that he thought it poor business to sell off the best portion, and that "there is not much difference in what it will cost to carry the whole against a portion of it. I would rather wait a little longer if necessary, and take a chance on a better deal later." On December 18, 1935, Russell wrote Fagan saying he thought it would be foolish to sell a part of the place and that "I feel things will pick up and we will have a better opportunity later on". Russell further testified that he made an oil lease on the land on June 20, 1936, that he talked over the possibility of leasing it with Fagan but did not discuss the matter with Zink. He also testified when the transaction in question was made "the program was that they were to pay (him) interest at the rate of 7% per annum, payable quarterly".

[1, 2] The evidence fully sustains the court's finding that this was an equitable mortgage, and further comment is unnecessary. Appellants rely upon the case of Davis v. Stewart, Cal.App., 88 P.2d 734, in which it was held that where a debt is extinguished when a deed is given the fact that an option to repurchase is also given is not sufficient to show that the deed was an equitable mortgage. In that case, as the court pointed out, the written declaration of the parties and all of the evidence showed that the transaction was intended as an absolute transfer of the property. In the instant case, the debt was not extinguished but a new debt was created at the time the transaction was consummated. A part of the evidence, including much of the testimony of the appellant T. B. Russell, is entirely at variance with the theory of an absolute transfer of this land. While a conflict appears, the evidence supports the findings and conclusion to the effect that this was an equitable mortgage. The final provision of the agreement, that the same should be null and void if the agreement to purchase was not "consummated" within three years, was merely an attempt to waive in advance the right of redemption, which may not be done. Civ.Code, § 2889.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

32 Cal.App.2d 521

THOME v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 6186.

District Court of Appeal, Third District, California.

May 4, 1939.

Hearing Denied July 1, 1939.

1. Animals ⇐29, 32

The Bovine Tuberculosis Act does not authorize the destruction of healthy animals, and while an owner of cattle may not obstruct an official inspection of his animals, there is nothing to prevent him from being present with his own veterinarian to observe and participate in the examination so long as he does not interfere with the performance of duties of the state veterinarian. St.1933, pp. 97–105, §§ 221–254.

2. Animals ⇐29

Where smear of tuberculin about to be injected into cattle by state veterinarian was refused owner, owner was justified in refusing to permit state veterinarian to further proceed with tuberculin test of cattle, since owner had right to recover if test was improperly administered and approved virus was prerequisite of test, and whether test was properly administered could be determined only by obtaining a sample of the virus. St.1933, pp. 97–105, §§ 221–254.

3. Poisons ⇐3

Under statutory definition of economic poison, tuberculin used in diagnosing tuberculosis in cattle is not an "economic poison" required to be kept in a container to which is affixed imprinted label containing certain facts. St.1933, pp. 97, 237, 238, §§ 221(a), 1061(a), 1065.

Proceeding by Manuel Garcia Thome against the Superior Court of the State of California in and for Merced County and others to review an order finding petitioner guilty of contempt.

Order annulled, and petitioner discharged.

Prior opinion, 87 P.2d 100.

J. L. Royle, of Fresno, for petitioner.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for respondents.

Ben Harrison, U. S. Atty., and Francis C. Whelan, Deputy U. S. Atty., both of Los Angeles, amici curiae.

PER CURIAM.

A rehearing was granted in this case in order that we might have the benefit of further argument. Additional briefs have been filed and the matter orally argued, and after further consideration we adopt the opinion heretofore filed, as follows:

"By this writ petitioner seeks to review an order of the Superior Court of the County of Merced finding petitioner guilty of contempt.

"This is another case growing out of the preliminary injunction issued by the superior court restraining and enjoining certain defendants, including petitioner, from interfering with the agents of the state department of agriculture in testing cattle under the provisions of the Bovine Tuberculosis Act. Secs. 221–254, St.1933, pp. 97–105.

"After the issuance of the preliminary injunction an order was directed to petitioner to show cause why he should not be punished for contempt of said preliminary injunction. A hearing was had and petitioner adjudged in contempt of court, and ordered punished therefor.

"There seems to be no conflict in the testimony. Upon a certain day petitioner was notified to have his cattle in stanchions, preparatory to receiving the tuberculin test. Upon that day a duly authorized veterinarian of the agricultural department appeared at the dairy of petitioner, and found the cattle were all confined in their stanchions. Petitioner was present in person and with a duly licensed veterinarian. Petitioner then requested of the state veterinarian a sample or smear of the tuberculin about to be injected into his cattle. This request was refused, and the petitioner then would not permit the test to proceed, and the citation and conviction of contempt followed.

[1] "This court recently upheld the constitutionality of that portion of the Agricultural Code relating to bovine tuberculosis (Affonso v. Brock, Cal.App., 84 P.2d 515) upon the ground it was a valid exercise of the police power enacted in the interest of the public health. We there pointed out, however, that although stringent and summary, the act did not deprive the owner of his remedy for wilful and unlawful destruction of his cattle, if in fact they were not afflicted with tuberculosis, and that he had a remedy for the wilful or wrongful destruction in a subse-

quent action for damages against those who were responsible for such killing. The destruction of healthy animals was not authorized by the statute, and while an owner of cattle may not obstruct an official inspection of his animals nor interfere with the department nor its agents while carrying out the provisions of the act, there is nothing to prevent him from being present with his own veterinarian to observe and participate in the examination.

"A misunderstanding seems to have arisen as to the meaning of the word 'participate'. By the use of that word it was intended, and its meaning justifies the interpretation, that an owner might at that time, do any and all things, either by himself or through his veterinarian that would not in any manner or way interfere with the performance of the duties of the state veterinarian.

[2] "Accordingly we believe an owner in the protection of his subsequent right to challenge the acts of the state, was entitled to and was justified in requesting a smear of the tuberculin about to be injected into his cattle. One of the prerequisites of the administration of this test is the use of approved virus. The only practical way that such a fact can be determined is to obtain, prior to its use, a sample thereof. Where, as in the case at issue, this right was refused the owner, he was justified in refusing to permit the department to further proceed with its test.

"The law accords the owner every right and opportunity to show that the law had been carelessly or improperly administered or that his cattle were not reactors, and to deprive him of the means of so showing, would be to deprive him of a constitutional right. It would be an idle act to declare that the owner could, upon an appropriate showing, recover for abuse upon the part of the state and at the same time deny him the opportunity of obtaining the evidence necessary to make such showing.

"As regards the uncertainty of the terms of the preliminary injunction, we have, in Mattos v. Superior Court, Cal.App., 86 P. 2d 1056, considered that point. We need not here repeat what was there said.

[3] "Petitioner also objected to the use of the tuberculin by the veterinarian because it did not have affixed to the container a printed label stating certain facts required by section 1065 of the Agricultural Code. We do not believe that tuberculin is a substance as that term is used in the definition of economic poison.

" ' "Economic poisons" includes any substance, or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all insects, fungi, bacteria, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the director may declare to be, a pest, which may infest or be detrimental to vegetation, man, animals or households, or be present in any environment whatsoever.' Sec. 1061(a), Agricultural Code.

"Tuberculin is defined as the 'product of the growth of the tubercle bacillus from any source, used or intended to be used in diagnosing tuberculosis in cattle.' Sec. 221(a), Agricultural Code.

"The order is annulled and the petitioner discharged."



32 Cal.App.2d 610

THRASHER v. THRASHER et al.

Civ. 2331.

District Court of Appeal, Fourth District, California.

May 10, 1939.

Appeal and error ⇐787

Where appellant took no further steps after filing notice to clerk of trial court to prepare transcript of record, and trial court later granted motion terminating any proceedings for preparation of a record, and no proceedings for preparation of a bill of exceptions or of a transcript were pending before trial court, and time therefor had expired, appeal was dismissed upon motion.

Appeal from Superior Court, Riverside County.

Proceeding by Harriet M. Thrasher against Mary E. Thrasher and others. From adverse judgment, plaintiff appeals.

Appeal dismissed.

Max M. Gilford, of Los Angeles, for appellant.

A. Heber Winder and William A. Wood, both of Riverside, and Winthrop O. Gordon, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

Motion by respondent to dismiss appeal on the ground that no transcript has been filed and that proceedings for the preparation of a record have been terminated in the trial court.

From the certificate of the county clerk it appears that judgment was entered on February 21, 1938; that a motion for a new trial was denied on April 25, 1938; that notice to the clerk to prepare a transcript was filed on May 31, 1938; that no further steps have been taken by the appellant since said date with respect to preparing a record; that on February 26, 1939, on motion, an order was made in the trial court terminating any proceedings for the preparation of a record; that no proceedings for the preparation of a bill of exceptions or of a transcript are now pending before said court; and that the time therefor has expired. The motion must, therefore, be granted. Bruce v. Tunstall, 24 Cal.App.2d 370, 75 P.2d 120; Christensen v. Couey, 136 Cal.App. 268, 28 P.2d 689.

The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.



REGAN et al. v. SAN MATEO COUNTY et al. *

Civ. 10853.

District Court of Appeal, First District, Division 1, California.

May 12, 1939.

Rehearing Denied June 10, 1939.

Hearing Granted July 11, 1939.

1. Counties ⇐74(3)

County Government Act passed during county treasurer's elective term, prohibiting retention by county officers of commissions, fees, perquisites, or other moneys, abrogated county treasurer's right under previous statute to inheritance and transfer tax commissions during his unexpired term, and his salary which in same year was increased by statute reclassifying county was only compensation treasurer could accept. Pol. Code, §§ 4005c, 4006, 4290; section 4244, subd. 17, as amended by St.1931, p. 1174.

2. Officers ⇐100(1)

The Legislature could grant elected county treasurer right to retain inheritance and transfer tax commissions and by same token could take away the right during his term, and right to retain commissions was entirely independent of statute fixing county treasurer's salary. Pol.Code, §§ 4005c, 4006, 4290; section 4244, subd. 17, as amended by St.1931, p. 1174; section 4250, as amended by St.1923, p. 1161; St.1921, p. 1500, as amended; Const. art. 11, § 9.

3. Counties ⇐24

Provision of county charter passed during elected county treasurer's term requiring all county officers to pay collected fees or moneys into county treasury, and provision that compensation paid to elective and appointive officers was to be in full for all services rendered, abrogated elected county treasurer's right to inheritance and transfer tax commissions during his unexpired term, since county charter provisions superseded general law giving treasurer right to commissions. St.1933, p. 2967, art. 6, § 13; p. 2976, art. 13, § 5.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by H. W. Regan and others against the County of San Mateo and others for inheritance and transfer tax commissions. From an adverse judgment, plaintiffs appeal.

Affirmed.

Carl W. Anderson, of Burlingame, for appellants.

Gilbert D. Ferrell, Dist. Atty. and D. E. Sullivan, Asst. Dist. Atty., both of Redwood City, for respondents.

WARD, Justice.

This is an appeal by the assignees of Harry E. Jenkins, formerly treasurer of the county of San Mateo, from an adverse judgment in an action against the county for inheritance and transfer tax commissions.

*For subsequent opinion see 97 P.2d 231.

[1] Harry E. Jenkins was the duly elected, qualified and acting treasurer of San Mateo county from January 5, 1931, until January 7, 1935. Thereafter, under the provisions of a county charter which had in the meantime become effective, for the appointment of a treasurer, he was selected, duly appointed and served in that capacity until October 28, 1936. From the date of his election until August 14, 1931, Jenkins, as treasurer, collected and retained certain commissions on inheritance and transfer taxes to which he was entitled under the provisions of section 4290 of the Political Code. On this last-mentioned date there became effective the County Government Act (St.1931, p. 1168). Subdivision 17, of § 4244, Pol.Code, as amended by section 1, of this act (page 1174) provided that all fees, perquisites, commissions and other moneys received by any county official, excepting the coroner, public administrator and certain county clerk registration deputies, should be paid into the county treasury and belong to the county. This provision is explicit. It prohibits the retention by any county officer of commissions, fees, perquisites or any other moneys received by any officials other than those specifically excepted. In the same year the county of San Mateo was raised from the twenty-first to the fifteenth class, secs. 4005c and 4006, Pol.Code and the salaries of certain county officers were raised, including that of the county treasurer, but the act provided that the salaries "shall be in full for all compensation to said officials". Stats.1931, p. 1168, at pp. 1170 and 1174. The salary was, therefore, the only compensation the treasurer could accept for his official service. County of Kern v. Fay, 131 Cal. 547, 63 P. 857; County of San Diego v. Schwartz, 145 Cal. 49, 78 P. 231.

[2] Appellants contend that the change in the classification of the county did not confer upon the treasurer the benefit of the increased salary during his unexpired term (art. XI, sec. 9, Const. of Cal.; Smith v. Mathews, 155 Cal. 752, 103 P. 199), and that his salary for that period remaining the same he was officiating under the previous statute (Pol.Code, § 4250, as amended by St.1923, p. 1161); that the Inheritance Tax Act, St.1921, p. 1500, as amended, permitted the collection of inheritance tax commissions and that therefore the privilege of collecting them could not be affected before the end of his elective term. The right or privilege to the commissions was entirely independent of the statute fixing the salary of the county treasurer. The legislature had the power to bestow this perquisite and by the same token the right to take it away.

[3] On July 1, 1933, the new charter of San Mateo county became effective. Section 13 of article VI of the charter (Stats. 1933, p. 2967) provides that a county officer authorized to collect fees or moneys must on the next business day pay into the county treasury the receipts so collected. The charter relative to the salaries of certain county officers, etc., superseded the statute, but the right to retain the commissions here in question had already been abrogated. The county charter did not countenance the retention of the inheritance tax commissions during the elective or appointive terms of the treasurer.

Appellants contend that the charter does not prohibit the retention of inheritance tax commissions by ex-officio officers. Section 5 of article XIII (Stats.1933, p. 2976) provides that the compensation paid to elective and appointive officers shall be in full for all services rendered. A county charter provision dealing with matters of compensation controls over a general law. Section 13 of article VI (Stats.1933, p. 2967) applies to "every county officer". Lesem v. Getty, 23 Cal.App.2d 57, 72 P.2d 183; Matter of Dodge v. City and County of San Francisco, 135 Cal. 512, 67 P. 973; San Francisco v. Mulcrevy, 15 Cal.App. 11, 113 P. 339; Mulcrevy v. San Francisco, 231 U.S. 669, 34 S.Ct. 260, 58 L.Ed. 425; County of Alameda v. Cook, 32 Cal.App. 165, 162 P. 405. If the freeholders in framing the San Mateo county charter desired that its officers, ex officio or otherwise, should pay to the county all the perquisites over the salaries fixed in the charter, they had a right to so provide.

In Reuter v. Board of Supervisors, 220 Cal. 314, 326, 30 P.2d 417, 422, the court in dealing with another question arising out of the provisions of this same charter, said: "The general purpose of section 7½ of article 11 of the Constitution was to give local self-government or county home rule to counties of the state by means of charters framed under said constitutional amendment. That this was the intent and purpose of the section clearly appears from the language of the section itself, which declares that, after the charter has been approved by the Legislature, 'such charter

shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.'"

The judgment is affirmed.

I concur: KNIGHT, Acting P. J.



32 Cal.App.2d 482

OWINGS et al. v. GATCHELL et al.

Civ. 10611.

District Court of Appeal, First District, Division 1, California.

May 2, 1939.

1. New trial ⇐6

The granting or refusing of a motion for a new trial is largely within the discretion of the trial court.

2. New trial ⇐71

In passing on a motion for a new trial, the trial court is not bound by the rule of conflicting evidence but may weigh the evidence for both parties and determine the just conclusion to be drawn from it.

3. New trial ⇐68

If the trial court is satisfied that the findings of the jury are contrary to the evidence, it may grant a new trial.

4. New trial ⇐72

In proceedings on a motion for a new trial the question of the probative force of the testimony is within the determination of the trial court even though the evidence is not conflicting.

5. Appeal and error ⇐1015(3)

In action arising out of automobile accident, jury having found for defendant, appellate court refused to set aside order granting a new trial where there was some testimony that defendant was operating his automobile in a negligent manner and trial court had right to accept such testimony as true, although testimony was not believed by the jury and was contrary to the preponderance of evidence.

6. Appeal and error ⇐977(3)

It is only on rare instances and on very strong grounds that action of the trial court in granting a new trial will be disturbed, and if there is a reasonable or even debatable justification for action of trial court in granting a new trial, its ruling will not be disturbed.

7. New trial ⇐68

In action for injuries sustained in a collision between defendant's automobile which was proceeding along three-lane highway and plaintiffs' automobile which was attempting to cross highway, plaintiffs' testimony that defendant was not proceeding in proper traffic lane at time of accident, if believed by trial court, was sufficient justification for granting of plaintiffs' motion for new trial after jury found verdict for defendant.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Mary Owings and Elmer Owings against Charles H. Gatchell and Edwin Coe for damages arising out of an automobile accident. The trial court granted a nonsuit as to the defendant Coe and the jury found for defendant Charles H. Gatchell. From an order granting plaintiffs' motion for a new trial, the defendant Gatchell appeals.

Order affirmed.

Yale S. Kroloff, of Oakland, for appellant.

Frank v. Kington, of Redwood City, for respondents.

KNIGHT, Justice.

A sedan automobile owned and driven by Charles H. Gatchell, and a roadster belonging to Elmer Owings and driven with his consent by Edwin Coe, collided on the main highway just south of Redwood City at about 1:30 o'clock in the afternoon. Mary Owings, 70 years of age and the mother of Elmer Owings, was riding with Coe at the time of the accident; and on account of the injuries she claims to have sustained therein she joined with her son in bringing this action for damages against the drivers of both automobiles, Mrs. Owings seeking to be compensated for personal injuries, and her son for property damage to his automobile. At the conclusion of plaintiffs' case a nonsuit was granted as to Coe, and upon the submission of the

cause to the jury it returned a verdict in favor of the remaining defendant Gatchell. Judgment was entered accordingly, and plaintiffs moved for a new trial, which was granted as against the defendant Gatchell, upon the grounds of insufficiency of the evidence and newly discovered evidence. From the order made in that behalf the defendant Gatchell appeals.

Plaintiffs make no attempt to sustain said order on the second ground specified therein, nor could it be upheld on that ground for the reason that the affidavit filed by Mrs. Owings in support of the motion is wholly insufficient to meet the plain legal requirements governing such matters. The single question presented by the appeal is, therefore, as to the insufficiency of the evidence; and the essential facts appearing therefrom are these: Coe, the driver of the roadster, was a friend of the Owings family, and on the day of the accident, after eating lunch with them at their home in Redwood City, stated he would take the roadster and make some repairs to the upholstery; but before starting the work, he consented to drive Mrs. Owings down the main highway to do some shopping. The highway runs in a northerly and southerly direction, and they entered from the east side, but did not drive upon the paved portion thereof. They turned to the left and drove southerly along the shoulder on the east side for a short distance, and stopped at a store to make some purchases; thereupon they continued to drive southerly along the shoulder of the east side for another short distance, and then turned to the right and started across the highway to the west side. The highway in that vicinity is divided by white lines into three lanes ten feet wide, the east lane being for northbound traffic, the middle lane for passing, and the west lane for southbound traffic; so that in order to reach the west lane it was necessary for Coe to drive across the east and middle lanes. Just about that time the defendant Gatchell, a clergyman residing in Redwood City, traveling northerly in the east lane of the highway, overtook a truck traveling in the same direction. In order to pass it, he turned into and proceeded up the middle lane, and while still abreast of the truck the roadster suddenly appeared in front of him, and the collision therewith occurred on or near the white line dividing the middle and the west lanes. The truck had just entered the highway from the west side less than 200 feet south of the point of the collision, and crossed over to and proceeded along the east lane. It was loaded high with shrubs and flowers, and Coe admitted having seen its approach before he started to cross the highway in front of it. The defendant Gatchell testified that after overtaking the truck and before starting to pass it, he looked ahead up the middle and west lanes, observed that they were clear of traffic, and then proceeded to pass the truck by turning into the middle lane; that he was driving about thirty miles an hour, and that while still abreast of the truck, with the front wheels of his car two or three feet ahead of the end of the truck, the roadster suddenly appeared in the middle lane directly in front of him, coming diagonally across the highway from the east side, in front of the truck; that he immediately applied his brakes, but was unable to avoid the collision, the left front end of his car striking the left rear end of the roadster.

There is a conflict of evidence as to the movements of the roadster just before it started to cross the highway. Coe testified that after stopping at the store he drove southerly along the east shoulder to a point about fifteen feet north of the northerly corner of Buckingham street, which enters the highway from the east side but does not cross it; that he stopped at that point with his front wheels about three feet off the paved highway, looked toward the south, saw no traffic coming, then to the north and saw two cars coming from that direction; that he waited until they passed, then looked south again and saw the truck at a distance he estimated to be about 500 feet down the highway, coming north; that he then proceeded to cross the highway at an angle. His testimony in this regard was flatly contradicted, however, by a Mrs. Moore, who owned and operated a service station immediately north of the northerly corner of Buckingham street. She testified that Coe did not stop at any point north of said corner, nor at all before starting across the highway; that he drove past her service station, continued on across the end and to the farther side of Buckingham street and then without stopping at all turned sharply to the right and cut diagonally across the highway in front of the truck. Furthermore, it is certain that when Coe turned to cross the highway at the point fixed by him the truck was less than 500 feet away, be-

cause as shown by the map used at the trial, the correctness of which is not disputed, the truck entered the highway less than 325 feet from said turning point. The evidence is conflicting also as to the exact point where the impact occurred. Mrs. Moore testified that as Coe started across the highway he "got in front of the truck and collided right in this middle lane" with the Gatchell car; that at the time of the impact the back part of the roadster was still in the middle lane. The testimony given by the defendant Gatchell agrees with that of Mrs. Moore. He testified that when the impact occurred the rear half or one-third of the roadster was still in the middle lane. Coe was unable to state just where the roadster was when it was struck, his testimony on this point being that it was "pretty close" to the white line dividing the middle and the west lanes; that it was "possible * * * that some portion of the left rear part of the car may have extended a little into the passing lane", but he "could not say for sure". Mrs. Owings testified, however, that the roadster was entirely within the west lane; that they had been traveling therein "maybe 50 or 60 feet, maybe more * * * maybe 100 feet" before the collision occurred. Thee other witnesses were called to testify as to the happening of the accident. They were selling oranges from a truck parked on the east shoulder of the highway just south of the point of collision; but only one of them, Andy Gant, was able to give any information at all as to the location of the cars at the time of the collision, and his testimony was quite indefinite. He stated that the rear end of the roadster may have been a little over in the middle lane when it was hit.

At the time of the granting of the nonsuit as to Coe, the trial court stated that its order in that behalf was based upon the ground that there was no evidence showing negligence on the part of Coe, and it so advised the jury. But despite such ruling it afterwards submitted the question of Coe's negligence as an issue of fact to the determination of the jury under instructions to the effect that if it found that the accident was proximately caused by negligence on his part, plaintiffs could not recover as against the defendant Gatchell. In this connection it went on to instruct the jury further, and properly so, as follows: "Under the law of California, a person riding in an automobile cannot recover against a third party, where the driver of that automobile is operating same at the time of the collision, as the servant or agent of the person riding therein, and the said driver of that automobile is guilty of some negligent act or omission, which did in some degree, proximately contribute to the accident, the reason being that under such circumstances the negligence of the driver is imputed to his principal or master. Therefore, if you find that at the time of the collision the driver, Edwin Coe, was operating that automobile in which the plaintiff, Mary owings, was riding, as the agent or servant of the plaintiffs, and you further find that there was negligence on the part of the driver, Edwin Coe, in the operation of that automobile, which negligence did proximately contribute to the said accident, then you are instructed that the negligence of Edwin Coe is imputed to the plaintiffs and such imputed negligence bars their recovery. * * * The fact that this court has granted a nonsuit in this case on his behalf is not under any condition to be considered by you as any evidence of negligence or lack of negligence on the part of either party." Obviously, therefore, by returning a verdict in favor of the defendant Gatchell, the jury must have found either that he was free from any negligence, or if negligent, that Coe, too, was guilty of negligence which contributed proximately to the happening of the accident; and it is quite apparent that the evidence as a whole and particularly the testimony given by Mrs. Moore and the defendant Gatchell is legally sufficient to support the jury's verdict on either ground.

[1-4] The well-settled rule is, however, that the matter of granting or refusing to grant a motion for a new trial is largely within the discretion of the trial court (Work v. Whittington, 61 Cal.App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal. App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal.App. 212, 199 P. 874); and if satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (Gordon v. Roberts, 162 Cal. 506, 123 P. 288); that even though the evidence

is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224; Roberts v. Southern Pacific Co., 54 Cal. App. 315, 201 P. 958; Wulbern v. Gilroy Express, 116 Cal.App. 222, 2 P.2d 508.

[5-7] In the present case plaintiffs have not specified any particular facts upon which they rely to sustain the trial court's order granting the new trial. It would appear, however, that if the Gatchell car in attempting to pass the truck crossed over the dividing line between the middle and the west lanes and collided with the Owings car while it was traveling entirely within the west lane, an inference of negligence on the part of the defendant Gatchell may be drawn therefrom; and it would seem that the testimony given by Mrs. Owings that such was the case is sufficient to support such an inference. True, as evidenced by its verdict, the jury was unwilling to accept her observations as being correct; and there is ample justification for the rejection thereof because not only was her testimony on this point contrary to the preponderance of the testimony showing that a portion of the Owings car was still in the middle lane when the Gatchell car collided therewith, but her observation was also that the truck was traveling up the middle lane; whereas, beyond question, as shown by the testimony of all the other witnesses, it was traveling in the east lane. However that may be, the trial court doubtless took a different view and accepted as true the testimony given by Mrs. Owings as to the location of the cars at the time of the impact, and that being so, its conclusion is binding on appeal even though we might differ therewith and agree with the one adopted by the jury. (20 Cal.Jur. 119). In other words, it is the law that so long as a case presents an instance showing a reasonable or even fairly debatable justification for the action taken by the trial court in granting a new trial, its ruling will not be disturbed even if as a question of first impression the appellate court might feel inclined to take a different view from that of the trial court as to the propriety of its action; and that it is only in rare instances and upon very strong grounds that the determination of the trial court will be disturbed. (2 Cal.Jur., pp. 905, 906). For the reasons stated we are not prepared to hold herein that the order granting the new trial is without legal justification.

The order is therefore affirmed.

We concur: TYLER, P. J.; GRAY, Justice pro tem.



32 Cal.App.2d 556

BARSHA et al. v. METRO-GOLDWYN-MAYER et al.

Civ. 12095.

District Court of Appeal, Second District, Division 2, California.

May 8, 1939.

Hearing Denied July 7, 1939.

1. Dismissal and nonsuit ⇐26

The dismissal of action as to one tort-feasor, no satisfaction having been received, does not release the others.

2. Dismissal and nonsuit ⇐26

In action for allegedly copying a motion picture scenario written by plaintiffs, where plaintiffs' motion to dismiss action as to several of individual defendants was made after it appeared that individual defendants were not joint tort-feasors, and was for sole purpose of releasing plaintiffs from liability for costs to such defendants, such dismissal did not release motion picture company also named as defendant.

3. Trial ⇐142

It is within province of jury to draw reasonable inferences from facts shown in evidence, and effect of inferences reasonably drawn is not destroyed as matter of law by testimony of witnesses which may be considered as contradictory thereto.

4. Appeal and error ⇐996

An inference of jury which is supported by evidence and not opposed to human experience and reason cannot be disturbed by appellate court.

5. Literary property ⇐9

Whether motion picture company unlawfully copied motion picture scenario entitled "High Fever" written by plaintiffs in their production of motion picture "A Day

at the Races" was for jury, notwithstanding uncontradicted testimony of writers of company denying the copying of plaintiffs' manuscript.

6. Literary property ⇐9

Evidence that motion picture scenario written by plaintiffs was submitted to defendant motion picture company, that manuscript was retained during period of five months by person in charge of production of motion picture "A Day at the Races," that such person made numerous suggestions in production of picture, and that there were numerous similarities between motion picture and plaintiffs' scenario, sustained finding of jury of unlawful copying by defendant motion picture company.

7. Literary property ⇐9

If such similarities are shown as to justify inference of copying of protectible material, it is necessary to prove only that substantial part of material was copied to sustain liability for unlawful copying.

8. Literary property ⇐2

There may be literary property in particular combination of ideas or form in which ideas are embodied, although there can be no property in ideas themselves.

9. Literary property ⇐8

The test to determine whether there has been unlawful copying of protectible material is whether the two works, when compared, show such pronounced similarities of substantial portions of details, sequence of events, and manner of expression and treatment, as to warrant inference of copying.

10. Evidence ⇐314(1)
Witnesses ⇐380(5)

In action for allegedly copying a motion picture scenario written by plaintiffs, testimony of witness that person in charge of production of picture which allegedly was copied from plaintiffs' scenario had told her that he was interested in plaintiffs' manuscript was hearsay, but was admissible as impeachment, where it was shown that plaintiffs were surprised at testimony of witness, who had been called as their witness, and proper foundation for impeachment was laid.

11. Appeal and error ⇐206(1)

Failure to ask for instruction limiting effect of evidence admitted generally waives objection thereto, and complaint cannot be made for first time on appeal.

12. Trial ⇐296(7)

In action for allegedly copying a motion picture scenario written by plaintiffs, instruction that if evidence shows a marked resemblance between original and alleged infringing work, a "presumption" of piracy arises, even though there are no eyewitnesses of copying or direct proof thereof, was not prejudicial error, because of use of word "presumption" rather than "inference," in view of further instruction and fact that distinction between terms is often difficult to draw. Code Civ.Proc. § 1957.

13. Trial ⇐295(1)

An erroneous statement in one instruction will not necessitate reversal of judgment where instructions taken as whole do not mislead jury.

14. Trial ⇐285

In construing a charge it must be viewed in light of common understanding, and the practical administration of justice should not be defeated by too rigid adherence to technical analysis of whole or any part thereof.

15. Appeal and error ⇐1170(9)

The reviewing courts will refuse reversals of judgments because of errors in instructions, unless it affirmatively appears that appealing party has suffered substantial injury. Const. art. 6, § 4½.

16. Appeal and error ⇐1170(9)

In action for allegedly copying a motion picture scenario written by plaintiffs, instruction that before jury could find for defendants it must appear that defendants released their photoplay without knowledge of material which had been submitted to them by plaintiffs, though erroneous, did not entitle defendants to reversal, in view of other instructions. Const. art. 6, § 4½.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Henry Barsha and David Weissman against Metro-Goldwyn-Mayer and Lowe's Incorporated, for allegedly unlawfully copying and appropriating a motion picture scenario written by the plaintiffs. From a judgment for the plaintiffs and an order denying defendants' motion for entry of judgment in their favor not-

withstanding the verdict, the defendants appeal.

Affirmed.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz and Herman F. Selvin, both of Los Angeles of counsel), for appellants.

Carpenter, Babson & Fendler, of Los Angeles (Harold A. Fendler, of Los Angeles, of counsel), for respondents.

WOOD, Justice.

A judgment was entered against the corporation defendants in the sum of $10,000 upon the return of the verdict of a jury. The appeal is prosecuted by the corporation defendants from the judgment and from the order denying their motion for the entry of judgment in their favor notwithstanding the verdict. A number of individual defendants were named in the complaint but as to them the action was dismissed.

Plaintiffs wrote a motion picture scenario which they titled "High Fever". A copy of plaintiffs' manuscript was delivered to appellants on January 2, 1935, for the purpose of examination and reading, appellants agreeing that if they did not purchase the manuscript they would return it to plaintiffs. The manuscript was delivered to Irving Thalberg, production manager for appellants, by Mrs. Edna Schley, an agent, who, to refresh her memory, while testifying read from her diary entry: "I also gave him (Thalberg) story for the Marx Bros. 'High Fever' by Barsha and LaSage (Weissmann). This is a very likely original for them and Mr. Thalberg will read personally." The manuscript remained for five months with appellants, who refused to purchase it and returned it to plaintiffs. Thereafter appellants produced a motion picture under the title "A Day at the Races". It is charged by plaintiffs that appellants deliberately and unlawfully copied and appropriated their literary composition and produced a photoplay containing substantial portions of the composition which was their exclusive property; that appellants "have inextricably intermingled the same with other literary composition and moving picture scenario, but which defendants have cunningly and shrewdly combined therewith". It was shown in evidence that Mr. Thalberg, since deceased, took active part in the production of the picture "A Day at the Races". One of his assistants testified: "Q. Did Mr. Thalberg have anything to do with the story 'A Day at the Races?' A. Yes. He helped in construction. He helped in suggestions, and he helped in the usual manner, in which all producers help in regulating and superintending direction of author's work."

[1, 2] Appellants contend that the voluntary dismissal of the action as to the individual defendants amounted to a retraxit and that they were thereby released from liability. The motion for dismissal was made in open court after it had appeared from depositions and otherwise that the individual defendants were not joint tort-feasors. The motion was made for the sole purpose of releasing plaintiffs from liability for costs to the persons dismissed from the action. Plaintiffs testified that they had not received anything whatever in satisfaction of the claim upon which the action is based. The dismissal of the action as to one tort-feasor, no satisfaction having been received, does not release the others. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869.

As is to be expected in such cases the briefs contain much discussion on the question of the extent of the similarities between plaintiffs' manuscript and the picture produced by appellants. A special production of "A Day at the Races" was viewed by the jury and at the request of both parties the members of this court also have seen a presentation of the picture. From the manuscripts contained in the record and from the picture itself it is to be observed that both the plaintiffs' manuscript and the manuscript for the picture were prepared with the idea in view of having certain actors known as the Marx Brothers play the important parts. In both, a wealthy dowager conceives the idea that a certain veterinarian (Groucho Marx) has great medical ability, and she insists upon the veterinarian becoming the head of a sanitarium which she agrees to assist financially and does in fact assist financially because the veterinarian is installed as chief of staff; the other Marx brothers (Chico and Harpo) purport to act as assistants to the veterinarian, although all are ignorant of proper medical practice; they perform fake examinations, sing while performing an examination, confuse gas service station equipment with hospital equipment and cause operating rooms to be flooded with water; the treatment which the veterinarian gives to the wealthy widow at the sanitarium consists largely of holding her

hand and demonstrating spurious affections for her, but whenever he can escape from the widow he makes love to prettier women; one of the female characters attempts to betray the veterinarian for the benefit of another man, who seeks to profit personally by undermining the veterinarian's influence with the widow, expose him as a quack and thus destroy the sanitarium; the sanitarium is in financial difficulties, from which it is finally saved (by the outcome of a football game in plaintiffs' manuscript and of a horse race in the photoplay); although the veterinarian is exposed as a faker and his philandering becomes known, the widow continues to pursue him until she finally succeeds in winning him.

[3-6] It is contended on behalf of appellants that the implied finding of the jury that appellants made use of their composition is not supported by the evidence. Their argument is based largely upon the testimony of writers in the employ of appellants who testified that they did not use plaintiffs' manuscript. It is within the province of the jury to draw reasonable inferences from the facts shown in evidence and the effect of inferences reasonably drawn is not destroyed as a matter of law by the testimony of witnesses which may be considered as contradictory thereto. An inference which is supported by the evidence and not opposed to human experience and reason cannot be disturbed by an appellate court. Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74. Notwithstanding the testimony of the writers the issue of fact remained for the determination of the jury who were the sole judges of the weight of the testimony and who were not bound to accept testimony as true if they were not convinced of its truth. Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550. Uncontradicted denials on the part of employees of appellants did not compel the conclusion on the part of the jury that there had been no copying of plaintiffs' manuscript. In Edwards & Deutsch Lith. Co. v. Boorman, 7 Cir., 15 F.2d 35, 36, it is said: "Appellees' position, however, is that having explicitly denied that they copied appellants' production, and having sworn positively that they got their ideas from other sources, and no one having sworn to the contrary, the court was bound to find no copying and therefore no infringement. The cases are numerous where such situations have arisen and the same claim has been made without avail." From many facts shown in evidence, particularly the retention of plaintiffs' manuscript during the period of five months by the person in charge of the production of appellants' picture, the making of numerous suggestions by him in its production and numerous similarities appearing in the two plays, it is manifest that the finding of copying by the jury is supported by the evidence.

[7-9] If such similarities be shown as to justify an inference of copying of protectible material it is necessary to prove only that a substantial part of plaintiffs' manuscript was copied to sustain liability on the part of appellants. Although there can be no property in an author's ideas, "there may be literary property in a particular combination of ideas or in the form in which ideas are embodied". Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56, 58. The test is stated by appellants to be whether "the two works, when compared, show such pronounced similarities of substantial portions of protectible material, i. e., of details, sequence of events, and manner of expression and treatment, as to warrant the inference of copying." Measured by this test we are satisfied that the jury's implied finding of unlawful appropriation is sustained by the evidence. The similarities hereinabove set forth, together with numerous incidents contained in both the manuscript and the photoplay, are sufficient to sustain a finding by the jury that appellants have used the same unique combination of ideas devised by plaintiffs centering around the sanitarium situation, the same combination of humorous scenes and characters and a substantial number of the same situations and incidents in similar sequence. It is true that many changes were made in the photoplay as actually produced, but a subsequent author cannot avoid his liability by making changes or omissions from or additions to the original plot. He cannot excuse his unlawful appropriation by a showing that there was much of the original work which he did not appropriate. Maurel v. Smith, D.C., 220 F. 195; Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49.

[10, 11] Appellants complain of the ruling of the trial court admitting the testimony of one of the parties to the effect that Mrs. Schley had told him that Mr. Thalberg had told her that he (Thalberg) was interested in plaintiffs' manuscript. The testi-

mony was undoubtedly hearsay but was admissible as impeachment, it having been shown that plaintiffs were surprised at the testimony of Mrs. Schley, who had been called as their own witness, and the proper foundation for impeachment having been laid. If appellants had desired to have Mrs. Schley's testimony limited to its purpose of impeachment an appropriate instruction should have been requested by appellants so that the jury could have been informed that her statements must not be taken as proof that Mr. Thalberg had in fact read plaintiffs' manuscript. No such instruction was requested. "Failure to ask for an instruction limiting the effect of evidence admitted generally waives objection thereto, and complaint cannot be made for the first time on appeal." (10 Cal.Jur. 817; Keyes v. Geary Street Railway Co., 152 Cal. 437, 93 P. 88; Liebrandt v. Sorg, 133 Cal. 571, 65 P. 1098.

[12] Some of the instructions of the trial court are criticized by appellants, the claim being made that the instructions did not clearly define the material in plaintiffs' manuscript which is protectible. We are satisfied that in the numerous instructions offered by the parties and given by the court the jury was fully and fairly instructed on the subject. However, the court of its own motion gave instruction No. 17 which is doubtless subject to criticism. This instruction is as follows: "You are further instructed that it is claimed by plaintiffs that defendants retained plaintiffs' literary composition in their possession for a period of five months, and became fully informed, and had full knowledge of the contents thereof. In other words, it is claimed that defendants had 'access' to the manuscript, as the law books put it. In this respect, you are advised that if plaintiffs make out a prima facie case of 'access'—in other words, if they prove that the opportunity to copy existed at about the proper time, you must consider such evidence in connection with defendants' evidence that, although having access, they did not acquaint themselves with its contents, and then determine in your minds which evidence preponderates, or has the more convincing force. If the evidence shows a marked resemblance between the original and the alleged infringing work, a presumption of piracy arises, even though there be no eye witness proof of copying, or direct evidence thereof. However, if you believe from all the evidence that, although having access to plaintiffs' manuscript, defendants, or any agent, officer or employee of defendants, did not acquaint themselves with the contents, or the original or novel arrangement, if any, thereof, of plaintiffs' manuscript, you cannot return a verdict in favor of plaintiffs under the issues in this case, but you must under such belief on your part, find for the defendants. In other words, if the evidence on the part of the defendants, which has been received in this case, balances the evidence of plaintiffs in convincing force, or preponderates over the evidence offered by plaintiffs, your verdict must be for the defendants. Manifestly, under the issues in this case, if defendants or their agents or employees, did not know the contents or arrangement of what plaintiffs had written, they could not intentionally pirate or plagiarize the same. Furthermore, if the agents of defendants, in the preparation for screen production of the photoplay 'A Day at the Races', actually used, arranged, or employed any of the themes, words, ideas, or locales of the plaintiffs' scenario 'High Fever', before plaintiffs' scenario was submitted to them, or they became acquainted, if at all, with its contents or arrangements, then plaintiffs' words, ideas, themes or locales were not original, and cannot be protected in this action; but before you can find for defendants, it must appear that they publicly released their photoplay by production or publication upon the screen without knowledge of or before acquaintance with the material or arrangement of its contents as submitted by plaintiffs".

Complaint is made of that part of the instruction in which the court states "a presumption of piracy arises, even though there be no eye witnesses of copying or direct evidence thereof". Plaintiffs point out that the language criticized is almost identical with the language used in Encyclopædia Britannica Co. v. American Newspaper Ass'n, C.C., 130 F. 460 at page 464, where the court states: "Substantial identity, or a striking resemblance between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant." In Copyright Law and Practice by Drone at page 660, the author states: "Identity between the alleged infringing work and copyrighted work raises the presumption that the one was copied from the other." Under the

California practice the court, instead of using the word, presumption, should have instructed the jury that it was within their province to draw an inference of piracy if the evidence showed a marked resemblance between the two works. It would not be reasonable to hold, however, that the jury was misled by the use of the word, presumption, as they were clearly told in the same and other instructions that a verdict could not be rendered in favor of plaintiffs unless the jury should find from a preponderance of the evidence that appellants did in fact copy protectible material from plaintiffs' manuscript. Inferences and presumptions are both recognized as indirect evidence (Code Civ.Proc. § 1957), and the line of demarcation between them is often difficult to draw. To use the language of Justice Thornton in White v. White, 82 Cal. 427, 438, 23 P. 276, 7 L.R.A. 799, the distinction is "sometimes very thin". It seems inconceivable that the jury could have been misled by the use of the word, presumption, instead of the word, inference, when our highest courts have met with difficulty in accurately deciding their use and application. In Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 734, 81 P.2d 950, 955, 118 A.L.R. 533, the court was considering an instruction in which the word, presumption, was used instead of the word, inference, in stating the rule of res ipsa loquitur. Mr. Justice Curtis, speaking for the court, pointed out that in such a situation, "no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words". The court in its opinion further stated that "these terms are often erroneously used interchangeably, and as conveying the same meaning. We find that many lawyers and courts as well make this same mistake. We question whether the ordinary layman, to say nothing of many members of our profession, clearly comprehends the difference in the meaning of these two expressions."

[13-16] Instruction No. 17 is also subject to criticism in that in the last several lines of the instruction the jury were told that before they could find for appellants it must appear that they released their photoplay without knowedge of the material which had been submitted to them by plaintiffs. This part of the instruction is inconsistent with other parts of the same and other instructions given by the court. An element was omitted, apparently inadvertently, by the trial court in the last part of instruction No. 17, but in numerous other instructions it was made clear to the jury that if appellants had independently conceived and prepared a composition which was not taken or copied from plaintiffs' work they would not be liable to plaintiffs for damages. In this case an unusually large number of instructions were given and the trial court was not required to state all of the law applicable to the action in one instruction. At the commencement of his instructions to the jury the judge stated: "Mr. Reporter, the instructions of the court will be largely oral, so I will ask you to be kind enough to take them all down in shorthand." The judge then proceeded to instruct the jury at length but in giving instructions which were "largely oral" he made the inaccurate statement above mentioned. The instructions, which considered together were fair to both parties, contained nothing to justify a contention that the jury might have been confused in reaching the verdict. From the commencement of the trial to its termination they were thoroughly impressed with the fact that the question for their determination was whether defendants had unlawfully appropriated the literary property of plaintiffs. They would have been more than stupid if they believed that they could return a verdict for plaintiffs without a finding on their part that appellants had used plaintiffs' composition in the preparation of the photoplay. An erroneous statement in one instruction will not necessitate a reversal of a judgment where the instructions taken as a whole do not mislead the jury. Mosesian v. Crown Cleaners and Dyers, 122 Cal.App. 248, 10 P.2d 193; Callet v. Alioto, 210 Cal. 65, 290 P. 438. "In construing the charge of the court, it must be viewed in the light of common understanding, and the practical administration of justice should not be defeated by a too rigid adherence to close and technical analysis of the whole or any part thereof." Hayden v. Consolidated Min. Etc. Co., 3 Cal.App. 136, 139, 84 P. 422, 423. The trend of the latest decisions of reviewing courts, especially since the adoption of section 4½ of article VI of the California Constitution, is to refuse reversals of judgments because of errors in instructions unless it affirmatively appears that the appealing party has suffered sub-

stantial injury. We see no occasion for reversing plaintiffs' judgment because of the instructions.

The judgment and order are affirmed.

I concur: CRAIL, P. J.

I dissent: McCOMB, J.



32 Cal.App.2d 524

CITY OF LOS ANGELES et al. v. AITKEN et al.

Civ. 6132.

District Court of Appeal, Third District, California.

May 4, 1939.

Supplemental Opinion May 23, 1939.

1. Eminent domain ⇐148

Interest is allowed as part of damages or compensation to which one whose property has been taken under power of eminent domain is entitled as part of "just compensation." Const. art. 1 § 14.

[Ed. Note.—For other definitions of "Just Compensation," see Words & Phrases.]

2. Eminent domain ⇐243(1)

An interlocutory decree in condemnation is to be treated as a final determination of the rights of the parties.

3. Eminent domain ⇐258

Under statute requiring condemnor to pay amount of compensation fixed in interlocutory decree within 30 days after final judgment, effect of appeal is to stay operation of 30-day limit. Code Civ.Proc. § 1251.

4. Eminent domain ⇐258

An appeal taken from interlocutory decree fixing compensation to be paid by condemnor had effect of staying execution, but when 30-day period within which judgment is required to be paid expires judgment becomes a direct and fixed obligation subject to modification or reversal on appeal. Code Civ.Proc. §§ 1251, 1255a.

5. Eminent domain ⇐247(1)

After expiration of 30 days within which compensation fixed in interlocutory decree in condemnation proceedings must be paid has expired, the general rule with respect to payment of interest on judgment is applicable. Code Civ.Proc. §§ 682, 1251, 1253, 1255a, 1256; Const. art. 1, § 14; art. 20, § 22.

6. Eminent domain ⇐246(2)

Condemnor by failing to abandon proceeding within 30 days after entry of interlocutory decree fixing compensation waived right to abandon and became conclusively bound to pay judgment in event that no reversible error was found on appeal. Code Civ.Proc. §§ 1251, 1255a.

7. Eminent domain ⇐247(1, 2)

An interlocutory judgment in condemnation where there has been no abandonment of proceedings by condemnor is not merely an adjudication of conditional liability, but becomes a "judgment" within Constitution requiring payment of interest on judgment and pending an appeal by condemnor judgment bears interest at legal rate from expiration of 30 days after its entry until paid. Code Civ.Proc. §§ 682, 1251, 1253, 1255a, 1256; Const. art. 1, § 14; art. 20, § 22.

[Ed. Note.—For other definitions of "Judgment," see Words & Phrases.]

8. Eminent domain ⇐247(2)

As regards condemnees' right to interest during time of pendency of appeal from interlocutory decree fixing compensation in absence of showing that condemnees' possession during appeal resulted in any financial remuneration to them, appellate court could not indulge in presumption that condemnees received any rents, issues, and profits during that period from the sole fact that they were in possession. Const. art. 20, § 22.

9. Eminent domain ⇐247(2)

In condemnation proceedings, judgment bears interest at legal rate from expiration of 30 days after its entry until paid notwithstanding condemnee remains in possession, but condemnee is not entitled to both interest and profits resulting from possession and profits may be allowed by way of set off against interest or in reduction thereof. Code Civ.Proc. §§ 682, 1251, 1253, 1255a, 1256; Const. art. 1, § 14; art. 20, § 22.

10. Eminent domain ⇐247(2)

Where condemnee claims interest from expiration of 30 days after entry of interlocutory decree fixing compensation notwithstanding condemnee remained in possession, burden of alleging and proving that condemnee received profits which could be set

off against interest rests on condemnor. Code Civ.Proc. §§ 682, 1251, 1253, 1255a, 1256; Const. art. 1, § 14; art. 20, § 22.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action in condemnation by the City of Los Angeles and another against Nina B. Aitken and others. From an order denying a motion to recall and quash writs of execution and to enter satisfaction of judgment, plaintiffs appeal.

Affirmed.

Ray L. Chesebro, City Atty., S. B. Robinson, Asst. City Atty., Samuel Poorman, Jr., Deputy City Atty., Carl A. Davis, Deputy City Atty., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for appellants.

Thomas W. Cochran, Chapman & Chapman, Anderson & Anderson, and W. R. Law, all of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order denying a motion to recall and quash writs of execution, and to enter satisfaction of judgment.

Appellants brought an action in condemnation, and upon a trial being had, an interlocutory decree, upon the verdict of the jury, was entered on September 28, 1934, awarding compensation in the sum of $120,000. On October 8, 1934, appellants appealed to this court from the provision of the decree fixing the award of compensation, and on December 4, 1935, an opinion was rendered by this court affirming the award mentioned. On February 6, 1936, the remittitur issued by this court in said action was duly filed in Tuolumne county. Thereafter, the total amount of said award was deposited with the clerk of the court, with an agreement that such award might be paid to respondents without prejudice to their claim for interest due thereon. On June 29, 1937, respondents caused an execution to be issued out of the superior court of Tuolumne county, directing the sheriff of Los Angeles county to satisfy the unpaid part of the judgment for compensation arising out of interest due on the judgment in the sum of $11,223.24, out of the personal and real property of plaintiffs. Appellants then filed a notice of motion to quash the writ of execution above mentioned, and to enter satisfaction of the judgment, upon the ground that said judgment for which the writs were issued had been paid in full, and for the further reason that the interlocutory order of condemnation did not, in express terms, provide for the payment of interest. The motion was heard upon affidavits, and thereafter denied, and this appeal is prosecuted from said order denying said motion.

The sole question to be decided upon this appeal is whether or not interest at the legal rate should be allowed upon the compensation fixed in an interlocutory decree of condemnation during the pendency of an appeal from said decree, by the condemnor, where the condemnee, during such time, has remained in possession. The contention of appellants is, first, that the proceeding in eminent domain is a special one, and that as no provision is made for the payment of such interest in title 7, part 3, of the Code of Civil Procedure, § 1237 et seq., relating to eminent domain, no recovery can be had. Second, that an interlocutory decree of condemnation is merely an adjudication of the amount which plaintiffs should pay, and that it was not a judgment requiring the payment of a specific amount of money, and merely an adjudication of a conditional liability which might, or might not, become a fixed, absolute obligation; hence, it does not bear interest like an ordinary money judgment. It is also urged that as there was no change of possession during the pendency of the appeal, and as respondents were in undisturbed possession during said period of time, they cannot have both the use of the property and interest on the award at the same time.

[1, 2] Before proceeding to take up the several contentions advanced by appellants, we wish to point out the general principles which should be borne in mind throughout the discussion. "In the great majority of the jurisdictions, interest is allowed as part of the damages or compensation to which one whose property has been taken under the power of eminent domain is entitled as part of the just compensation required by the Constitution." 18 Am.Jur., p. 912, sec. 272. The right to recover interest on a judgment is given by section 22, article XX, of the Constitution of California, which reads as follows: "The rate of interest upon the loan or forbearance of any money, goods or things in action, or on

accounts after demand or a *judgment* rendered in any court of the State, shall be seven per cent per annum." A judgment is defined as "the final determination of the rights of the parties in an action or *proceeding*". Code Civ.Proc. § 577. It has been repeatedly held in this state, and in fact all parties here concede, that an interlocutory decree in condemnation is to be treated in all respects as a final determination of the rights of the parties. This court so held in the case of Lincoln Northern R. Co. v. Wiswell, 8 Cal.App. 578, 97 P. 536, the subsequent "final order of condemnation" (section 1253, Code Civ.Proc.), being an order *after* final judgment.

Taking up the first question raised, while it does appear that there is no specific mention made in said title 7, relating to the recovery of interest upon an award of this character, there is a reference to another provision of the Code of Civil Procedure which is highly significant. Section 1256 of said title 7 reads as follows: "Except as otherwise provided in this title, the provisions of part 2 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." Among the provisions of part 2 of the Code of Civil Procedure, section 682 provides in part as follows: "If it (the execution), be against the property of the judgment debtor, it must require such officer to satisfy the judgment *with interest*, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property." It would thus appear that any execution issued upon an award under the provisions of said title 7 would carry with it the right to recover interest at the legal rate.

[3] It is secondly contended that legal interest should not be allowed upon the interlocutory judgment, for the reason that it was not one for the payment of a specific amount of money, but merely an adjudication of a conditional liability which might, or might not, become a fixed and absolute obligation. Section 1251 of the Code of Civil Procedure provides that: "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed" (that is, the amount of compensation fixed in the interlocutory decree). Within said thirty-day period this appeal was taken. The effect of such appeal was to stay the operation of the thirty-day limitation mentioned in the statute. Colusa, etc., R. R. Co. v. Superior Court, 31 Cal.App. 746, 161 P. 1011. This, in turn, stayed the execution, as no execution could issue until the thirty-day period had expired. To this extent we are in accord with appellants. We are of the opinion, however, that the provisions of section 1255a of the Code of Civil Procedure, and the construction given that section in the case of City of Los Angeles v. Deacon, 3 Cal.2d 641, 46 P.2d 165, 167, lead to a conclusion which is adverse to the position which appellants have taken. That section provides, in part, as follows: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment."

[4, 5] In the Deacon case it was definitely held that an appeal does not stay the running of the thirty-day period mentioned in the section last quoted. The court states: "The point involved has never been passed upon directly by an appellate court in this state; it is an open question. Considered as such, we agree with the contention of G. H. Deacon Investment Co. et al. that once the 30-day period provided in section 1255a starts to run an appeal does not stay its operation. We are of the opinion that one of the major purposes intended by section 1255a was to compel the condemnor to decide within 30 days after the entry of the interlocutory decree whether it desires to abandon. This does not in any way deprive the condemnor of its right to appeal. When an interlocutory decree of condemnation is entered, the condemnor, in the absence of an appeal by the condemnee, knows how much the improvement will cost. If it decides not to abandon, but decides to appeal, it may do so. If the appeal by the condemnor is unsuccessful, the condemnor has lost its right to abandon, and must pay. This rule is fair and just to all concerned." From this it must necessarily follow that although the appeal had the effect of staying the execution, nevertheless when the time limitation mentioned in section 1255a expired, the judgment became a direct and fixed obligation, but subject to modification or reversal on appeal, as any other action. It then had the same force and effect as any other judgment for the payment of money, and the general rule with respect to the payment of interest thereon is applicable. This, in effect, is the holding in the case

of Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426, 427, where the court said (referring to a proceeding in condemnation): "In such proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a of the Code of Civil Procedure shall be made within 30 days after final judgment (Code Civ.Proc. section 1251), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases. (Code Civ.Proc., section 1252). *In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action.*"

[6] The only matter in which defendants were interested was the recovery of the amount of the judgment. Their right to *enforce* this judgment was stayed by the appeal, just as, in any ordinary damage action, execution may be stayed upon appeal. In the eyes of the law, the money was due when the thirty-day period provided in section 1255a, supra, expired. The mere fact that respondents were deprived of the right, during appeal, to enforce such judgment, cannot affect its legal implications and consequences, so far as interest is concerned. The plaintiffs elected to waive the right to abandon, and decided to rely upon appeal. By thus failing to abandon, within the statutory time, they in effect, conclusively bound themselves to pay the judgment in the event that no reversible error was found on appeal. In the case of Phillips v. Pease, 39 Cal. 582, an interlocutory judgment in condemnation was held to be a "judgment" under section 144 of the Practice Act, which defines a judgment in the identical language now used in section 577 of the Code of Civil Procedure. This case further holds that interest at the legal rate should be allowed upon such judgment.

In the case of Plum v. City of Kansas City, 101 Mo. 525, 14 S.W. 657, 659, 10 L.R.A. 371, the court, discussing the question as to whether or not a judgment in condemnation was subject to the same rule as other judgments with respect to a matter of bearing interest, said: "Whatever the proper rule may be for their construction in this regard, under statutes making them merely tentative, or expressly or impliedly postponing their final effect, it seems measurably clear that, under such provisions of law as those now before us, they should be classified as judgments or orders for the payment of money, within the meaning of the interest act."

In discussing the same question, the court in State v. Humes, 34 Wash. 347, 75 P. 348, 349, said: "It (a judgment in condemnation) adjudges the recovery of the money or damages. It is true, the effect of the judgment when the money is paid is also to pass title to real estate, but it is none the less a judgment for the recovery of money."

The rule in the state of Michigan is set forth in the case of Campau v. City of Detroit, 225 Mich. 519, 196 N.W. 527, 528, 32 A.L.R. 91, as follows:

"Plaintiff's contention is that confirmation by the court of the award is a judgment, and by express statutory provisions judgments draw interest at the rate of 5 per cent. per annum in this state. For the city it is contended that this is a special proceeding authorized for the public welfare, not according to the course of common litigation or common law, gives the condemning municipality a year without default after confirmation of the award in which to raise the money and make payment, leaves the condemnee in possession, use, and enjoyment of the property condemned until paid for, and there is no provision in the charter or act it follows for adding interest to the award. That this is a judicial proceeding, and confirmation of the award by the court is a judgment is settled law in this state. It is the result of the exercise of judicial authority in which the court finally determines and adjudicates that the sum awarded is at that time just compensation to the owner for his private property. It is immune from collateral attack, is conclusive upon and enforceable at the instance of all parties to the proceeding, and in general ranks with judgments for all practical purposes. Scotten v. Detroit, 106 Mich. 564, 64 N.W. 579; Balch v. Detroit, 109 Mich. 253, 67 N.W. 122; Zoltowski v. Judge of Recorder's Court, 112 Mich. 349, 70 N.W. 1018. * * * When judgment was entered upon the award and no appeal taken, the rights and obligations of the parties were legally adjudicated and fully fixed. The amount of defendant's indebtedness for the land it compelled plaintiff to sell was as

finally and forcibly determined as by any other judgment. Its absolute right and title to the property only awaited payment of a judgment, based on just compensation for the property at the time it was rendered. Defendant at its option could pay forthwith, or at any time thereafter within the year granted it before payment could be enforced, while plaintiff could only mark time and wait for his money. The charter and statute it follows are silent as to interest, either during or after the year of optional deferred payment. It is not disputed, and was in effect conceded at the hearing, that plaintiff would be entitled to interest after the year expired. If constitutional grounds be taken as the test, just compensation would seem to require interest on his judgment the first year after it was rendered, as well as those which follow. Looking to legislation for authority we find none providing that he shall not have interest, and the only statute we have on that subject provides without exception that judgments shall draw interest at 5 per cent from time of rendition.

"We conclude that interest upon final judgments in proceedings of this kind is within the letter and spirit of the statute granting interest upon all judgments recovered."

[7] We therefore conclude that an interlocutory judgment in condemnation, where there has been no abandonment of the proceedings by the condemnor, is not merely an adjudication of a conditional liability, but becomes a "judgment" within the meaning of section 22, article XX, of the Constitution, and that pending an appeal by the condemnor, such judgment bears interest at the legal rate from the expiration of thirty days after its entry until paid. As we have stated, this is the precise situation which is found in any ordinary action for the recovery of a money judgment, and we see no valid reason why interest upon the judgment here should not be recovered as it is recovered in other cases.

[8] Thirdly: It is earnestly contended by appellants that, as respondents have been in exclusive possession during the appeal, interest on the award should not be allowed, the theory being that during that interval respondents have received the rents, issues and profits arising from the property taken, and thus were compensated for loss of interest. There is a great diversity of authorities upon this question. "In the absence of any statutory provisions controlling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation to be made for the property taken. * * * As to interest on the award or judgment for compensation, some of the cases hold that it bears interest from the date of confirmation or entry, like an ordinary judgment; others, that interest should only be computed from the date of the possession by the parties condemning, or from the time when the owner can enforce payment, or from the date of the demand." Lewis on Eminent Domain, 3rd ed., sec. 742. It would appear that our courts have differed not so much in respect to the *right to interest* as to the *time when such interest should commence*, or as to what facts or circumstances could intervene to abridge that right, such as the matter of possession by the owner. It appears that the property taken was the right to appropriate and transport the waters of certain streams flowing from Mono lake to the city of Los Angeles for municipal purposes, and to acquire rights of way for diversion works and conduits. No facts were adduced upon the hearing of this motion, showing or tending to show, that the possession of the rights thus taken, pending the appeal, had resulted in any financial remuneration to respondents. In the absence of any such showing, we cannot indulge in the presumption that respondents received any rents, issues and profits during the period in question, from the sole fact that they were in possession. "But, whatever may be said of these more or less technical questions, the vital question is, What constitutes full compensation? Conceding that the possession remains in the landowner, it cannot be said with any degree of reason that the value of his possession is not impaired by the judgment of damages. Possession is only one of the elements of value in land. The right to rent, the right to sell, the right to improve, are all valuable rights which must in the nature of things be affected by this relation. If so, it conclusively follows that he has not received full compensation. As said by the court in Lake Koen Navigation, Res. & Irr. Co. v. McLain Land & Inv. Co., 69 Kan. 334, 76 P. 853: 'In condemnation appeals the issue is, what shall be full compensation? Interest is allowed merely as a means of securing such compensation. If, upon the condemnation of land, complete deprivation

do not follow at once, still, further tenure is rendered precarious. Possession may be disturbed at any time, and all property rights are exercisable only under doubt and uncertainty as to their duration. As a recompense for the loss attending this embarrassed use of the land, and this qualification of dominion over it pending the payment of the condemnation money, interest may be allowed.' * * * Inasmuch as the landowner has nothing to do but to receive full compensation before his land should be taken, *the question of whether the possession has been equal to interest on the award is a fact to be established affirmatively by the condemning party.*" North Coast R. Co. v. Aumiller, 61 Wash. 271, 112 P. 384–386. "The best rule is that which does not arbitrarily make possession equivalent to interest, but allows interest from the date of valuation (i. e., judgment), and reduces the amount by the estimated value of possession." Randolph on Eminent Domain, sec. 280, cited and followed in the Aumiller case, supra.

[9, 10] We believe that the fairest and most equitable course is followed in the foregoing cases, and therefore take the view that while interest should be allowed, notwithstanding the possession of the owner, the latter is not entitled to both interest and profits resulting from such possession, and such profits may be allowed by way of set-off against the interest, or in reduction thereof. The burden of alleging and proving that such profits were received, and the amount thereof, rests upon the condemnor, as was held in the case of North Coast R. Co. v. Aumiller, supra. This rule was also followed in Uniacke v. Chicago, etc., R. Co., 67 Wis. 108, 29 N.W. 899, 900, where the railroad company had not taken possession of the condemned property, and claimed for that reason imposition of interest on the award was inequitable. It was there said: "It should be observed that the burden is upon the party seeking to condemn land to show the existence of conditions which will operate to take a given case out of the general rule in respect to interest. It is not sufficient to show merely that such party has not actually taken possession of the land. The fact that it has been condemned, and is liable at any time to be so possessed, will necessarily, in most cases, seriously interfere with its beneficial use by the former owner—often entirely destroy it." The case of Los Angeles v. Gager, 10 Cal.App. 378, 102 P. 17, is not in conflict with this view. The only question there involved was whether or not the condemnee was entitled to interest, not upon a *final judgment* in condemnation, but upon the value of the land from the date of the issuance of summons to date of judgment, where the condemnee was in possession during that time. Furthermore, the Constitution (cited above), allows interest upon a judgment for the recovery of money. As we have shown, this judgment became final and fixed upon the failure to abandon within the statutory limitation. The constitutional provision quoted above makes no exception in respect to interest due on a judgment, based upon the retention of possession of property by the judgment creditor during the appeal. We cannot agree with the statement of appellants to the effect that the allowance of interest would be inequitable as to them. They made the election to appeal, as we have stated. Thus, they withheld from defendants the amount of the judgment which became absolutely due and payable upon the failure to abandon. The matter of the title and possession of the property taken no longer concerned defendants. By law those rights were taken from them. Interest upon the award is not in the nature of "additional compensation", nor does the case of People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600, relied upon by appellants, so hold. On the contrary, as we have seen, it is a method devised for the purpose of assuring the condemnee that he will receive the "just compensation" to which he is entitled under section 14, article I of the Constitution of California. Theoretically, it is designed to place and maintain the condemnee in the same position, at the termination of an appeal, as he was when the judgment was stayed. Under the laws and Constitution of this state respondents were entitled to interest upon their judgment, at the legal rate, from and after the expiration of the thirty days from the entry thereof, as a portion of the just compensation for the taking. Such interest could, however, be offset by proof that the possession, pending appeal, was profitable to respondents. We cannot assume or arbitrarily say that such profits accrued or existed, as the record here is without proof of such facts. The burden of asserting and proving these facts was upon appel-

lants. It follows that with such a record before it, the trial court had no alternative but to grant this motion, and thus permit the recovery by respondents of all interest due on the judgment.

Great reliance is placed by appellants upon the case of Colusa, etc., R. Co. v. Superior Court, 31 Cal.App. 746, 161 P. 1011, decided by this court on October 31, 1916. There, the usual interlocutory decree in condemnation was entered upon a verdict. Within thirty days plaintiffs perfected an appeal to this court. Thereafter, an application for writ of supersedeas was filed in this court, wherein it was alleged that defendant had applied to the superior court for an order directing the clerk to issue an execution against the condemnor upon said judgment for the sum of $16,931.40. It was held that the appeal removed the subject-matter of the order from the jurisdiction of the lower court, and that such court was without jurisdiction to entertain the motion, and the writ was granted. The matter of interest upon the judgment was not directly involved. That case holds, as we have already stated, that the running of the thirty-day period *within which payment must be made,* was suspended by the appeal, and this, in turn, suspended the right to an execution. Any holding in that case to the effect that the appeal suspended the operation of section 1255a, supra (which limits the right to abandon), must be taken to have been overruled in the subsequent case of City of Los Angeles v. Deacon, discussed above. The latter case very definitely decided that an appeal does not suspend the running of the thirty-day period mentioned in said section. We have already discussed the effect of such holding, and its effect upon the finality of the judgment.

Referring to other authorities cited by counsel, we find nothing in City of Sacramento v. Swanston, 29 Cal.App. 212, 155 P. 101, conflicting with our views. It was there held that the requirement that the condemnor pay attorneys' fees upon abandonment of the proceedings, did not conflict with the constitutional requirement that laws of a general nature must have a uniform operation, because of the distinctive character of condemnation proceedings.

The remarks quoted from McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615, to the effect that such proceedings are special and the prescribed method must be strictly pursued, had reference to proceedings in eminent domain for the construction of levees under the Swamp Land Act. The statute required such proceedings to be initiated in a particular manner, and it was held that where the statute required the petition to be presented by the state board, whereas, the petition filed and presented was by some other party, jurisdiction was not conferred upon the court to proceed in the matter.

The case of San Francisco, etc., R. Co. v. Leviston, 134 Cal. 412, 66 P. 473, 474, is not in point. The only question involved was as to the obligation of the condemnor to pay interest on the award of the jury and costs, *within the thirty-day period,* as a condition to obtaining a final order of condemnation. The court held that "the only condition imposed is the payment of 'the sum of money assessed' 'within thirty days after final judgment,' * * * which seems to exclude the idea of any other condition being proper than the one specified". In other words, the court recognizes the fact that by the provisions of sections 1251 and 1252 of the Code of Civil Procedure, plaintiff is allowed thirty days of grace within which to pay the award and obtain the final decree of condemnation or abandon; but obviously, that rule does not conflict with the well-established conclusion that upon the expiration of those thirty days, if the award has not been paid or the proceeding abandoned, the interlocutory decree becomes a money judgment having all of the characteristics, and enforceable in the same manner, as an ordinary judgment in a civil action.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

Supplemental Opinion.

PER CURIAM.

Our attention has been called to language in the opinion which might be construed to the effect that legal interest should be allowed the condemnee from the date of the taking of the property under condemnation proceedings. Such question was not presented upon this appeal, and we do not want to be understood as holding that legal interest should be allowed prior to the entry of the interlocutory decree, as where property is taken by the state, or any agency of the state, prior to the trial and entry of such decree.

34 Cal.App.2d Supp. 767

LEWIS v. FERRARI.

No. 95915.

Appellate Department, Superior Court, San Diego County, California.

May 16, 1939.

1. Appeal and error ⇐548(1)

On appeal, upon judgment roll, Superior Court could not resort to evidence adduced before trial court.

2. Appeal and error ⇐907(3)

In employee's action to recover for hours worked in excess of that permitted by statute, where appeal was upon the judgment roll, conclusion of trial court that, by voluntarily working overtime, employee was in pari delicto with employer and therefore not entitled to recover, could not be disturbed notwithstanding employee's contention that her continued employment was dependent upon conforming to the employer's wishes, since, employee not having brought up the evidence, the reviewing court was unable to say that it was insufficient to support the trial court's conclusion. St.1937, p. 224, § 1354.

3. Master and servant ⇐80(9)

In employee's action to recover for hours worked in excess of that permitted by statute, determination whether there has been such constraint by employer as to permit recovery by employee does not rest on any presumption declared by law to result from the fact of employment, but must be established by evidence. St.1937, p. 224, § 1354.

4. Estoppel ⇐52

The doctrine that one to whom the benefit of a police regulation inures is necessarily its beneficiary, in a sense which precludes him from waiving its provisions, and exonerates him from the consequences of being a voluntary party to its violation, should be extended with caution.

5. Master and servant ⇐13(1)

The statute limiting employment of employees to 48 hours per week is not for the exclusive benefit of the employees as respects their rights to voluntarily waive its provisions by agreeing to work overtime, but is in the nature of a restriction for the benefit of the community. St.1937, p. 224, § 1354.

6. Constitutional law ⇐81

Police regulations are not ordinarily enacted for the benefit of individuals or selected classes of individuals, but in their nature being restrictions on liberty are designed to bear some reasonable relation to the welfare of the whole community.

7. Master and servant ⇐80(3)

An employee, who voluntarily agreed with employer to work overtime in violation of statute limiting hours of work to 48 hours per week, was in pari delicto with the employer and not entitled to recover extra pay for overtime as against contention that she was not in pari delicto because she was a member of the class for whose benefit the statute was enacted, and that the Legislature therein treated the employer alone as the perpetrator of the offense and the employee merely as its victim. St.1937, p. 224, § 1354.

Appeal from Municipal Court of City of San Diego; Philip Smith, Judge.

Action by Hazel M. Lewis against Ambrose Ferrari for services rendered the defendant as an experienced retail clerk. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Davies, Wallace & Wallace, of San Diego, for appellant.

Fitzgerald & Selleck, of San Diego, for appellee.

HAINES, Presiding Judge.

This is an appeal upon the judgment roll. The facts as found by the Municipal Court are, in brief, as follows:

From November 1, 1936, to October 2, 1938, the appellant, who is an adult woman, was employed by the respondent as an experienced retail clerk in a place of business operated by him at San Diego, California, known as "The Liquor House." She voluntarily worked therein more than 48 hours per week and was paid $16 per week for her work. The reasonable value of her overtime work was 33⅓ cents per hour. From November 1, 1936, until February 1, 1938, the respondent employer did not keep in a form and manner approved by the Industrial Welfare Commission, any record of the number of hours worked or the amounts earned by appellant. On or about February 1, 1938, however, respondent furnished appellant a time book for the purpose of keeping a record of the number of hours worked by appellant. Respondent directed appellant to keep a record in the book which

should show that appellant worked only 48 hours per week. He also directed her to state to any person who inquired that she worked only a maximum of 48 hours a week. In compliance with respondent's directions appellant from February 1, 1938, to October 1, 1938, made entries in the time book purporting to show that she worked only 48 hours per week. Both appellant and respondent knew that such entries were untrue.

As a conclusion of law the trial court found that by voluntarily working with respondent's knowledge for longer hours than the statute permits, appellant was in pari delicto with respondent and, therefore, not entitled to recover from him anything for her overtime work. Judgment was entered for respondent accordingly and the present appeal followed.

[1-3] Since only the judgment roll is before us we are unable to resort to the evidence adduced before the trial court. In support of the appeal two positions appear to be relied upon, that is: First, that as between the appellant and the respondent the former was in the subordinate position; that her continued employment was necessarily dependent upon her conforming to respondent's wishes and directions and, therefore, that she cannot be said to have been in pari delicto with him; and, second, that she cannot be held to be in pari delicto for the further reason that she is a member of a class for whose benefit the statute was enacted and that in denouncing a penalty for its violation against the employer only, Labor Code, Section 1354, St.1937, p. 224, the legislature has recognized a distinction between the situation of employer and employee, treating the former alone as the perpetrator of the offense and the latter merely as its victim.

(1) It may frequently happen that an employee, is, as compared with the employer, in a distinctly unfair position in that his or her continued employment depends on the employer's volition and such employee may be unable for the time at least to find other suitable employment and be thus in effect constrained to conform to the employer's wishes though they be in some respect unlawful. Holden v. Hardy, 169 U.S. 366, 397, 18 S.Ct. 383, 42 L.Ed. 780. It would, however, as we think, be going too far to hold that such a situation must, as a matter of law, always and necessarily result from the mere circumstance that a statutory regulation has been infringed and that the relation of employer and employee exists. Thibault v. National Tea Co., 198 Minn. 246, top of page 248, 269 N.W. 466, 467. In other words, the determination whether or not there has been such constraint does not rest on any presumption declared by the law to result from the fact of employment. That there has, in a given instance, been such constraint, where it is not established by direct evidence, may, at the most, be inferred from the circumstances. In the present case the trial court has not only not drawn any such inference from the evidence before it, but has found the fact to be otherwise—namely that the overtime work was "voluntary." Since the plaintiff has not brought up the evidence, we are unable to say that it was insufficient to support this finding, which is tantamount to a finding that there was no constraint.

(2) We come, then, to the other position, namely that, even in the absence of actual constraint, the plaintiff is not to be penalized for participation in the violation of a statute designed for her own protection. In support of this position various expressions have been called to our attention. Thus, it was said in the note to Levinson v. Boas, 150 Cal. 185, 88 P. 825, 11 Ann.Cas. 661, in 12 L.R.A.,N.S., 575, 618 that: "The general rule that Courts will not enforce contracts prohibited by statute, nor allow money or property paid or delivered in pursuance of them to be recovered back, does not apply to the innocent party for whose protection the statute was enacted" (Citing Mason v. McLeod, 57 Kan. 105, 45 P. 76, 41 L.R.A. 548, 57 Am. St.Rep. 327.)

Neither Levinson v. Boas nor Mason v. McLeod involved any labor statute, the former case involving a pawn broker who had undertaken to do business without procuring the required license and the latter case involving a contract for the sale of a patent made in violation of a law requiring the vendor to file with the Clerk of the District Court an affidavit of the genuineness of his patent and of its remaining unrevocated.

The note referred to is, however, quoted with approval in Turney v. J. H. Tillman Co., 112 Or. 122, 129, 228 P. 933, which was a case in which the Court held that a contract of employment of a workman on a State job in excess of eight hours a day in violation of the Statute of that State was not void so far as the employee was concerned so as to prevent recovery for

overtime labor, notwithstanding that the Statute had made its violation by an employer a misdemeanor. The Court there held the statutory provisions to have been made for the benefit of employees. As possibly bearing out this construction, it may be noted parenthetically that the Oregon statute, Or.L. § 6718, had excepted from the inhibition of overtime work the case of an "emergency when no other competent labor is available" and provided that in such circumstances double wages should be paid for the overtime. It is to be further noted that this Oregon case had to do with employment on a State job, where the State was in contractual relations with the employer, who was, in some sort, its mandatary, and that as was expressly recognized in the decision, the case proceeds in considerable part upon the theory that the State might rightfully attach such conditions as it should see fit to the use of its own funds (as to which see also 39 Corpus Juris, pp. 59-60, Sec. 39 and cases cited under note 7).

Apart from this Oregon case of Turney v. J. H. Tillman Co., however, and the particular facts there involved, it is true, as laid down in general terms in Smith v. Bach, 183 Cal. 259, 263, 264, 191 P. 14, 15, that: "There are authorities which, while not denying the general rule that an illegal contract cannot be enforced, whether malum in se or malum prohibitum, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely malum prohibitum, and that in the latter case courts will take notice of the circumstances, and will give relief, if justice and equity require a restoration of money received by either party thereunder. 13 Corpus Juris, p. 411, § 341. In such a case the complaining party is protected, the prohibition being for his benefit, and, not being in pari delicto he is entitled to relief. Id., p. 501, § 443. By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in pari delicto, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require. Pomeroy Eq.Jur. 3d Ed., § 942; Gray v. Roberts, 2 A.K. Marsh., Ky., 208, 12 Am. Dec. [383] 385; Wassermann v. Sloss, 117 Cal. [425] 431, 49 P. 566, 38 L.R.A. 176, 59 Am.St.Rep. 209; City of Los Angeles v. City Bank, 100 Cal. 18, 34 P. 510; Savings Bank of San Diego County v. Burns, 104 Cal. [473] 480, 38 P. 102; Manchester & L. R. R. Co. v. Concord R. R., 66 N.H. 100, 20 A. 383, 9 L.R.A. 689, 49 Am.St.Rep. [582] 589; 13 Corpus Juris, p. 501, § 444."

The particular statute the violation of which was involved in Smith v. Bach, was that forbidding the making of sales of land by reference to unrecorded maps. What the Court decided was that, though a contract of sale and purchase disregarding the inhibition was void and unenforcible, yet that a payment made under it might be recovered by the intended vendee, he being, though involved in the illegality of the contract, held less culpable than the vendor because the statute was conceived to be designed for his protection. With respect to this decision it is to be observed that it neither resulted in an enforcement of the contract nor in conferring on either party any of the benefits which would or might have resulted from the contract had it been a valid one; but merely restored the intended vendee to his status quo ante. It goes without saying that, the contract being illegal, the Court would have refused to decree its specific performance, had the vendee sought that, regardless of the circumstance that it treated him as not being altogether in pari delicto with the vendor.

[4-6] It seems to us evident, moreover, that a large degree of caution must be exercised in the extent to which the courts shall go in applying the theory that one to whom the benefit of a police regulation inures is necessarily its beneficiary in any such exclusive sense as to entitle him to waive its provisions and to exonerate him from the consequences of being a voluntary party in its violation. Where, as in the case of some of the federal enactments, an inhibition against causing or permitting an employee to work more than a specified time in course of a day or week, with or without making the violation of the restriction by the employer criminal, is accompanied by a provision permitting the employee to recover for such overtime work, an intention is, of course, evinced, to treat such employee as in a lesser degree to blame, if to blame at all, for the violation of the statute. How far, if at all, such attempted distinction is valid

we need not inquire as it is not made in the statute before us. The only distinction here expressed as between the employer and employee involved in the forbidden arrangement for overtime work is that the former is subjected to a criminal liability while the latter is not. We do not think that this statute ought to be held to be designed for the exclusive benefit of the employee. Police regulations are not ordinarily enacted for the benefit either of individuals or of any selected classes of individuals. They are in their nature restrictions on liberty and as such ordinarily designed to bear some reasonable relation to the welfare of the whole community. There may, indeed, be cases where certain classes of individuals are so situated as to be subject to particular disadvantages sufficient to require police regulations in their favor to insure to them legal rights in some sort commensurate with those enjoyed by the community at large. But generally speaking where police regulations are made undertaking to protect some particular class of persons, such protection is accorded because the welfare of such class of persons is conceived to be bound up with the welfare of the community as a whole. Particularly is this the case with women as a class. The circumstance that the restriction of their hours of labor inures to their benefit does not militate against its beneficial effect through them on the health and welfare of the community as a whole. When, therefore, a particular woman, participates in the violation of such a regulation, it seems to us fallacious to argue that she is justified in so doing because the regulation is meant for her benefit and she has a right to waive the benefit. We hold that she has no such right. The benefit is one intended for the community of which she is but a single member, and the circumstance that she may be one of the members of the community especially benefitted by the regulation affords her no justification for violating it. Actual coercion or circumstances amounting in effect to the same thing may in some degree *excuse* her participation in its violation but that is not the same thing as *justifying* it.

What we have just said finds confirmation in such decisions as that of the Supreme Court of Utah in Short v. Bullion-Beck & Champion Mining Co., 20 Utah 20, 57 P. 720, 721, 45 L.R.A. 603, involving a statute which forbade the employment of miners for more than eight hours a day upon underground work, though it denounced penalties therefor only against employers. The Utah Supreme Court upheld a judgment denying to an employee who worked underground for longer hours any recovery for the overtime. It approved an expression by the trial court to the effect that: "The question is * * * whether, under this law, such a contract is invalid as to the employé. We think in law and in reason it is. It is void as to him —First, for the reason that he is impliedly forbidden to make such a contract; second, because when he enters into a contract of this nature he knowingly and voluntarily assists the employer to violate the law, he becomes in effect a particeps criminis with the employer, for it is patent that with no employé willing to make such a contract the employer is powerless to act."

The Supreme Court went on to say: "We are further of the opinion that the right to waive this legislative protection is without the power of the employé. The law is in the nature of a state police regulation. Its object is the good of the public as well as of the individual. * * * This protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good."

[7] With these views we are in entire accord. Moreover if an express contract in contravention of the statute is for the reasons stated void, it is equally plain that the law will not from voluntary overtime work raise an implied contract to pay the reasonable value of the overtime. Such an implied contract would be as contrary to the purposes of the statute as an express contract. Indeed that sought to be enforced in Short v. Bullion-Beck and Champion Mining Co. appears itself to have been of this character, the action having been on a quantum meruit.

We recognize that circumstances may exist where, by reason of coercion actual or virtual, an employee though not *justified* may be in some sort *excused* for failure

to observe the statutory limitation upon hours of work, and may not, therefore, be in *pari delicto* with the employer in violating the statute. The findings of the trial court, however, by which we are here bound, exclude the instant case from that category, because they determine that the overtime work was on appellant's part voluntary. If it was voluntary it was not excusable.

The judgment is affirmed.

We concur: MUNDO, J.; THOMPSON, Judge pro tem.

13 Cal.2d 424

MERIDIAN, Limited, v. CITY AND COUNTY OF SAN FRANCISCO et al.

Sac. 5088.

Supreme Court of California.

May 5, 1939.

As Modified on Denial of Rehearing June 3, 1939.

See 91 P.2d 105.

1. Waters and water courses ⇐37

The provision of constitutional amendment, that riparian rights in stream attach to no more than so much of flow as may be required or used consistently with such amendment, means that riparian owner can claim no more than rights guaranteed him by law to use waters of stream for all present and prospective useful and beneficial purposes, and adopt means made available to him thereby to protect such rights. Const. art. 14, § 3, adopted in 1928.

2. Waters and water courses ⇐36

Unused waters, flowing in streams of state to sea or inland drainage basins, constitute public waters to be used, regulated, and controlled by state or under its direction.

3. Waters and water courses ⇐85

Injunctive relief against diversion of water from stream will not be granted lower riparian owner on mere proof that such diversion will diminish stream's flow past his lands, and he has no legal recourse, if sufficient water remains after such diversion to satisfy his reasonable demands. St.1913, p. 1017, § 11, as amended; Const. art. 14, § 3, adopted in 1928.

4. Waters and water courses ⇐40, 142

A riparian owner, whose water needs and requirements, both riparian and appropriative, have been fully met and safeguarded to extent contemplated by constitutional amendment, has no right to require that surplus water flow past his lands to sea without being used. Const. art. 14, § 3, adopted in 1928.

5. Waters and water courses ⇐144, 152(3)

A riparian owner is entitled to all water of stream which he can put to reasonable beneficial use and to injunction for protection of such right, but is not entitled to injunction to control appropriator's use of water in exercise of right not injurious to riparian right, though subordinate thereto. Const. art. 14, § 3, adopted in 1928.

6. Injunction ⇐1

"Injunction" is equitable remedy available generally to protect, or prevent invasion of, legal right.

[Ed. Note.—For other definitions of "Injunction," see Words & Phrases.]

7. Waters and water courses ⇐152(3)

To entitle riparian owner to injunction against diversion of water by appropriator, such owner's right to use water must first be shown and then actual or threatened invasion thereof.

8. Waters and water courses ⇐42, 144

The prevention of waste of water in stream is imposed on both riparian owner and subordinate taker under inferior right or without right, as duty not to commit waste is enjoined on all water users.

9. Waters and water courses ⇐42, 144

"Waste" of water means use thereof needlessly or without valuable result, its employment prodigally or without any considerable return or effect, or its use without serving a purpose, and, as denounced by constitutional amendment limiting riparian rights, means use of water by riparian owner under previously protected right to compel flow of waters of stream to sea without benefit to himself when beneficial use thereof could otherwise be made. Const. art. 14, § 3, adopted in 1928.

[Ed. Note.—For other definitions of "Waste," see Words & Phrases.]

10. Waters and water courses ⇐42, 144

There is no "waste" in constitutional or legal sense in permitting waters for which no beneficial use has been developed or which are not presently needed by any users, to flow freely in their natural courses to sea or other natural outlets. Const. art. 14, § 3, adopted in 1928.

11. Levees and flood control ⇐3
Waters and water courses ⇐36, 127, 132, 140

The restraint and storage of water in upper reaches of state's streams for purposes of flood control, equalization and stabilization of flow, and future use, are beneficial uses, to which such waters may be put by state, but such right of storage is subordinate to beneficial uses made in exercise of riparian and prior appropriative rights and may be exercised only pursuant to appropriations lawfully made. Const. art. 14, § 3, adopted in 1928.

12. Waters and water courses ⇐133

It should be first concern of court and state department of public works in exercise of its powers under Water Commission Act to recognize and protect interests of those having prior and paramount rights to use waters of stream in any case pending before them. St.1913, pp. 1017, 1021, §§ 10, 15; Pol.Code, § 363e.

13. Waters and water courses ⇐143

When excess water exists after demands on stream for domestic, irrigation, and other recognized lawful purposes by riparian owners and appropriators are fully met, it is for state to say whether diversion thereof is excessive. St.1913, pp. 1017, 1021, 1032, §§ 10, 15, 38.

14. Waters and water courses ⇐130, 152(3), 159

The waters of Tuolumne river and its tributaries in excess of lower riparian owners' and prior appropriators' needs for all reasonably useful and beneficial purposes were released by constitutional amendment for storage and other beneficial uses incident thereto, and injunctive or other processes of court are not available to such owners or appropriators to prevent such storage. Const. art. 14, § 3, adopted in 1928.

15. Waters and water courses ⇐75

Threatened pollution of water of river because of city's increased storage thereof would not justify injunction against city's use of its enlarged storage facilities, in absence of actual pollution, especially as protective measures short of absolute prohibition may be applied by court, if necessary.

16. Waters and water courses ⇐152(12)

A city, storing and diverting waters of river for its use, was not so prejudiced by court's measurement of lower riparian owner's water right on basis of annual continuous flow, determined by high maximum flow for certain month, as to require reversal or modification of judgment enjoining city from diverting more than stated quantity of water per day.

17. Waters and water courses ⇐133

A notice of city's appropriation of "all the water, natural or stored, here flowing in Eleanor Creek at the point which this notice is posted," was not invalid as not stating amount of water claimed, since it plainly indicated maximum claimed, which was made certain by capacity of city's enlarged reservoir as approved by Secretary of the Interior nearly four years before such notice and actually constructed. Civ.Code, § 1415; Act Cong. Dec. 19, 1913, 38 Stat. 242.

18. Waters and water courses ⇐133

The failure of notice of city's appropriation of water to state size of flume, ditch, pipe, or aqueduct for diversion thereof, and failure to record such notice within ten days after posting thereof, did not affect city's right to store water in its reservoirs to their enlarged capacities under other notices of appropriation. Civ.Code, § 1415.

19. Waters and water courses ⇐152(7)

In action against city to quiet title to water rights and enjoin diversion of waters of river, two of city's water appropriation notices, not described in its answer, but included in exhibit purporting to describe all such notices, were admissible in evidence, in absence of objection to their sufficiency.

20. Waters and water courses ⇐152(11)

Where no substantial damage to corporation's riparian or appropriative rights in waters of river by city's diversion of waters therefrom for storage was shown, relief granted corporation should have been limited to injunction against city's storage of water in excess of its prescriptive right when there is not flowing by corporation's land quantity of water which it can beneficially use, unimpaired in quality by any act of city beyond exercise of such right.

21. Waters and water courses ⇐152(11)

The term "surplus high waters," as used in court's findings, conclusions of law, and judgment in action against city to quiet plaintiffs' title to water rights and enjoin diversion of waters of river by defendant for storage, must be deemed to refer to "excess waters," defined as waters subject to appropriation for beneficial use over and above what may reasonably be subjected to such use on lands bordering stream.

[Ed. Note.—For other definitions of "Excess or Surplus Water," see Words & Phrases.]

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; Raglan Tuttle, Judge.

Action by Meridian, Limited, a corporation, against the City and County of San Francisco and others to quiet title to

water rights, enjoin defendants from setting up prior claims thereto, and enjoin defendant city from transporting waters of certain river away from its watershed or ascertain damages to plaintiff's land because of such diversion and transportation. From so much of the judgment as enjoined defendant city from storing water in excess of its prescriptive right and diverting more than specified quantity per day and subordinated certain of its appropriative claims to that of plaintiff, defendant city appeals, and from so much of the judgment as denied an injunction against conveyance of water from the watershed of such river, plaintiff appeals.

Modified and affirmed as modified.

Sloss, Turner & Finney, of San Francisco, and Murray Bourne, of Fresno, for Meridian, Limited.

W. C. Le Hane, of Modesto, amicus curiae for John C. Whaetley et al.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and A. E. Chandler, Special Counsel, all of San Francisco, for City and County of San Francisco.

Allen G. Wright and Robert M. Searls, both of San Francisco, amici curiae for San Francisco Chamber of Commerce.

SHENK, Justice.

Two appeals are here for consideration. One is the appeal of the defendant, City and County of San Francisco. The other is an appeal by the plaintiff. By stipulation both are presented on a single record.

The action involves the rights of the city as an appropriator of water of the Tuolumne river in connection with its Hetch Hetchy project, and the rights of the plaintiff as a riparian owner and appropriator of water down stream from the works of the city.

The plaintiff commenced the action on May 31, 1932, against the city and four other defendants: Turlock Irrigation District, Modesto Irrigation District, Waterford Irrigation District and West Stanislaus Irrigation District. The issues affecting the plaintiff and the city and West Stanislaus Irrigation District were determined. Pursuant to the authority of section 579 of the Code of Civil Procedure, the court caused several judgments to be entered. Certain issues tendered by the plaintiff and the three other defendant irrigation districts remain undetermined in the trial court. No appeal was taken from the judgment against it by the West Stanislaus Irrigation District, and the judgment, in so far as it affects that district, has become final.

The conflicting claims of the parties involve their rights in and to the waters of the Tuolumne and San Joaquin rivers and their tributaries. The San Joaquin river is a natural water course arising in the Sierra in Fresno and Madera counties. It flows through the counties of Fresno, Madera, Merced, Stanislaus and San Joaquin and discharges into an arm of the bay of San Francisco. The Tuolumne river is a tributary of the San Joaquin. It rises also in the Sierra, as a drainage area of about 1500 square miles, and flows westerly through the counties of Tuolumne and Stanislaus, joining the San Joaquin about two miles above the plaintiff's riparian lands. The constant flow of both rivers, if unobstructed, has always been and, according to engineering opinion, will always be variable. The flow of the Tuolumne varies greatly in amount and in rate from year to year, from season to season, and from time to time in any season. The principal high flow from heavy rains and melting snows occurs during the months of March, April, May and early June of each year.

The plaintiff is the owner of El Solyo ranch, which is located on the west bank of the San Joaquin river with its southerly line about two miles down stream from the confluence of the two rivers. The ranch consists of five contiguous parcels with an aggregate area of 4320 acres, of which approximately 3208 are riparian to the San Joaquin river. In 1919 and 1920 the plaintiff's predecessors constructed a system for the irrigation of the ranch, consisting of a pumping plant located on the bank of the San Joaquin river near the north-easterly corner of the ranch, and a system of pipe lines and works for distributing the water pumped from the river. At the time of the trial the irrigated portion of the ranch embraced about 3700 acres. A portion of the ranch, comprising about 350 acres, has not been prepared for irrigation but is suitable for farming by that method. In the cultivated area are about 800 acres of full-bearing deciduous fruit trees and 600 acres of matured and bearing vines. Crops of almost every description suitable to the locality are grown, including truck garden vegetables, grain and alfalfa. All of the ranch is agricul-

tural land of great fertility and is susceptible of a high degree of cultivation. A dairy is also maintained thereon. From 100 to 400 persons are employed in conducting the ranching operations and the development as a whole represents an investment of about $4,000,000. The San Joaquin river is the only available source of supply for the irrigation and domestic use of the ranch, and the flow of the river past the ranch consists largely, and at times almost entirely, of waters contributed to it by the Tuolumne river.

On October 10, 1919, Roy M. Pike, a predecessor in interest of the plaintiff, filed with the state water commission an application for the appropriation of water of the San Joaquin river for the irrigation of El Solyo ranch. The application was approved by the commission, and on March 13, 1933, the division of water rights issued to the plaintiff its license No. 1280 showing the work as contemplated by the application had been completed. The license was for the appropriation of 46.74 second feet of water from about March 1st to about November 1st of each season for the irrigation of 3781 acres of the ranch. The system of irrigation works covered by the license is in use for the irrigation of the ranch and the area covered is the entire ranch except 540 acres—which excepted area is riparian to the San Joaquin river.

The rights of the defendant irrigation districts are not involved on these appeals, but a brief notice of their location, purposes and works will contribute to an understanding of the problems under consideration. The Turlock Irrigation District embraces about 185,000 acres and lies south of the Tuolumne river and east of the San Joaquin river in Merced and Stanislaus counties. The Modesto Irrigation District contains about 81,203 acres and lies north of Tuolumne and east of the San Joaquin in Stanislaus county. The Waterford Irrigation District contains about 14,000 acres and lies north of the Tuolumne and east of the Modesto District in Stanislaus county. Prior to the commencement of this action there had been brought under irrigation in these three districts 140,734 acres, 67,141 acres, and 5382 acres respectively. The lands of the West Stanislaus Irrigation District border the westerly bank of the San Joaquin river above the plaintiff's ranch about two miles from the confluence of that river with the Tuolumne river.

In 1894 the Turlock and Modesto districts constructed the La Grange dam across the Tuolumne river near the town of La Grange. By means of the dam the water of the river is diverted into two main canals, the Turlock main canal south of the river and Modesto main canal north of it. The capacity of the diversion works and main structures of the Turlock main canal is 3000 second feet and of the Modesto main canal is 2000 second feet, of which a capacity to the extent of 250 second feet has been reserved for the Waterford District by contract between the two districts. In 1922 the Turlock and Modesto districts constructed the Don Pedro dam across the Tuolumne to form the Don Pedro reservoir with a storage capacity of 261,750 acre feet. In addition to those works the districts have constructed canals, ditches and other structures for the purpose of delivering water to the lands within their respective boundaries. The Turlock and the Modesto districts have also constructed an electric power plant below the Don Pedro dam with an installed capacity of 41,100 horsepower. The Turlock District has constructed a second power plant, known as the La Grange power house, at the end of the Turlock main canal intake tunnel. This has a capacity of 6000 horsepower. Many millions of dollars have been expended in these developments.

For many years prior to the commencement of the action the districts intercepted and diverted part of the flow, and for long periods within the irrigation season the entire flow, of the Tuolumne river by means of their dams and other works.

In 1901, the City and County of San Francisco started a project for the storage and diversion of the waters of the Tuolumne river for the use of the city and other localities adjacent to San Francisco bay. It has become known as the Hetch Hetchy project and includes reservoirs, power plants and diversion works in the watershed of the Tuolumne river above the Don Pedro reservoir. The first appropriations made in behalf of the city for its project were made by Mayor James D. Phelan on July 29, 1901, for 5000 inches of the flow of Eleanor creek below the outlet of Lake Eleanor, and 10,000 inches of the flow of the Tuolumne at the outlet of Hetch Hetchy valley. These appropriations were followed so closely by diligent survey work for a reservoir site at Lake Eleanor and at Hetch Hetchy val-

ley that Mr. C. E. Grunsky, then city engineer, was able to transmit to the register of the United States land office at Stockton, under date of October 16, 1901, certain maps and other documents constituting right of way applications for two reservoirs under Congressional Act of February 15, 1901, 16 U.S.CA. § 79. These applications were not approved until May 11, 1908 ("Garfield Permit", 36 Land Decisions 409). The opinion in that matter fully reviews the history of the applications before the Department of the Interior, including the protests made by many against the use of the Yosemite National Park for reservoir purposes, and the resulting investigations by the government regarding the needs of the city. The capacity of Lake Eleanor reservoir as thus approved was 41,290 acre feet, and the capacity of Hetch Hetchy reservoir was 107,426 feet. Eighteen notices of appropriation under the state law in force prior to the effective date of the Water Commission Act, December 19, 1914, were posted during the period July 29, 1901, to February 27, 1911, inclusive. These appropriations were posted in the name of the city or one of its representatives, or by William Ham Hall or by Sierra Ditch Water Company. The appropriations made by the last two parties were purchased by the city.

The notices of appropriation of July 29, 1901, for the appropriation of 5000 inches of the waters of Eleanor creek and for 10,000 inches of the waters of the Tuolumne river are sufficient for the appropriation of water for the full capacity of Lake Eleanor reservoir and Hetch Hetchy reservoir as approved by the Secretary of the Interior Garfield on May 11, 1908. Much delay in the prosecution of the work ensued. Secretary of the Interior Ballinger issued his order to the city to show cause why the Hetch Hetchy valley should not be eliminated from the Garfield permit, and his successor, Secretary Fisher, refused to take further action without authority from Congress. No actual construction work could be done on the Hetch Hetchy project until after the approval of the Raker Act on December 19, 1913 (38 Stats. 242). The provisions of that act were formally accepted by the city on January 12, 1914, by ordinance No. 2598.

The Raker Act provided, among other things, that nothing therein should be construed as affecting or interfering with the laws of the state of California relating to the control, appropriation, use or distribution of water for irrigation or for municipal or other uses, or with any vested right acquired thereunder. The act also required the city to recognize the prior rights of the Turlock and Modesto Irrigation districts as then or thereafter constituted or enlarged within certain specified limits for reasonable use of water.

Subsequent to the passage of the Raker Act the city diligently proceeded with its project. Under the provisions of the act Secretary of the Interior Lane, on June 9, 1914, approved an amended application of the city for reservoir and dam site privileges in the Hetch Hetchy valley to the capacity of 345,000 acre feet. Under date of December 27, 1915, he approved an amended map for the Lake Eleanor site with capacity of 289,862.9 acre feet. Other notices of appropriation will be hereinafter referred to. The Hetch Hetchy reservoir was completed in 1923, and as then constructed had a storage capacity of 206,000 acre feet of water. It was formed by the O'Shaughnessy dam, a concrete structure 345 feet high, built at a cost of over $7,000,000. Lake Eleanor is situated on Eleanor creek, a tributary of the Tuolumne river. The dam forming the lake and reservoir was completed in 1918, is seventy feet high, has a storage capacity of 28,000 acre feet of water and cost over $300,000.

Since the enactment of the Raker Act and prior to the commencement of this action, the city has constructed plants for the generation of hydro-electric power on the Tuolumne river and its tributaries at points above the lands of the plaintiff and the defendant irrigation districts. The principal plant is located on Moccasin creek, is known as the Moccasin power house, is equipped to generate 100,000 horsepower, and has been operated to that capacity since 1925. A secondary plant is situated on the right bank of the Tuolumne river at a point known as Early intake. It is below the major reservoirs, has a capacity of 4500 horsepower and has been operated since May, 1918.

Before the commencement of the action the city constructed diversion works known as the Hetch Hetchy aqueduct, designed for the conveyance of waters of the Tuolumne river to the City and County of San Francisco and adjacent territory. The portion of this aqueduct extending

from Early intake to the Moccasin power house is about 20 miles in length, was completed in June, 1925, and has a capacity in excess of 620 cubic feet per second. The portion of the aqueduct extending from the Moccasin creek power house to the vicinity of the City and County of San Francisco was not completed until after the commencement of this action. That portion consists of: (1) The Foothill division, which exends from the Moccasin creek power house to Oakdale portal at the easterly edge of the San Joaquin valley, is about 16 miles in length, was completed in May, 1932, and has a capacity in excess of 620 cubic feet per second; (2) the San Joaquin division, which extends across the San Joaquin valley, is about 47 miles in length, was completed in May, 1932, and has a capacity of 93 cubic feet per second; (3) the Coast Range division, which extends from Tesla portal at the westerly edge of the San Joaquin valley to Irvington portal in Alameda county, is about 28 miles in length, was completed after May, 1932, and has a capacity of 250 million gallons of water daily; (4) the Bay Crossing division, which extends from the Irvington portal about 24 miles to Crystal Springs reservoir in San Mateo county, from which reservoir water is distributed in San Francisco for domestic and other municipal uses. This portion of the aqueduct has a capacity of 670 cubic feet per second and was completed in May, 1926.

The average annual run-off of the watershed of the Tuolumne river during the thirty-eight-year period in which the run-off was measured—1895 to 1933—has been 1,842,500 acre feet. In dry years it has been less than 600,000 acre feet. The foregoing recital of facts is taken from undisputed findings of fact.

The complaint is in the nature of an action to quiet title to water rights and for injunctive relief to protect those rights. Two causes of action are set forth. The first alleges the facts constituting the plaintiff's claim of rights as a riparian owner, the status and claims generally of the defendant irrigation districts and the City and County of San Francisco. It is specially alleged that the city claims an interest in the waters of the Tuolumne river adverse to the plaintiff, but that such claim, if any, "is without any right whatever and is subsequent and subordinate to the rights of said plaintiff as owner of said riparian lands".

In the second cause of action the plaintiff pleaded an appropriative right on the San Joaquin river separate from its riparian right, with priority as of October 10, 1919, over any claim of the city. This appropriative right was alleged to be prior and superior to any right of the city to interfere in any way with the natural flow of the Tuolumne river or the San Joaquin river or to transport away from the watershed any of the waters of those rivers. It is then alleged that the city intends to enlarge the storage capacity of its reservoirs and its diversion system so that the same would be capable of diverting and transporting away from the watershed a constant flow of 620 cubic feet per second.

The plaintiff prayed: (1) That the defendants be required to set forth any claims of right they might have as against the plaintiff in the water of said rivers; (2) that the plaintiff's claimed rights to the water of said rivers be quieted, and that it be adjudged that the defendants have no rights which are not subject and subsequent and subordinate to the rights of the plaintiff as alleged in the complaint; (3) that the defendants be enjoined from setting up any claim to said waters except subject to and in subordination of the alleged rights of the plaintiff; (4) that the city be enjoined from transporting any of the waters of the Tuolumne river away from its watershed; (5) if the court should conclude that the city should not be so enjoined, that then the court ascertain the damages that would be caused to plaintiff's lands because of such diversion and transportation; (6) that the court fix and determine the extent of the rights of each of the defendants other than the city to take, store, divert and use the water of the rivers; and (7) for general relief and costs.

The answer of the city admitted the contemplated diversion, but denied that such diversion would violate the plaintiff's rights. It also set up seventeen separate defenses based upon claims by appropriation, prescription, intervention of public use, bar of the statute of limitations, and estoppel. On April 3, 1933, the case of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5, was decided, wherein it was first held by this court that the riparian doctrine of Herminghaus v. Southern California Edison Company, 200 Cal. 81, 252 P. 607, and similar cases preceding it, was no longer in effect in this state

and that the doctrine of reasonable use should thereafter be applied to the waters of the state. In its amended answer, filed April 20, 1933, the city disclaimed any intention of claiming under its appropriations any water theretofore used or thereafter required by any riparian owner, including the plaintiff, for useful or beneficial purposes on their riparian lands. The city prayed that its rights be determined and quieted as against the plaintiff.

Prior to the trial of the action, there had always been sufficient water in the San Joaquin river to supply all of the plaintiff's requirements. Upon the trial the court found and concluded that for the reasonable and proper irrigation of the presently cultivated 3730 acres of its ranch and on the additional irrigable and cultivable 350 acres, the plaintiff was and would be entitled to divert from the San Joaquin river "20,000 acre feet of water per year, to be diverted at a maximum of 100 cubic feet per second"; that the plaintiff as a riparian owner "at the present time is entitled to divert from the San Joaquin river 13,220 acre feet of water per calendar year, at a maximum rate of diversion of 66.8 cubic feet per second, and that when all the riparian lands of the plaintiff, after the portion now uncultivated shall have been brought under cultivation are irrigated, the required amount will increase to 14,840 acre feet per year to be diverted at a maximum rate of 75 cubic feet per second"; that these rights of the plaintiff are subject to the prescriptive rights of the city and also of the Turlock, Modesto, and Waterford districts, but are prior and superior to all other claims of those defendants and of the West Stanislaus District; and that the plaintiff is entitled to have its water free from pollution caused by any acts of the defendants in excess of their prescriptive rights and which would render it unfit for use on said riparian lands. These conclusions were carried into the judgment.

For years prior to the commencement of this action the Turlock and Modesto districts, by means of their dam and other works, interrupted and divverted part of the flow, and for long periods within the irrigation season the entire flow, of the Tuolumne river. In the years 1918 to 1931, inclusive, they took the entire flow of the river for a minimum of 23 days to a maximum of 275 days per irrigation season, and on an average over the fourteen years of 115 days per season.

From these facts the trial court concluded that the Turlock and Modesto districts are the owners by prescription of a right, prior and superior to the plaintiff's riparian right, to store, regulate and divert waters of the Tuolumne river for the irrigation of lands within their respective boundaries and for the generation of electric power to such an amount as will cause a "gross abstraction" from the river of 775,710 acre feet per calendar year; to divert into their canals at La Grange the waters so abstracted at maximum mean daily rate of 1790 cubic feet per second for the Turlock District and 1261 cubic feet per second for the Modesto District; and to store and regulate the entire flow of the Tuolumne river in the Don Pedro reservoir within the limits of the foregoing "gross abstraction". By reason of this storage and the releases for irrigation and power purposes the flow of the San Joaquin past the El Solyo ranch is different than it would be otherwise. The result of this method of operation has been to increase and equate the amount of water reaching the ranch during the low water period. Seepage, drainage and spill of the water taken by the districts cause a return flow which the court found was proportionate to the use of water by the districts, and becomes available for use on the plaintiff's lands substantially at the time of greatest requirements. The court found that during the ten-year period preceding the commencement of this action the return flow of the Tuolumne river between La Grange dam and the junction of the two rivers just above the plaintiff's properties, mingling with the waters of those rivers, constituted "a volume of water constantly many times larger than will be required for beneficial use on the entire area of the plaintiff's riparian lands and of a quality satisfactory for such use". A further finding is that the return flow from the use of water by the districts, in amounts to which their priority of right is acknowledged by the city, will maintain in the channel of the San Joaquin river along the plaintiff's riparian lands, together with other waters therein, a volume of flow suitable in quality for irrigation use and constantly larger than the requirements for beneficial use on the plaintiff's riparian lands, and that no acts of the districts short of discontinuance of irrigation can

diminish the return flow to an extent that the plaintiff will not have sufficient water in the river along its lands to satisfy its riparian rights as fixed by the court.

There is abundant evidence in support of the foregoing findings. According to one of the plaintiff's own witnesses the drainage into the Tuolumne has averaged between 2400 and 3800 acre feet per annum and the spillage about 24,000 acre feet per annum. Over a sixteen-year period preceding the commencement of this action there was an estimated continuous return flow of 212,800 acre feet, or about 293 cubic feet per second, at Tuolumne City a short distance above the plaintiff's property, which is about six times the highest average monthly diversion rate for water taken by the plaintiff from the river to satisfy the irrigation needs of the riparian lands in the past. If the drainage and spillage were cut off entirely there would still be a return flow from seepage alone amounting to over 190,000 acre feet per annum, and no acts of the districts short of a discontinuance of irrigation can diminish such return flow to an appreciable extent or to the extent that the plaintiff will not have sufficient water in the river along its lands to satisfy its riparian right as fixed by the court.

Here it may be noted that upon the trial the plaintiff took the position that it was entitled to have this return flow, without reduction in amount or change in quality by a continuance of the districts' operations under present practices. However, the court concluded that the plaintiff, as a riparian owner, is not entitled to have the districts continue to conduct their operations in such manner that the return flow "shall continue as heretofore, undiminished in quantity and unimpaired in quality; except that the districts have not the right to change their method of operation arbitrarily or wilfully in a manner not beneficial to the lands within their boundaries so as to result in the diminution in quantity or deterioration in quality of said return waters to the injury or damage of plaintiff or its riparian lands".

The court fixed the rights of the West Stanislaus District as against the plaintiff. That district comprises 21,400 acres lying westerly from the San Joaquin river and southerly and westerly of the lands of the plaintiff. In 1928 it commenced the construction of a pumping plant and intake canal, and in 1929 first diverted and used water from the reservoir for the irrigation of lands within its boundaries. Its intake is on the westerly bank of the San Joaquin river about one-fourth of a mile upstream from the confluence of the two rivers. At times of low flow because of the condition of the two stream channels, substantially all the waters reaching this intake and diverted by the district consists of water added to the San Joaquin by the flow of the Tuolumne river.

The court found that the West Stanislaus District was the owner, subject to the riparian and appropriative rights of the plaintiff, of an appropriative right to divert water of the San Joaquin at a rate of 262.15 cubic feet per second, but that such right had not been exercised for any prescriptive period. It was also found that a public use had intervened to the extent of 60,000 acre feet of water per calendar year (and no more), which constituted the full requirement of that district and that by its diversion the district would take for public use a portion of the plaintiff's riparian right. The district was accorded but refused to exercise a right to condemn, and judgment was entered enjoining that district from diverting water from the San Joaquin river, at any point above the plaintiff's riparian lands, more than 60,000 acre feet in any calendar year, or at a higher rate than 262.15 cubic feet per second. This judgment has become final for the reason that no appeal was taken therefrom. The status of this district is set forth somewhat at length because of the contention of the city that the injunction against it should have gone no further than the injunction against the West Stanislaus District.

The taking of testimony at the trial was concluded on April 25, 1934, and the cause was continued for submission pending the filing of briefs and oral argument.

On September 28, 1935, some nine months and more before the rendition of judgment herein, the trial court entered an order directing that the City and County of San Francisco and West Stanislaus Irrigation District have until October 15, 1935, within which to submit a written offer to compensate the plaintiff in money for any damage which the plaintiff might sustain "as a result of any taking of water by such defendant for public use in excess of the rights of such defendant, together with a written request to this (Superior) court to ascertain the amount of such

damage in said action"; that if either or both of said defendants should fail to make such offer and request within the time prescribed, such failure should be deemed a refusal to compensate the plaintiff for such damage, and of a waiver of a right to condemn in this action any property or rights of the plaintiff.

On October 15, 1935, the city filed a reply to the direction contained in the order of September 28, in which it stated that as the city "has no desire or intention of taking any water to which the plaintiff is ultimately declared herein to be entitled as against the city, there is no necessity for the city to make any offer to compensate plaintiff". With much elaboration the city then set forth in its reply the reasons, based on the facts in the case, why it should not be required to offer compensation to the plaintiff, the substance of which was that the city did not propose to take or damage any of the property or rights owned by the plaintiff, and that therefore there was no occasion for an offer or subsequent order of compensation.

As to the water rights of the City and County of San Francisco the court found, among other things not necessary to be stated, that the city has at all times conceded that the Turlock, Modesto and Waterford Irrigation districts have rights, prior and superior to any claimed by the city, to the waters of the Tuolumne river to the full extent of their needs, and that the city has not at any time claimed the right to divert for use any of the waters of the river other than waters previously stored by the city; that the water subject to storage by the city without invading the rights of the Turlock, Modesto and Waterford districts are "surplus high waters", defined for the purpose of the findings as "waters flowing at any time in the Tuolumne river and its tributaries above the La Grange dam over and above a daily flow of 4066 cubic feet of water per second of the natural flow of the Tuolumne river, measured at the La Grange dam, during the period of sixty (60) days immediately following and including April 15th of each year and in excess of a like flow of 2416 cubic feet of water per second, measured at the La Grange dam, at all other times"; that prior to the commencement of this action the city (1) has acquired the prescriptive right to store in Hetch Hetchy reservoir and Lake Eleanor, out of the surplus high waters, as defined, flowing in the Tuolumne river and its tributaries, 235,465 acre feet of water per seasonable year (October 1st to September 30th), and no more; (2) had released the waters so stored for a reasonable beneficial use, namely, the generation of hydro-electric power, but for no other beneficial use; and (3) had returned all the waters so stored and used to the Tuolumne river at a point above all the works of the defendant irrigation districts and above the lands of the plaintiff. By reason of the facts so found the court concluded that the city is the owner by prescription of the right, as against the plaintiff's riparian right, to store in "its reservoirs now in existence with their present capacities and no greater capacities", the "surplus high waters" and no other waters flowing in the Tuolumne river and its tributaries up to the amount of 235,465 acre feet of water, and no more, for one seasonal year, and to retain said water for power purposes and for no other use, returning all of the water so stored and used to the Tuolumne river above the works of the districts and above the lands of the plaintiff and not otherwise.

The court further found that prior to the commencement of the action the city had stored in Hetch Hetchy reservoir in a single seasonal year of maximum storage (but not continuously for five consecutive years) waters of the river up to the amount of 211,300 acre feet and had similarly stored, used and released water in Lake Eleanor up to 36,700 acre feet; that the maximum flow which the city would be able to obtain from the Tuolumne river "by the use of its present storage capacity of its two reservoirs", and without disregarding the prior rights of the defendant districts, and for conveyance to the city and adjacent territory, is 142 million gallons per day. In other words, the court found and concluded that the city had the right to store in its reservoirs and use for municipal purposes the waters of the Tuolumne river at the maximum rate of 142 million gallons per day and that this would be in excess of the reasonable needs of the city probably until 1980; that the storage and diversion of that amount of water would not deprive the plaintiff of water reasonably required by it for the irrigation of its lands, but that the storage of more than that amount would cause the plaintiff irreparable damage.

The court further found that as a part of its ultimate plan the city intended to

enlarge the capacity of its reservoirs then in existence so as to provide storage for the diversion to the city and adjacent territory of a constant flow of 400 million gallons per day, which the court concluded was more than the city could put to a reasonably beneficial use, now or at any time in the future. It was further found that there are at times flowing in the Tuolumne river surplus high waters not required for useful or beneficial purposes upon the lands of the plaintiff and that portions of the flow of the river run unused to and through the San Joaquin river to San Francisco bay.

The court ordered an injunction restraining the city from storing any of the waters of the Tuolumne river or its tributaries except "surplus high waters" as defined in the findings, or from "storing any of such waters except in its reservoirs now in existence" on the river, "within their capacities as existing at the commencement of this action and no greater capacity"; or from storing in the Hetch Hetchy reservoir "as said reservoir may be enlarged", any greater quantity of water than could be stored with the capacity which it had at the commencement of this action.

In its amended answer filed in April, 1933, the city alleged that it had not intended to enlarge its then storage capacity in the Tuolumne watershed within fifty years. Later it acceded to the request of the federal government in connection with its public works program to raise the O'Shaughnessy dam to a height of 430 feet. This improvement would provide additional storage of 151,000 acre feet. The work was well under way at the time of the trial, was completed, and additional water stored to the extent of the capacity of the raised dam.

Briefly, then, the judgment of the court fixed the amount of water to which the plaintiff was and is entitled, both as a riparian owner and as an appropriator; fixed the amount of water which the city was and is entitled to divert from the watershed of the Tuolumne river, measured by the extent of its prescriptive right to store, at 142,000,000 gallons per day; enjoined the city from storing additional water in its reservoirs to the extent of its increased storage facilities.

The city has appealed from that part of the judgment which enjoined it from storing water in excess of its prescriptive right to store; from diverting in excess of 142,000,000 gallons per day, and which subordinated certain of its appropriative claims to that of the plaintiff. The plaintiff has appealed from that part of the judgment which failed and refused to enjoin the city from conveying any water away from the watershed of the Tuolumne river.

The city, in its opening brief as appellant, states the following as the question involved on the appeal: "Is a lower riparian owner now entitled, as against an upper appropriator, to any water of a stream in excess of the amount thereof reasonably required for beneficial uses on his riparian lands when diverted by reasonable methods of diversion?"

The plaintiff counters with its statement of the questions involved, the first two of which are as follows:

"1. As against a lower riparian owner, is an upper diverter free to take and waste what water he wants, when he will not and cannot apply it to a beneficial use?

"2. Does the constitutional amendment of 1928 restrict waste by a riparian owner only, or does it also restrict waste by a subordinate taker under an inferior right or no right?"

Counsel for the city state in their opening brief: "Although other points of less importance are presented in this brief, this appeal would not have been taken if the form of injunction against the City were the same as that against West Stanislaus District."

It is conclusively shown that the amount of water allotted to the city, namely, 142,000,000 gallons per day, is more than the city is or will be able to put to a reasonable beneficial use when delivered at its boundaries or in its vicinity, even until 1980; that the city, if permitted, will store in excess of that amount, to permit a flow up to 400,000,000 gallons per day, in its enlarged storage facilities on the Tuolumne river, and use the excess for the generation of power or other permissible purposes; and that in order to carry out its plans it is and will be necessary at times to transport large quantities of water temporarily detained in storage through the Hetch Hetchy aqueduct, and permit the same to spill into channels leading into the bay of San Francisco.

It is also conclusively shown that the amount of water allotted to the plaintiff

is, and will be for all future time, more than sufficient to supply the reasonable needs of the plaintiff's lands for irrigation and other useful and beneficial purposes.

The question is presented for the first time since the adoption of the constitutional amendment of 1928 as to who has the power of control over the waters in the rivers and streams of the state which are in excess of the present and future needs of riparian owners and prior appropriators.

[1] Counsel for the plaintiff make the following pertinent observation with reference to the recent changes in the water law of this state: "Generally speaking, the decision of these appeals calls for the application, to the rights of the plaintiff and of the city, of the changes in the water law of this state which have resulted from the adoption, in 1928, of the amendment which added section 3 to article XIV of the Constitution of California. The effect of that amendment has been the subject of consideration by this court in several cases, notably: Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; and more recently, City of Lodi v. East Bay Municipal Utility District, 7 Cal.2d 316, 60 P.2d 439. Obviously, it is impossible for this court or any court to cover, in three or four decisions, the entire range of the effect of the amendment upon all water controversies that may arise in this state. The full scope of the new constitutional provision can be determined only after a large number of cases presenting different conditions shall have been decided."

In the cases referred to it was established that by the changes in the law the right to use the waters of rivers and streams of the state has been limited to a reasonable beneficial use; that the riparian owner has a prior and paramount right to this use and if necessary is entitled to the full natural flow of the stream or its equivalent undiminished in quantity and unimpaired in quality. The riparian owner is safeguarded in this right by the constitutional amendment. But the amendment also provides that "riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section * * *". This provision clearly means that when the law has guaranteed to the riparian owner the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes, and has made available to him the means of protecting the rights so guaranteed, he has received the full measure of benefit and protection to which he is entitled, and can claim no more.

[2] There are waters in the rivers and streams of the state to which the riparian right first attaches. The rights of other lawful users on the stream also rightfully attach. In addition there are in many of the rivers and streams of the state great volumes of water which pass on unused to the sea or to an inland drainage basin. In a real sense this excess water is a great natural resource available for the benefit of this and future generations, as the occasion for its use may arise. These excess waters constitute the public waters of the state to be used, regulated and controlled by the state or under its direction.

[3] Section 11 of the Water Commission Act, as originally adopted contained the following provision: "And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act." St.1913, pp. 1017, 1018. The same declaration was carried into the amendments to said section 11 in 1919, St.1919, p. 513, and in 1923, St.1923, p. 127. If it be said that the foregoing statutory declarations were contrary to the doctrine of the Herminghaus case and were impliedly rendered invalid by the decision in that case, the conclusive answer is that the same declarations are implicit in the new state policy promulgated by the constitutional amendment of 1928. That amendment has been controlling since its adoption and is binding in the present litigation. The significance of the constitutional amendment was apparently not appreciated prior to the decision in the case of Gin S. Chow v. City of Santa Barbara, supra, April 3, 1933. The present action

was commenced on May 31, 1932, and the cause of action was grounded on the theory of the Herminghaus case. As hereinbefore stated the city amended its answer on April 30, 1933, so as to allege its defenses within the law as interpreted in the Gin S. Chow case. The trial of the present case took place between February 5, and April 25, 1934. Subsequently but prior to the entry of judgment herein the opinions in the cases of Peabody v. City of Vallejo, supra and Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, supra, were filed. In ordering findings and judgment herein the trial judge wrote an opinion in which the new doctrine expounded in the Peabody and related cases was recognized, and concerning which the learned judge properly said: "Injunctive relief will no longer be granted upon mere proof that a diversion above will diminish the stream flow as it passes the riparian lands. If after such diversion there is sufficient water remaining to satisfy the reasonable demands of the riparian owner, he has no legal recourse in respect to such diversion."

[4] However, the findings and judgment later entered proceed on the theory that although his needs and requirements are met and safe-guarded in every respect, the riparian owner still has the right to an injunction to limit and control the action of an upper appropriator in storing and diverting the surplus waters of the stream. In other words, the judgment herein is to the effect that after the needs and requirements of all users on the stream, both riparian and appropriative, are fully met and safeguarded to the extent contemplated by the constitutional amendment, the right still remains in the riparian owner to require that the water in excess of all such needs and requirements flow past his lands unused to the sea, and that an injunction may issue to enforce that right. This is not in harmony with, but is directly contrary to the new doctrine.

[5-7] Under the amendment of 1928 the rights of the riparian attach to, but to no more than so much of the flow as may be required or used consistently with the amendment. That is, the riparian is entitled to all of the water of the stream, both in the quantity and quality of its natural state, which he is able to put to a reasonable beneficial use, and to be protected in that right by the injunctive processes of the court. But the riparian owner is not entitled to an injunction to control the use of water by an appropriator in the exercise of a right admittedly subordinate but in no way injurious to the riparian right. It is well settled that an injunction is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. In a case such as the one before us the right and its actual or threatened invasion must be shown. But the right must first be shown. Here the right to an injunction to protect and safeguard the plaintiff to the full extent of its beneficial requirements has been shown. But the right to an injunction to control the waters of the stream in excess of the plaintiff's needs is not shown, and the judgment herein is erroneous to that extent.

[8, 9] Inasmuch as the prevention of waste of water is imposed on the riparian under the new doctrine, counsel for the plaintiff, in their "Questions Involved", inquire if this same restriction against waste is not imposed on a subordinate taker under an inferior right or no right. Obviously, the answer is in the affirmative. The duty not to commit waste is enjoined on all users of water. An accepted definition of the term "waste", as applied to the use of water, may be said to be: "To use needlessly or without valuable result; to employ prodigally or without any considerable return or effect, and to use without serving a purpose." (Webster's New International Dictionary, Second Ed.) The term is necessarily relative. As denounced by the amendment of 1928, it was the use of water by a riparian owner under an asserted, and theretofore protected right to compel the waters of the stream, without any benefit to himself, to flow to a lower level and on to the sea when otherwise a beneficial use could be made of the same.

[10, 11] There are rivers and streams particularly in the most northerly part of the state whose waters flow freely to the sea in the course of nature and there is relatively little need otherwise for their utilization. Great quantities of water in those rivers and streams pass on to the sea because no other recognized beneficial use for the same has as yet been developed. There is no waste in a constitutional sense in permitting such water thus to seek and attain its natural level. There are also great quantities of water in other rivers of the state, such as the Sacramento

and its numerous tributaries, the Stanislaus, the Tuolumne, the San Joaquin, the Merced, the Kings and the Kern, not now needed by any users, which find their way to the sea or other natural outlet. To permit water thus to pursue its natural course is not the wasting of water in a legal sense. No one is injured or damaged thereby except in times of great flood when nature takes a tremendous toll from all in the path of the torrent, with resulting property damage and human suffering. Much benefit has been brought about and will yet ensue by the restraint of those excess waters. They are not necessarily "vagrant or enemy" waters. They may be the usual recurrent floods and as such are a part of the natural flow of the stream. To guard against them extensive protective measures, such as levees and other flood control works, have been taken and constructed and are maintained at great cost by and with the aid of the state. In June, 1935, floods on the San Joaquin broke through the levee protecting the El Solyo ranch, causing great damage to the plaintiff. In the spring of 1938 the state, at the request of the plaintiff, expended its funds in the protection of said ranch from the floods of that period. The many appropriations by the legislature for flood control generally throughout the state have been large and burdensome. The paramount importance of the conservation of the water resources of the state, including excess waters, has been recognized and emphasized for decades culminating in the original Water Commission Act in 1913, St.1913, p. 1012. The necessity for gathering and distributing flood or other waters not presently under beneficial use in the streams of the state was accentuated. The cooperation and aid of the federal government in working out some approved and comprehensive plan for the control and development of our water resources have been enlisted by the governor and the legislature. For example: St.1927, p. 2400; St.1935, p. 68. Aid to that end has been given and is being furnished in connection with the water development in the great central valleys. In truth, the program of the state in developing and conserving its water resources has progressed to the stage where it should be said that the restraint and storage of water in the upper reaches of our rivers and streams as a means of protection against damage by flood and of equalizing and stabilizing the flow are beneficial uses. If this be not so the efforts of the state and the federal government in providing primarily for storage, flood protection and stabilization of the water supply of the Sacramento and San Joaquin rivers by means of the Central Valley Project, St.1933, p. 2643, are beyond the pale of lawful enterprise and, according to the theory of the judgment of injunction herein, subject to the right of those farther down the stream to prohibit, even though such storage cause the lower owner no damage and be in fact of great benefit to him.

The federal government has constructed a huge dam on the Colorado river, the primary purpose of which was to restrain and store the flood waters of that river and by equalizing the flow not only protect the Imperial valley from a continuing threat of inundation, but also make water available for irrigation at times when most needed. The completion of that protective and conservation enterprise has made possible the works at Parker dam for the diversion of stored water to the distributing system of the Metropolitan water district at an estimated cost of $120,000,000. Metropolitan Water District v. Whitsett, 215 Cal. 400, 10 P.2d 751. These great projects are further confirmation of the fact that the storage of fresh water is deemed essential to the growth and progress of the state. It was undoubtedly the purpose of the proponents of the amendment of 1928 to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people. In according to that great purpose its proper significance it is necessary and appropriate to declare, as inherent in the plan, that the storage of water for the purposes of flood control, equalization and stabilization of the flow and future use, is included within the beneficial uses to which the waters of the rivers and streams of the state may be put within the intent of the constitutional amendment. But such right of storage must necessarily be subordinate to all beneficial uses on the stream made in the exercise of riparian and prior appropriative rights. And the right of storage may be exercised only pursuant to appropriations lawfully made. "The problem in any case is to ascertain what portion of the product of the stream is subject to appropriation after all reasonable beneficial uses on the part of those having paramount rights

have been enjoyed or safeguarded." Peabody v. Vallejo, supra, 2 Cal.2d at page 375, 40 P.2d at page 495.

[12, 13] The State Water Commission (now Department of Public Works, Pol. Code, sec. 363e), has the power under section 10 of the act to investigate all streams of the state for the purpose of ascertaining whether the use of water therein is in conformity with the water appropriation laws of the state. And the power extends to the use of water made under appropriations or attempted appropriations acquired or asserted prior to the passage of the act. By section 15 of the act the commission is given power to allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream. The highest use in accordance with the law is for domestic purposes, and the next highest use is for irrigation. When demands on the stream for those and other recognized lawful purposes by riparians and appropriators are fully met and an excess of water exists, it is for the state to say whether, in the conservation of this natural resource in the interest of the public, the diversion is excessive.

In section 38 of the Water Commission Act any unauthorized diversion of water subject to the provisions of the act is declared to be a trespass and the Department of Public Works is authorized to proceed in the superior court to have such trespass enjoined. There need be no apprehension therefore lest rights become vested, by prescription or otherwise, in an excessive use of water or in a use for unauthorized purposes.

[14] We conclude that the waters of the Tuolumne river and its tributaries in excess of the needs of lower riparian owners and prior appropriators for all reasonably useful and beneficial purposes have been released by the constitutional amendment of 1928 for storage and other beneficial uses incident thereto as above indicated, and that the injunctive or other processes of the court are not available to the lower riparian owners or appropriators to prevent the storage of such excess waters.

[15] The record in the present case shows that the water allotted to the plaintiff by the trial court is abundantly sufficient in amount to supply all of its needs and that no substantial damage to its lands has in that respect resulted by reason of the city's storage. It is true that there is evidence to the effect that by reason of the operations of the irrigation districts upstream from the plaintiff's lands the mineral content of the water as it reaches those lands is somewhat increased by the use thereof for irrigation on lands within those districts and its return to the stream by percolation and drainage. We cannot conclude, however, that the court based its judgment of injunction on the alleged impairment of the quality of the water of the river by the city's increased storage. It appears that the irrigation districts upstream from the plaintiff exercised their rights of priority during the ten year period preceding the commencement of this action; that during that period there had been no impairment of the quality of the water at the plaintiff's place of diversion by reason of the exercise of such rights, and that if the districts continue their operations as heretofore the riparian right of the plaintiff to water of a suitable quality will be fully protected and will suffer no substantial impairment. There is no evidence that the irrigation districts will or intend to discontinue their operations as heretofore. If the trial court intended by its judgment to enjoin the city's use of its enlarged storage facilities on the showing of impairment thereby of the quality of the water of the stream it must be said that the evidence on this issue is not of sufficient substantiality to warrant the injunction ordered. In fact, the court found on sufficient evidence that "the 'return flow' in the Tuolumne river has not in the past contained, and does not now contain a sufficient concentration of such salts, alkalis, and other chemical substances to render such water unfit for irrigation use on the plaintiff's riparian lands." The alleged "serious and threatening" damage of pollution, in the absence of actual pollution, would not justify the injunction ordered herein, especially when protective measures short of absolute prohibition may, if necessary, be applied by the court. Obviously, if the city's diversions should re-

sult in making the water of the river unfit for use at the plaintiff's location, and the release of fresh water by the city and its return down the river channel would freshen the water to the required extent, the city could by proper order of the court be required to make such releases without rendering useless the city's increased storage facilities. The distance between the storage works of the city and the plaintiff's land is not too great to render this solution unavailing, and the amount of water under the control of the city, pursuant to the judgment, is abundantly sufficient to enable it by such release to protect the flow at the plaintiff's location against any substantial pollution. Furthermore, the measurement of the flow as prescribed by the court, as next discussed in this opinion, would tend greatly toward an assurance of a lack of pollution at the plaintiff's location.

[16] In its points of "less importance", the city urges that the measurement of the plaintiff's water right as fixed by the court is not justified by the evidence. The court first determined the area of the plaintiff's riparian and nonriparian lands, and then fixed the amount of the plaintiff's reasonable requirements for water for both present uses and future needs. The decree declared the plaintiff, as a riparian, to be the owner of the right (subject to the city's prescriptive rights, but superior to all other claims of the city) to divert for reasonable use upon its cultivated riparian lands, 13,220 acre feet of water per calendar year, at a maximum rate of 66.8 cubic feet per second, and to divert from time to time such additional quantities of water as may be required for reasonable future use. The court did not carry into the decree its further findings with reference to the future needs of the plaintiff, but by an appropriate provision of the decree, retained jurisdiction of the cause so that if the plaintiff should require more water in the future, a determination of the question may then be made. The objection of the city is not directed to the extent of the plaintiff's award, but to the prescribed method of measuring the allowed quantities of water on a continuous flow basis annually by using the high maximum flow for July as the measure of the plaintiff's right. The point is that the court should have fixed as the measure of the plaintiff's right the monthly requirements as set forth in the plaintiff's undisputed evidence on that subject and as particularly shown by the schedule in the plaintiff's exhibit 115. The city's contention seems to be well taken, but it does not follow that the city is so prejudiced by the measurement on this annual basis as to require a reversal or modification of the judgment. During the month of July, according to the evidence, the requirements of the plaintiff for irrigation are at the peak, and it is on that peak requirement that the plaintiff's right is measured on a continuous annual flow basis. If it should develop in operating under the award as embodied in the decree, that the method prescribed by the trial court would impose an undue burden on the required releases to the prejudice of the city, or of any other user of water from the river, the court under its reserved power may readjust the measurements on such basis as may be deemed necessary.

The city also urges the point that the findings and conclusions of the court wherein certain notices of appropriation filed and recorded by the city are found to be ineffective for irregularity or nonconformity with the statute are unwarranted. The questioned findings were in response to issues tendered by the second casue of action of the complaint in which the plaintiff pleaded its appropriative right with priority as of October 10, 1919, over any claims of the city, and prayed that its title be quieted. In answer the city alleged that it owned forty-seven appropriations in connection with the Hetch Hetchy project and that the plaintiff's appropriative right was acquired subsequent to the city's rights; hence that title to those rights should be quieted against the plaintiff. As a further defense the city alleged its plan for the ultimate development of the Hetch Hetchy project and that it owned the right by appropriation as against the plaintiff to detain and store for future use for the development of power for domestic and municipal purposes in the city and county of San Francisco and adjacent territory, sufficient water of the Tuolumne river to allow diversion by it of a constant flow of 400 million gallons per day.

The city did not plead a prescriptive right as against the plaintiff's claim of appropriation as it did against the plaintiff's asserted riparian right. The plaintiff's right as an appropriator was fixed by the court at 46.74 cubic feet per second. On the issue of priorities the court found that

by virtue of five specified appropriations the city is the owner of appropriative rights, prior and superior to the plaintiff's appropriative right, to store in Lake Eleanor not to exceed 5000 miner's inches, or 100 cubic feet per second; in Hetch Hetchy reservoir not to exceed 35,000 miner's inches, or 700 cubic feet per second; in the proposed Cherry valley reservoir not to exceed 25,000 miner's inches, or 500 cubic feet per second; and to divert into the Hetch Hetchy aqueduct at Early intake not to exceed 25,000 miner's inches or 500 cubic feet per second. (The term "Miner's inches" used in the findings as a unit of flow refers to miner's inches measured under a four inch pressure, fifty of which are equal to one cubic foot per second. A cubic foot per second is equivalent to 646,272 gallons per day.)

The prior notices of appropriation found by the court to be valid were designated 1(a) and 3(a), posted by Mayor Phelan on July 29, 1901, for 5000 inches of Eleanor creek below the outlet of Lake Eleanor and 10,000 inches of the waters of the Tuolumne at the outlet of Hetch Hetchy valley. These notices were superseded by similar notices 1(c) and 3(b) posted by the city engineer on October 1 and September 29, 1908. Notice 3(c) posted by the city on February 18, 1911, for 25,000 inches of the waters of the Tuolumne at the outlet of Hetch Hetchy valley was also found to be valid. It was upon these notices of appropriation that the court based its conclusion that the city was the owner of the appropriative rights prior to and valid against the plaintiff's appropriative rights, to store in Lake Eleanor not to exceed 5000 inches and in Hetch Hetchy reservoirs not to exceed 35,000 inches. The city claims that its notices were sufficient to entitle it to store to the full capacity of Lake Eleanor reservoir site as enlarged and as approved under the provisions of the Raker Act (289,862.9 acre feet), and to store to the full capacity, as enlarged, of the Hetch Hetchy reservoir (345,000 acre feet).

The city argues that under the code method of appropriation no provision was made for giving notice of diversion for storage; that if an appropriator of water to be stored had specified in his notice the amount to be impounded, he would have had to name an amount of water greatly disproportionate to the size of the contemplated diversion ditch; that the logical course, and the course followed by the city, was to specify in the notice the amount, corresponding to the capacity of the described ditch, of regulated flow which would be obtained from storage. In other words the city contends that under the code method an appropriation of a specified amount of water conferred the right to impound such additional water as might be necessary to enable the appropriator to obtain from storage a regulated flow up to the amount stated in the notice of appropriation. The city urges the application of this theory. The plaintiff contends that the argument advanced by the city is inconsistent with the entire theory of the law of appropriation. Whatever may be the correct solution of this point, we think it is clear that the city's notices of appropriation found to be valid and those which were erroneously found to have been irregular, were more than sufficient to permit the operation of the city's increased storage facilities.

[17] Included in the notices which the court found to be irregular and therefore subordinate to the plaintiff's appropriative rights, is notice 1(e) dated February 27, 1911, for "all the water, natural or stored, here flowing in Eleanor Creek at the point which this notice is posted". This notice, if valid, is sufficient for the appropriation of enough water for the full capacity of Lake Eleanor reservoir as enlarged. The court found this notice to be invalid because it did "not state the amount of water claimed", as required by section 1415 of the Civil Code, in effect at the time the notice was posted, and it is argued that because the amount was not stated in the notice the city cannot claim priority under the doctrine of relation.

The purpose of the notice was to notify "all concerned" of the intentions of the city to appropriate, store and use the waters of the river for domestic and municipal uses. It was said by this court in 1880 that notices of intention to appropriate water were to be liberally construed. Osgood v. El Dorado Water & Mining Co., 56 Cal. 571, 579. We are inclined to apply such a rule to this notice under the special circumstances here shown wherein it appears that the notice plainly indicated the maximum of water claimed and that the capacity of the enlarged Lake Eleanor reservoir as approved by the Secretary of the Interior Lane, on December 27, 1915, nearly four years before the

plaintiff's notice, and as actually constructed, made certain that maximum at 289,862.9 acre feet.

[18] The trial court also found notice of appropriation 2(c), filed October 24, 1909, for 50,000 miner's inches to be stored in the proposed Cherry Valley reservoir, to be invalid on the ground that it failed to state the size of the flume, ditch, pipe or aqueduct by which it was intended to divert the water and that the notice was recorded on the eleventh day after posting instead of within ten days as provided by former section 1415 of the Civil Code. This notice stated that it was the intention to divert the water "by a conduit, pipe, ditch, flume or tunnel in size as may be hereafter determined". It is the contention of the city that this notice was a sufficient declaration of the city's intentions and that the alleged defect and the recordation of the notice on the eleventh day should not be held to subordinate the city's notice to the notice of the plaintiff filed ten years later, during all of which time the plaintiff and its predecessors in interest had notice of the city's plans. We are inclined to agree with the city's contention as applied to the facts here shown, but a contrary conclusion would not affect the city's right to store water in its reservoirs to their enlarged capacities under its other notices of appropriation.

[19] The city claims priority for two other appropriations, one for $15,000 miner's inches, posted October 4, 1908, on the northerly bank of the Tuolumne river near the mouth of Jawbone creek; and the other for 25,000 miner's inches, posted February 28, 1911, also on the northerly bank of the Tuolumne river near the mouth of Jawbone creek. A description of those two notices was inadvertently omitted by the city in its amended answer. On the trial the city introduced in evidence exhibit 572 which purported to contain a description of all of the city's notices of appropriation. Counsel for the city relied particularly on eighteen of these notices, but failed to mention the two inadvertently omitted in the answer, and on which later it was sought to rely. During the argument the counsel for the city requested that it be permitted to consider these two notices in evidence. On objection by counsel for the plaintiff on the ground that the offer came too late, the court denied the request. If these two notices are, as claimed, important in support of the city's rights in the premises, we think the court may well have permitted them in evidence, inasmuch as they were then a part of exhibit No. 572 and no objection to their sufficiency appears to have been made. If the time ever comes when the city may feel the necessity of relying on the additional notices, the questions relating to their status may be passed upon. According to the showing here made, the notices of appropriation found by the trial court to be regular, and those declared herein to be sufficient, cover all the water that the city will need, and it is protected by the judgment for all its requirements. Its real objection is to the limitations on its storage program prescribed by the injunctive order, and as to which the plaintiff is not legally concerned so long as it is safeguarded in its right to all the water it needs, both in quantity and quality, at its point of diversion.

[20] The city must therefore be upheld in its contention that no substantial damage to the plaintiff's riparian or appropriative rights has been shown and that the relief granted to the plaintiff should have been limited to an injunction restraining the city from storing water in excess of its prescriptive right at times when there is not flowing at the plaintiff's land the quantity of water which the plaintiff can beneficially use and of a quality unimpaired by any act of the city beyond the exercise of its prescriptive right. However, it will not be necessary to reverse the judgment in order that the proper result be effected.

It seems appropriate here to state that we are dealing in this action with a controversy between the city and but one user of water on the Tuolumne river, and the judgment is necessarily confined to the issues presented by the parties to this action. This method of resolving controversies involving the rights of the users of water on the river is necessarily piecemeal, unduly expensive and obviously unsatisfactory. This court pointed out first in Wood v. Pendola, 1 Cal.2d 435, 35 P.2d 526, and then in the cases of Peabody v. City of Vallejo, supra, and Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, supra, a method by which under section 24 of the Water Commission Act, the rights of all users of water on the river may be appraised and determined in one proceeding. This method would seem to be especially desirable where the

state's interest in the excess waters of the stream may be made to appear and the claim of public agencies as users on the stream render it burdensome for private users severally to assert their rights.

On the plaintiff's appeal it is contended that it is entitled to an injunction restraining the city from storing any water in addition to its prescriptive right to store and from diverting any water of the Tuolumne river whatsoever. From what has been said it follows that the plaintiff's established and conceded right does not include the power of control over the disposition of water in excess of what it can beneficially use. To the extent of such beneficial use, however, it is entitled to full protection; and the judgment so provides.

[21] The definition of "surplus high waters" as incorporated in the findings would seem to be too restrictive as a guide or general rule. When the expression is used in the sense of waters in excess of the beneficial needs of all lawful users on the stream it is all inclusive for the purposes of this case and for general purposes. Such excess waters are defined to be the waters of the stream subject to appropriation for beneficial use over and above what may reasonably be subjected to a beneficial use on the lands bordering the stream (Rindge v. Crags Land Co., 56 Cal.App. 247, 252, 205 P. 36), under rights fixed by the riparian status of the lands and by prior appropriation. The findings, conclusions of law and judgment in the use of the term "surplus high water", must therefore be deemed to conform in their application to what is here determined to be the true character of the waters which the city, in addition to its prescriptive right, claims the right to store, namely, the excess waters of the stream as above defined.

We therefore conclude:

1. That the plaintiff as a riparian owner has the right, subject to the city's prescriptive right, to all the water of the Tuolumne river which it can use on its riparian lands for useful and beneficial purposes as contemplated by the constitutional amendment of 1928; that the plaintiff's rights as such riparian and also as an appropriator are fully recognized and protected by the judgment of the trial court; that when the plaintiff's rights as a lower riparian owner and appropriator are thus protected, the plaintiff may not lawfully complain of, and has no right to prevent or control, the storage of waters in the upper reaches of the stream for flood control, stabilization and equalization of the flow, and other beneficial uses; that the plaintiff has not been damaged by the operation of the city's storage facilities and in fact may be greatly benefited thereby.

2. That the city and county of San Francisco, as against the plaintiff, has the right to store the excess waters of the stream as herein defined, for the purposes of flood control, stabilization and equalization of the flow and other beneficial uses, and as "holdover storage" to provide further assurance of the continuance of its municipal supply in periods of drought.

3. That the excess waters of the river constitute a natural resource subject to regulation by the state; that the people of the state have by the constitutional amendment of 1928 released such excess waters from the former restrictions and limitations on the use thereof and have made them available for further beneficial uses as indicated herein; that the state by statute has also provided safeguards against the unreasonable, or excessive, or unauthorized use of such excess waters; that until it is made to appear that the use of such excess waters is required for beneficial purposes by riparian owners or appropriators having a prior right, the city has the preferential right to store and utilize such waters to the extent of its enlarged storage facilities.

From what has been said the "judgment and decree" should be and it is modified in the following respects:

Paragraph IV is modified to read as follows: "That the defendant, the City and County of San Francisco, is the owner by prescription of a right, prior and superior to the plaintiff's riparian right, to store in its Lake Eleanor Reservoir and Hetch Hetchy Reservoir the waters, including the excess waters, of the Tuolumne River and its tributaries, up to 234,000 acre feet of water, and no more, at any one time, and up to a total of 235,465 acre feet of water, and no more, in any seasonal year, extending from and including October 1st of any year to and including September 30th of the next succeeding year, and to release the water so stored and use it for the generation of hydro-electric power; provided that when there is not flowing at the plaintiff's land the quantity of water to which it has been found to be entitled, and of a quality substantially unimpaired by any act

of the city beyond the exercise of its prescriptive right, the waters so stored and then being used for power purposes shall be returned after such use to the Tuolumne River at a point above the works of the defendants, Turlock Irrigation District, Modesto Irrigation District and Waterford Irrigation District, and above the lands of the plaintiff."

Paragraph V is modified to read as follows: "That the defendant the City and County of San Francisco, its officers, superintendents, employees, attorneys and servants, or any of them, be and they are and each of them is, enjoined and restrained from storing any of the waters of the Tuolumne River or its tributaries in excess of its prescriptive right, when there is not flowing at the plaintiff's land the quantity of water to which it has been found to be entitled and of a quality substantially unimpaired by any act of the city beyond the exercise of its prescriptive right."

Paragraph VIII is modified to read as follows: "That the defendant the City and County of San Francisco is the owner of appropriative rights, prior and superior to the plaintiff's appropriative right, to store in Lake Eleanor reservoir flows of the tributaries of the Tuolumne River to the capacity of said reservoir as enlarged; to store in the Hetch Hetchy Reservoir flows of the Tuolumne River to the capacity of said reservoir as enlarged; and to store in the proposed Cherry Valley reservoir flows of the tributaries of the Tuolumne River not to exceed 500 cubic feet per second, provided that said proposed reservoir shall hereafter be completed and put into use with due diligence; and to divert into the Hetch Hetchy aqueduct at Early intake flows of the Tuolumne river and its tributaries not to exceed 500 cubic feet per second. That the plaintiff's appropriative right is prior to all other additional appropriative rights or claims of said defendant."

As so modified the judgment is affirmed, neither party to recover costs on appeal.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; STURTEVANT, Justice pro tem; NOURSE, Justice pro tem.

EDMONDS, Justice (dissenting).

In my judgment, the question presented for decision in this case is much broader than that stated by associates and the facts upon which it rests compel a very different conclusion.

At the outset it should be said that no restriction should be laid upon the City of San Francisco to store and use, by diversion or otherwise, all water of the Tuolumne river which it can now or hereafter put to a beneficial purpose, subject, of course, to the superior rights of others to a portion of the flow of the stream. But a city, because it is a city, has no more right to divert water from its natural course and waste it than has an individual property owner. Water in California is so necessary to the development of both our cities and our agricultural regions that its use must be scrupulously safeguarded. Waste is waste, regardless of the identity of the one committing it.

As I read the record, the contentions of the plaintiff and the defendant city, who are the only parties to the appeal, range the entire field of conflicting claims in and to waters of the Tuolumne river and its tributaries and require a declaration of the rights of each of them. Both sought this adjudication in the court below. Plaintiff, by its pleading, asserted rights as a riparian and also as an appropriator, asked for a declaration of those rights, that its title thereto be quieted, and that invasion thereof be enjoined. Complaint was particularly made of threatened diversions of water by the defendant city to point outside of the watersheds of the streams in question.

By its answer the city admitted the contemplated use but denied that it would violate the plaintiff's rights. It also set up seventeen separate defenses based upon claims by appropriation, prescription, intervention of public use (without offer to pay for any taking), bar by the statute of limitations and estoppel, concluding with a prayer for declaration of its rights and the quieting of title thereto as against the plaintiff.

Upon trial of the cause all issues between plaintiff and the city were heard and determined, and a decree was entered determining (1) that the plaintiff, a riparian owner, is entitled, as against the city and subject only to its prescriptive right, to certain water; (2) that the city may not store any of the water of the Tuolumne or its tributaries except "surplus high waters" to a stated amount, and to the capacity of reservoirs as existing at the time of the commencement of the action; and (3) that the city may not divert from the Tuolumne watershed to San Francisco or adjacent territory at a rate in excess of 142 million

gallons daily, or sell or dispose of any water so conveyed for any purpose other than domestic or municipal use.

The uncontradicted evidence presented by the city in behalf of its pleaded claim to a water right shows that the maximum amount which it can put to a reasonable or any beneficial use, until at least the year 1950, is 60 million gallons continuous flow per day. Notwithstanding this evidence, the decision of my associates is, in effect, that regardless of a constitutional mandate prohibiting the waste of water, the trial court may not by any decree to be entered in this action, prohibit the city from diverting and transporting from the Tuolumne watershed an unlimited quantity of water which can be put to no beneficial use. It is of no moment, my associates hold, that such action may lower the water levels in the San Joaquin valley and deprive vast areas of land of needed moisture.

Such a conclusion, I am confident, violates all legal principles. In the first place, appropriations of water have always been limited to the amount which could be put to beneficial use. This was true long prior to enactment of the constitutional amendment of 1928. "The early cases measured the appropriator's right by the capacity of his ditch, but that rule has long since been repudiated in this state. Smith v. Hawkins, 120 Cal. 86, 52 P. 139. As the pressure of population has led to the attempt to bring under cultivation more and more lands, and as the demands for water to irrigate these lands have become more and more pressing, the decisions have become increasingly emphatic in limiting the appropriator to the quantity reasonably necessary for beneficial uses. Senior v. Anderson, 115 Cal. 496, 47 P. 454; Id., 130 Cal. 290, 62 P. 563; California P. & A. Co. v. Madera Canal & Irr. Co., 167 Cal. 78, 138 P. 718; Northern California Power Co. v. Flood, 186 Cal. 301, 199 P. 315; Oliver v. Robnett, 190 Cal. 51, 210 P. 408; Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Eden Township Water Dist. v. Hayward, supra [218 Cal. 634, 24 P.2d 492]. If the appropriator uses more than the amount so required, he gains no right thereto. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. In so far as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Big Rock Mutual Water Co. v. Valyermo Ranch Co., 78 Cal.App. 266, 248 P. 264. In determining what is a reasonable quantity for beneficial uses, it is the policy of the state to require within reasonable limits the highest and greatest duty from the waters of the state. California P. & A. Co. v. Madera Canal & Irr. Co., supra." Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal.2d 489, at page 547, 45 P.2d 972, at page 997.

Prior to the constitutional amendment of 1928, a riparian was entitled to the full flow of the stream as against a subsequent appropriator. Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, and cases there cited. Since the amendment, however, the riparian has been limited to a reasonable beneficial use as against an appropriator who also takes for a reasonable beneficial use. Gin S. Chow v. City of Santa Barbara, supra; Peabody v. City of Vallejo, supra; Tulare Dist. v. Lindsay-Strathmore Dist., supra. But as between a riparian and an appropriator, this is the full extent of the limitation on the riparian right; it applies only as against water appropriated for a reasonable beneficial use. As against a subsequent taking of water, in excess of that which can be reasonably used by the appropriator, the riparian is entitled to the full flow of the stream. In other words, the constitutional limitation upon the riparian right is not an absolute one; it is relative, in that it only applies as against a subordinate reasonable beneficial use. After satisfaction of the subordinate right, the paramount right to whatever flow is left in the stream remains in the riparian. Thus, if an excess amount of water exists over the reasonable beneficial needs of both the riparian and a subsequent appropriator, then such excess is a property right of the riparian.

This interpretation of the nature of the riparian right as restricted by the constitutional amendment adopted in 1928 (art. XIV, sec. 3) is in exact accord with the purpose and intent of that enactment, which reads: "It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised

with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. * * *"

The new enactment, which has been upheld as being within the police power, limits the right of the riparian; it takes from him a property right, the right to insist on the full flow of the stream even though he cannot use the water beneficially and others might put it to beneficial use. In other words, by the amendment a right is taken from the riparian and conferred on the subsequent taker. If there is no subsequent taker who can put the water to a reasonable beneficial use, then the riparian right remains unimpaired.

This is the only reasonable construction of the amendment. In a contest between a riparian and a subsequent appropriator, where the appropriator cannot put the excess flow to a reasonable beneficial use, it cannot be held to be a "waste" of water by the riparian to insist that such excess remain in the watershed until (but only until) some other user can put it to a reasonable beneficial use.

Furthermore, assuming that the views of the majority are correct, a duty still rests upon the trial court to include in its decree a provision restraining the waste of water by the city through the diversion of a flow in excess of that which can be put to a beneficial use. If, by virtue of the constitutional amendment, the water remaining in the stream, after satisfaction of riparian needs and the city's subordinate taking for beneficial use, is not a property right of the riparian, but is a vast natural resource, "excess", or free water of anomalous ownership to be controlled by the state in the exercise of its police power, this court should not approve a decree which grants the city affirmative relief without first requiring that its claims to water be asserted in good faith and for a beneficial use.

The city asked for a declaration of its rights prior and subordinate to those of plaintiff. Under established principles, a prerequisite to procurement of such relief is the exercise of good faith, which, in the present case, means an intention to take the water for a beneficial use. That intention must be bona fide and not for speculation, such as to store water for monopoly, or to divert it through an aqueduct and allow it to run to waste in the expectation that customers may be found who will use it at some future time. Wiel 3d ed. vol. 1, pp. 406–7; Farnham, Water and Water Rights, vol. 1, p. 787; Turner v. East Side Canal, etc., Co., 169 Cal. 652, 657, 658, 147 P. 579.

The principles which find expression in the maxims of equity are simple and fundamental and they are applicable to the state and a city as well as to an individual. Where the subject of litigation is a matter of great public interest, it is paramount that they be invoked. Thus, a proposed waste of water by a litigant precludes him from seeking the aid of a court of equity which will never declare a right or aid the accomplishment of a purpose violative of law or public policy. Indeed, if an exercise of jurisdiction will be prejudicial to public interest, the court may refuse to protect the private right unless it can also protect the public right. It is also a general principle that the right of appropriation must be exercised with regard to the rights of the public; it is not unrestricted but must be exercised with reference to the general condition of the country and the necessities of the people, and not in such manner as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 121, 32 S.Ct. 470, 56 L.Ed. 686; Wiel, Harvard Law Review, vol. 47, p. 436.

The evidence establishes conclusively that if the city proceeds at this time to carry out its enlarged storage and present diversion plan, it will store and take water which it does not need and which it cannot use beneficially within any estimated future

period. The amounts of water which the city will be able to put to reasonable beneficial uses and the extent of its present and possible future requirements are shown by uncontradicted evidence. It appears that when the Hetch Hetchy project was initiated, the city proposed to supply water to the entire San Francisco bay area, including the east bay region up to Richmond. For the purpose of serving this large area an ultimate diversion of 400 million gallons a day was proposed. But in 1923 or 1924, the East Bay Municipal Utility District undertook to supply the east bay territory with water from the Mokelumne river, and that project was completed about 1928. It brings water to the cities of Oakland, Berkeley, Alameda and Richmond. However, the city took no steps to reduce the size of its own project. It proceeded and is proceeding to completion of the project to the extent originally planned and one division of its aqueduct has been built, as originally designed, for a capacity of 420 million gallons a day.

The water which the city proposes to divert will, so far as this record shows, be used with the local supply for the City and County of San Francisco and a portion of the County of San Mateo. The trial court found that there is no other need, or place of use, for water transported through the city's aqueduct. The court also found that the present and future inhabitants of that territory will not require Hetch Hetchy water for domestic, municipal, or other reasonable beneficial use, to the extent of a continuous flow of 60 million gallons per day until after the year 1950, or to the extent of 142 million gallons per day until after the year 1980, and will not require any greater extent of continuous flow "within any time which can now be ascertained, predicted or estimated." These findings are fully supported by the evidence.

Mr. George A. Elliott, the city's expert witness, testified in detail as to the present and probable future needs of San Francisco and adjacent territory for water to augment the local supply. He forecast the growth of population of this area over a series of years, beginning with 1930 and thence forward at ten year intervals up to 1980. He also estimated the available supply of water from local or nearby sources then in use. Taking the estimates of population growth, with estimates of per capita consumption of water, he arrived at a series of figures of water requirements of the population to be served at each of the ten-year periods. He made two estimates of future growth of population, one on a higher and one on a lower rate of growth, and determined the consumptive uses of water in the area on each of these two bases. After allowing for local supply, he estimated that at the lower rate of population growth, the amount of water from the Hetch Hetchy project which the city would require for succeeding ten-year periods, would be as follows:

Year	Water in terms of million gallons daily
1940	22
1950	45
1960	65
1970	86
1980	107

At the higher rate of estimated population growth, his figures are:

Year	Water in terms of million gallons daily
1940	27
1950	57
1960	81
1970	110
1980	139

When he was examined upon these figures, Mr. Elliott was asked: "Now, you notice in your project the population and the total consumption, that you have stopped 50 years hence, approximately. Have you endeavored to make any figures beyond 50 years from date?" He replied: "It took almost all of the nerve I had to go that far ahead, Mr. Holm. You are hardly justified in going much beyond that, because there are so many things that may enter into it you can't foresee at all."

Although the highest estimated requirement of the territory to be served will not reach 27 million gallons per day until the year 1940, nevertheless the city, upon the completion of its aqueduct subsequent to commencement of this action, started to divert to San Francisco water to the full present capacity of the pipeline, that is, at the rate of 60 million gallons of water per day. The record contains no showing of any possible use for this surplus amount of water which the city is now diverting. In a controversy between a riparian and an appropriator asserting subordinate rights, the appropriator may only be allowed the quantity of water he can put to

a reasonable beneficial use, and the burden of proof is upon him to show the extent of such use.

The present storage facilities of the city, according to the evidence, will provide a draft of 142 million gallons of water daily. The city, in its amended answer filed in April, 1933, pleaded that it had no intention of increasing those facilities for a period of 50 years. Nevertheless, to further the public works program of the federal government, the city thereafter undertook the raising of the O'Shaughnessy dam at Hetch Hetchy reservoir and, in April, 1934, filed amendments to its answer to enable it to claim the right to the additional storage and diversion which such enlargement should provide. There was no need for this development, so far as this record shows. The city claims that it will be able to generate more electric power, but it does not state what use can be found for the additional amount.

The fact that the city has undertaken extensive development work and has already expended many millions of dollars, does not of itself confer a right to water in excess of that which can be put to reasonable beneficial use. The only way in which the city can have the full benefit of its project is to so proceed that construction keeps pace with but does not outrun the actual need for water, and this was the original plan. It is, of course, proper in developing a water system to anticipate the future growth of a community and to provide for its increasing need of water, and the courts have been liberal in including within a declaration of present necessity for the taking of water, the immediate future need of the territory to be served. But this does not mean that water which will not be needed for many years, if ever, may be actually taken by a municipality and then allowed to run to waste in the expectation that customers may be found who will use it at some future time. Sec. 1416, Civ.Code; sec. 20, Water Commission Act; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681; Turner v. East Side Canal, etc., Co., supra; Eden Township v. Hayward, supra; Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994. Such an excess taking is without right regardless of how long continued; it can confer no title and will receive no protection. Tulare Dist. v. Lindsay-Strathmore Dist., supra.

Although storage for purposes of flood control is a beneficial use of water, the record in the present case contains no evidence whatsoever concerning floods on the San Joaquin river or any action by the state in regard thereto. The city made no claim that its project was planned for flood control purposes; its works, other than those for power purposes, have been built as a project to carry the water beyond the watershed. What may properly be done to control flood waters is, therefore, not an issue in the case.

If these conclusions be correct, then in this action the city should be limited to a decree which declares the extent of its prescriptive and appropriative rights, both of which rest upon the requirement of beneficial use. In order to do this certain facts in addition to those stated in the opinion of my associates should here be noted.

The dispute is over the right to water in the future, not for use at the present time. When the action was tried there had been no diversion by the city outside of the watershed, and admittedly the plaintiff had suffered no damage. Another notable feature is that claims to water of the San Joaquin river intrude upon the issues only because the lands of plaintiff, and also those of defendant West Stanislaus district, border the westerly bank of that river not far from the point of its confluence with the Tuolumne. But the flow of the San Joaquin through this area consists largely, and during several months of the year almost entirely of water added to it by the Tuolumne. The lands served by the Modesto, Waterford, and Turlock districts lie in the San Joaquin valley and border both banks of the Tuolumne extending upstream from a place just above its discharge into the San Joaquin. The power plants, reservoirs, works and properties of the city are located in the high mountains. So it is that before reaching the lands of plaintiff, the waters of the Tuolumne and its tributaries pass through the reservoirs and power plants of the city, travel some 120 miles or more down stream, pass through the reservoirs and works of the Waterford, Turlock and Modesto districts, and discharge into the San Joaquin, from whence they are taken into plaintiff's pumping plant.

The distance between the works of the city and plaintiff's land, and the intervening operations to which the water is

subjected, are factors which added to the problem of formulating a proper and workable decree. However, the evidence adduced upon the trial was substantially without conflict. It consisted, in the main, of a great volume of statistical data, water records, engineering records, soil records, and maps, prepared under agreement between the parties, checked by both sides prior to the time of trial, and admitted practically without objection or contradiction.

This evidence shows that by reason of the districts' taking of water, and particularly as a result of the method by which they use it, the flow of the San Joaquin past plaintiff's land is different than it would otherwise be. Among other causes for this is the practice of the districts to fill the Don Pedro reservoir early in each year for the purpose of assuring a supply of water for irrigation. If, later in the year, it is found that some of the water stored will not be required for irrigation, the excess is released and used for the generation of electric power. The result of this method of operation has been to increase and equate the amount of water reaching plaintiff's ranch during the low water period. Another important factor resulting from the districts' intervening use is the large volume of return flow described in the majority opinion.

The claims of the city go back to the year 1901, when its project was initiated. Owing to difficulties in securing the right from the United States to use Hetch Hetchy valley for a reservoir site and to occupy other public lands, the commencement of actual construction work was long delayed. The Congressional Act of December 19, 1913, (38 Stat. 242) known as the Raker Act, by which the city was finally enabled to proceed, requires the city to recognize:

(1) The prior rights of the Modesto and Turlock districts, as constituted or as said districts may be enlarged to contain in the aggregate not to exceed 300,000 acres of land, to receive 2350 second feet of the natural flow of the Tuolumne river, measured at the La Grange dam, whenever the same can be beneficially used by said districts, and that the city shall never interfere with said rights; and

(2) The rights of those districts to the extent of 4000 second feet of water out of the natural daily flow of the Tuolumne river for combined direct use and collection in such storage reservoirs as may be provided by them during the sixty-day period immediately following and including April 15th of each year. *A further provision is that the city shall not divert beyond the limits of the San Joaquin valley any more of the waters of the Tuolumne watershed than, together with the waters which it has or may acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.*

Subsequent to passage of the Raker Act the city diligently proceeded with its project. At the date of trial of this case it had expended approximately $76,000,000 for the construction of vast works, and about $12,600,000 for interest during time of construction. Prior to and at the commencement of this action, all water used by the city in operating its power plants, was discharged into the bed of the Tuolumne; none of it was conveyed away from the plaintiff's riparian lands. Also, all water released from the reservoirs of the city again flowed in the bed of the Tuolumne, or one of its tributaries, and was available for use by plaintiff and the districts.

However, before the plaintiff filed its suit the city had constructed dams and other works for the diversion of water at Early intake on the Tuolumne below its two storage reservoirs. The city had also constructed portions of the Hetch Hetchy aqueduct, which was designed for the conveyance of water diverted at Early intake to San Francisco and adjacent territory. The portion of this aqueduct extending from Early intake to the Moccasin power house, approximately 20 miles in length and having a capacity in excess of 620 cubic feet of water per second (400 million gallons daily), was completed in June, 1925, and was in use before the suit was started. The portion extending from Moccasin power house to its terminus near San Francisco, was not completed or in use prior to commencement of this action, or for more than two years thereafter. By means of its aqueduct the city is able to convey water a distance of over 100 miles for use outside the watersheds of the Tuolumne and San Joaquin rivers and their tributaries.

The trial court found that the city's intention to store and divert water was a matter of common and general notoriety, known by plaintiff and its predecessors at least as early as 1924, in which year the city purchased two strips of plaintiff's ri-

parian land to be used for construction and operation of its power transmission lines and Hetch Hetchy aqueduct; that neither plaintiff nor its predecessors made any objection to the city's proposed operations prior to June 24, 1931, but permitted the city to expend large sums for construction work. However, on June 24, 1931, and again on October 2, 1931, plaintiff notified the city in writing that it would seek injunctive relief against any attempted diversion of water which would in any manner decrease the flow of the Tuolumne past plaintiff's lands. Notwithstanding these notices and the pendency of this action, the city proceeded to complete construction of the Hetch Hetchy aqueduct and, in October, 1934, commenced the diversion of water to San Francisco at the rate of 60 million gallons daily. The court further found that although the city intended as part of its ultimate plan to increase the capacity of its aqueduct to permit a total ultimate diversion of 400 million gallons daily and to enlarge its storage facilities accordingly, at the time this action was commenced and at the time of filing its amended answer in April, 1933, no change in the then existing facilities was contemplated for at least 25 years; that notwithstanding this fact the city now intends to enlarge O'Shaughnessy dam so as to increase the storage capacity of Hetch Hetchy reservoir from 206,000 acre feet of water to 357,00 acre feet, and intends to store additional quantities of water therein, and to use that water for both power purposes, and diversion to San Francisco.

Other findings of the court are that the city had at no time claimed the right to store waters other than waters in excess of the prior rights of the Turlock and Modesto districts (as mentioned in the Raker Act,) and in addition thereto, in excess of a continuous flow of 66 cubic feet per second, to which the city has always conceded that these districts and the Waterford district have a prior and superior right. In its findings the court referred to the waters out of which the city could store without invading these prior rights as "surplus high waters", and, defined that term as follows: "The waters flowing at any time in the Tuolumne river and its tributaries above the La Grange dam over and above a flow of 4066 cu. ft. of water per second of the natural daily flow of the Tuolumne river, measured at the La Grange dam, during the period of sixty (60) days immediately following and including April 15th of each year, and in excess of a like flow of 2416 cu. ft. of water per second, measured at the La Grange dam, at all other times." It found that while there are at times "surplus high waters" of the Tuolumne, not reasonably required for use or beneficial purposes upon plaintiff's riparian lands, which run unused into San Francisco bay, that, except for return flow, the entire natural flow of the Tuolumne and San Joaquin rivers during times other than times of high water, is taken and reasonably and beneficially used for irrigation purposes.

On the question of storage the court found that prior to commencement of this action the city had openly, notoriously, and adversely to plaintiff and its predecessors, and under a claim of right: (1) Stored in Hetch Hetchy and Lake Eleanor reservoirs, out of "surplus high waters", 235,465 acre feet of water per seasonal year, extending from October 1st of each year to and including September 30th of the next year; (2) Stored in Hetch Hetchy in a single seasonal year of maximum storage, but not for five consecutive years, up to 211,300 acre feet, and in Lake Eleanor up to 36,700 acre feet; (3) Applied such waters to the reasonable beneficial use of generation of hydro-electric power; and (4) Returned all waters so stored and used to the Tuolumne at a point above all the works of the districts and the lands of plaintiff.

Concerning diversion, the court found that many years before this action was commenced the city had announced to the public its intention to convey waters previously stored by it to San Francisco and adjacent territory for domestic and municipal uses; that the maximum continuous flow which the city would be able to obtain for such diversion by use of existing storage facilities and without disregarding the prior recognized rights of defendant districts, was 142 million gallons per day; that "such continuous flow of 142 million gallons per day could not be obtained except by the storage of waters other than surplus high waters * * * and by obtaining 32% of such flow through the diversion of waters other than those previously stored. * * *"

The court also found that all waters diverted by the city will be required for use, and used, only within the City and County of San Francisco and a portion of the County of San Mateo; that the pres-

ent and future inhabitants of this combined territory will not require that water, for domestic and municipal and other reasonable beneficial uses, to the extent of a continuous flow of 60 million gallons per day until after the year 1950, or to the extent of 142 million gallons per day until after the year 1980, and will not require any greater extent than 142 million gallons per day, or any waters which could be provided by the enlargement of the city's existing reservoirs or by the construction of additional reservoirs, "within any time which can now be ascertained, predicted or estimated".

The only rights of the city superior to those of the plaintiff are such as it acquired by prescription. Concededly, as against plaintiff, the city's prescriptive right to store extends to the quantities of water which for five consecutive years prior to commencement of this action it stored openly, notoriously, continuously, adversely to plaintiff and under a claim of right for power purposes. However, the city has contended throughout that the evidence not only establishes its prescriptive right to store water for the generation of electric power, but also a prescriptive right to divert the stored water for consumptive use without the watershed. It argues that the rights of a lower riparian attach only to the natural flow of the stream; that they do not attach to waters released from upper storage as against the appropriator who has stored such waters; that stored waters are the personal property of the storer as long as he retains possession of them; that they are thereafter subject to his exclusive control, and he may release them from the reservoir, and conduct them through the natural stream channel to points of diversion and conveyance to place of use.

This argument overlooks the precise point at issue, which is not to determine whether any rights of the lower riparian attached to waters released from upper storage into the stream channel during the prescriptive period, but to fix the extent of the prescriptive right of the city as against the plaintiff. It is elementary that a prescriptive right to the use of water is created by a continuous invasion of the right of the servient owner and must be measured by the extent of the invasion. Thus, in the case of an unauthorized interference with the flow of a stream, the riparian owner, by permitting the interference to go unchallenged for five years, loses the right to complain of it, but he does not lose the right to object to any greater, other, or more injurious interference than that to which he has been subjected. Prescriptive rights are stricti juris and may not be extended beyond the actual user, Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095; Eden Township v. City of Hayward, supra.

Thus the measure of the city's prescriptive right as against plaintiff is the extent to which its taking has interfered with the flow of water coming down to plaintiff's riparian land. As the city, over the prescriptive period, has not abstracted or made consumptive use of any water, the total amount which has passed plaintiff's property in any one year has not been decreased, but the seasonal flow has been changed. In my judgment, the extent of this alteration of flow measures the extent of the city's prescriptive right as against plaintiff; that is, the city, by storing the waters, making beneficial use of them for production of power, and then releasing them, altering the flow of the stream but not depleting it in total annual amount, has acquired a prescriptive right to so store, use, and release those waters, but has acquired no other right. Incidentally, this adverse use by the city has conferred no right upon plaintiff to insist upon a continuance of the alteration of the stream flow past its property, or to claim any permanent benefit therefrom, such as, for example, no right to require the city to discharge water into the stream during periods in which there would, without storage, be no natural flow, Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994.

The city's reliance upon the principle that "stored waters are the property of the storer" should not avail it here. The general application of that principle is with respect to waters severed from the stream and held in artificial structures. A number of the authorities cited by the city refer to ownership of specific amounts of water so held at particular times, with ownership limited to the period the water is held in possession; they refer to ownership of the water itself after impounding, which is personal property, as distinguished from a water right. As already stated, the question here is not who has in the past owned the waters actually impounded and released by the city, but is what right the city has with reference to such waters in

future and for diversion from the watershed.

That the act of impounding water and using it to generate electric power does not confer rights to the extent claimed by the city is plain. Suppose the city undertook merely to store water continuously without using it beneficially. As storage of water in a reservoir is not in itself a beneficial use Lindblom v. Round Valley Water Co., supra but is a mere means of applying the water to such use, storage alone will not ripen into a prescriptive right of any character, but constitutes an "unreasonable use" of water forbidden by the constitutional amendment of 1928. It follows that storage of water and its use to a particular extent for a certain purpose will create a right to the extent of the use, but not to any greater use. In other words, there must be a beneficial use of water in order to create a right by prescription, and the extent of such use and the manner of its exercise, is the measure of the prescriptive right. Thus, a temporary use of water and its return into the stream channel can never ripen into a prescriptive right of permanent diversion.

In this case the extent of the beneficial use made by the city of the stored water during the prescriptive period was for the generation of electric power, with return of the water thereafter to the stream channel, and that extent of use is the measure, and the limit of the measure, of the city's prescriptive right. It includes the right to store water, use it for the generation of electric power, and then return it to the stream above plaintiff's land. It does not include diversion of water, which would constitute an additional and distinct invasion of plaintiff's right, not exercised over the prescriptive period. It is immaterial that the city claimed the right to divert over that period, for it did not in fact actually divert any water. Where there is no exercise of a beneficial use, no prescriptive right is acquired.

The only right of the city prior to plaintiff's riparian right to sufficient water to satisfy its present and future reasonable demands is the prescriptive right which has been discussed. The city, an appropriator, claims the further right, subordinate to plaintiff's right, to store and take any or all of the water remaining in the Tuolumne river and its tributaries. So long as it does not injure plaintiff, says the city, plaintiff has no right to enjoin or limit it in the full exercise of this subordinate right. This statement is correct only in so far as it pertains to that portion of the remaining water which the city actually requires for reasonable beneficial use.

In addition to the reasons which have already been given for limiting the city's taking to water which it can use, the particular facts of this case, especially those bearing on the subject of pollution, show a further right in the plaintiff, as against the city's proposed waste, to have the waters of the stream flow past its land. The evidence shows that the city's diversion will affect the quality of the flow available to plaintiff. The water which passes plaintiff's land includes return flow which has become impregnated and polluted with alkalis and other chemical substances. Water containing such substances in sufficient concentration is unfit for irrigation use and is harmful to lands, trees, and crops.

Plaintiff's riparian lands are composed of a heavy soil which affords no drainage through percolation to the underlying water table. The effect of irrigating such lands with impregnated water is to produce a cumulative concentration of harmful substances in the soil of the area irrigated. Plaintiff's representative testified that for a number of years it has contended with a tightness or impenetrability of the soil caused by irrigation. Among other things, this witness stated: "That was a very puzzling and dismaying thing, and during '25 and '26 and '27, we carried on careful investigation to find how to correct this increasingly bad situation. We then began our method of making moisture tests * * * and we found that gypsum, if applied to these soils, made them friable. That really was the major solution to our problem and we made a general application of gypsum over the whole ranch, thousands and thousands of tons, in '28. We also found that that was helped by the growing of cover crops and today, in every one of our areas, we put in cover crops which called for added quantities of water, by the way, because they need an irrigation in the fall to bring them up, and we plow them under the following March."

Expert testimony was adduced by both sides concerning the present and possible future effect of pollution upon plaintiff's lands. Although this evidence was not without conflict, it affords strong support for the contentions of plaintiff and the

findings of the trial court. Soil expert Twining, being asked, "What is the effect of a concentration of those substances in the water?" replied:

"In sufficient concentrates, they will prevent the growth of practically any cultivated crop; in sufficient amounts they will prevent the growth of any vegetation and of course, lesser amounts will affect according to the concentration.

"Q. Have they any effect in greater concentration upon the ability of water to permeate the soil? A. Yes * * * the chlorides, particularly chloride of sodium, going into the soil by means of water, will produce deflocculation or make the soil sticky and eventually will be impervious to water."

Mr. Twining stated that he had made successive analyses of the waters of the San Joaquin and its tributaries and had found that "as the years pass by, and as the water goes * * * farther down the river * * * there has been a progressive increase in the salinity or alkalinity, as we term it, in the water of the San Joaquin, as demonstrated by analyses I have taken over a period from 1910 to 1933 inclusive.

"Q. And has that gone side by side with an increase in the area upon which water is applied? A. Yes * * * in the first place, there has been a lessening of the flow and there is a certain amount of drainage water carrying more salt that goes back into the river. * * * The fresher the water, the better it is, and using saline waters, it is necessary to use more water in order to prevent surface accumulation. Of course, there is a limit to the amount of salinity in a water that can be used. * * * Soils * * * that are readily drained, can use much more saline water, that is, water with higher alkaline or salinity. * * * If the land drains, the water goes through and carries the salts with it. * * * Water applied on the soils, heavy type soils on the El Solyo ranch, the water doesn't drain off or drain through the soil, and therefore any amount of salinity is cumulative. * * *

"Q. What is the effect upon the water in a river of reducing the proportion of fresh water in it as compared with drainage water that has passed through land in the course of irrigation? A. The fresh water, of course, dilutes your river water and decreases the salinity, the total salinity, and of course would be better water and the more you reduce the addition of fresh water, the more dangerous the water becomes for irrigation purposes."

The trial court found that the return flow in the Tuolumne has not in the past contained a sufficient concentration of salts, alkalis, and other chemical substances to render it unfit for irrigation use on plaintiff's riparian lands; that except at times of very low flow the impregnated or polluted water resulting from seepage return after irrigation and forming a part of the flow available for use upon plaintiff's riparian lands has been commingled with and diluted by fresh or unpolluted water flowing in the Tuolumne or released into the stream by defendants. But the court also found that if the city should carry away from the Tuolumne a part of the flow of fresh water which has hitherto come down the river, or if the districts should so change their methods of diversion, storage, and use of waters of the Tuolumne as to reduce the proportion of fresh or relatively unpolluted water forming a part of the flow available to plaintiff, then the impregnation with harmful substances and the pollution of such flow, and the frequency and duration of periods of pollution would be increased.

It is manifest from the evidence and from the findings that any taking of fresh water from the stream will affect the quality of the remaining flow. It is true that the trial court afforded plaintiff protection against pollution by decreeing that plaintiff's riparian right for reasonable beneficial uses was a right to water not only sufficient in quantity but also of a quality fit for irrigation, and the court also retained jurisdiction so that if in the future the water available to plaintiff becomes polluted to an extent which makes it unfit for use, then the court, in the exercise of its retained jurisdiction, may make such further findings and decree as the facts warrant.

But even this relief, under the rules herein declared, does not afford plaintiff the full protection of its riparian right. As against a subsequent appropriator's taking of water for a reasonable beneficial use, the riparian's right is satisfied if it receives its full entitlement of water of a quality fit for its proposed use, but as against a subsequent appropriator's proposed taking of water in excess of the amount which is needed and can be bene-

ficially used, the riparian is entitled to have such excess left in the stream bed for enrichment and purification of the flow. In other words, even under the limitation imposed by the constitutional amendment, the riparian is entitled to water of the highest quality which the stream will normally afford if that entitlement can be obtained without invasion of subordinate rights to the taking of water for reasonable uses.

The appropriative rights of plaintiff and the city and their respective priorities rest upon the same basis, that is to say, neither may acquire or perfect a right to more water than can be put to a reasonable beneficial use. Plaintiff pleaded an appropriative right separate from and independent of its riparian right, with priority as of October 10, 1919, over any claim of the city, and prayed that its title thereto be quieted. In answer to that count the city alleged that it owned forty-seven separate and distinct appropriations of water in connection with the Hetch Hetchy project and that any appropriative right claimed by plaintiff was acquired subsequent to its appropriative rights; hence that title to those rights should be quieted against plaintiff. As a separate defense directed to the second cause of action, the city alleged its plan for the ultimate development of the Hetch Hetchy project, and alleged that it owned the right, as against any appropriative right of plaintiff, to appropriate, detain, and store for future use for the development of power for domestic and municipal purposes in the City and County of San Francisco and adjacent territory, sufficient water of the Tuolumne and its tributaries to allow diversion by it of a constant flow of 400 million gallons of water daily.

By these pleadings, the sole issue presented is the priorities of the respective appropriative rights alleged by plaintiff and the city. Plaintiff asked no affirmative relief against the city. The city claimed no prescriptive right against plaintiff's appropriation. Admittedly, the city's operations had never interfered with plaintiff's diversion of water to the full extent of its appropriation. Admittedly also there was no issue of intervention of the public use. Thus upon trial of the cause, plaintiff and the city each sought to prove priority of appropriative rights.

Plaintiff showed that it was the owner, independently of its riparian right, and subject only to prior rights of the city, of an appropriative right, with priority as of October 10, 1919, to take and divert for beneficial use, waters of the San Joaquin river, at the rate of 46.74 cubic feet per second from March 1st to November 1st of each year, the place of use being limited to 3781 acres of the ranch, and excluding 540 acres of parcel one thereof lying immediately adjacent to the San Joaquin river and riparian thereto and to the Tuolumne. The court so found and this finding was carried into the decree.

The city introduced in evidence certified copies of notices of forty-seven alleged prior appropriations initiated by it. Eighteen of these notices had been pleaded in abbreviated form in the city's amended answer, and counsel stated that although it was necessary to offer all forty-seven notices in evidence in order to follow their historical sequence, the city would rely only upon the eighteen, which were posted and filed in the years 1901 to 1911.

During that period, which was prior to enactment of the Water Commission Act (Stats.1913, p. 1012, Deering's Gen.Laws, Act 9091), the appropriation of water was governed by sections 1410 to 1422 of the Civil Code. Section 1414 declared that "as between appropriators, the one first in time is the first in right." Section 1415 provided that a person desiring to appropriate water must post a written notice at the point of intended diversion, stating therein: "1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; 2. The purposes for which he claims it, and the place of intended use; 3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it," and the section further provided that a copy of the notice must be recorded within ten days after posting.

Section 1416 (prior to amendment of 1911) provided that within sixty days after posting of the notice, the claimant must commence the excavation or construction of the works in which he intended to divert the water, or survey, road or trail building, necessarily incident thereto, "and must prosecute the work diligently and uninterruptedly to *completion*," provided that if erection of a dam had been recommended by state authorities, the claimant should have sixty days after completion of the dam in which to commence excavation or construction. Section 1417 defined

"completion" to mean "conducting the waters to the place of intended use". Section 1418 applied the "doctrine of relation". It provided: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." Section 1419 stated that "a failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith."

Under this method of appropriation, by application of the "doctrine of relation", priority of appropriative right dates from the posting of a notice in the form prescribed by section 1415, provided that subsequent to posting the notice, the claimant diligently prosecutes toward completion the work necessary to diversion and use of the water. However, if there is a lack of due diligence on the claimant's part, a later appropriator who proves that he first completed his works and actually took and beneficially used the water, has a prior right. De Necochea v. Curtis, 80 Cal. 397, 401, 20 P. 563, 22 P. 198; 26 Cal.Jur., pp. 79–80, sec. 270–271.

In this case the evidence shows that the city's appropriations were the first to be initiated but plaintiff's appropriation was the first to be completed. The city's claimed appropriations were all initiated between 1901 and 1911. Plaintiff's appropriation was initiated on October 10, 1919, and construction of works for diversion of the water was prosecuted with due diligence to completion. On the latter date the city's project was still in the course of construction. It was using only a small amount of water stored in Lake Eleanor to generate power at the Lower Cherry river power house. Its Hetch Hetchy reservoir and Moccasin power house were not finished, and there was no actual diversion of water to San Francisco until 1934, subsequent to the filing of the present action. Applying the "doctrine of relation" to this situation the trial court properly concluded that, as plaintiff's valid appropriation antedated any actual use of water by the city, the latter is entitled to priority only for those appropriations which were initiated by the posting of valid notices and followed by the prosecution of construction work with due diligence.

Some of the eighteen notices relied upon by the city were posted by it or its representatives, while others of them were posted by Wm. Ham Hall or by Sierra Ditch and Water Company, who later transferred their rights to the city. The trial court refused to accord the latter appropriations priority, either because there was no proof of transfer to the city or other evidence that the city was the owner thereof, or because the work necessary to diversion and use of the water was not shown to have been prosecuted with due diligence by the city or its predecessors. In its briefs on this appeal the city does not seriously question the sufficiency of the evidence to support these findings, but it states that without considering any of the notices posted by Wm. Ham Hall or Sierra Ditch and Water Company, the remaining notices which were posted by it or its representatives were valid and sufficient to cover allowance of appropriations to the extent claimed by it. Some of the latter notices, the court found, were superseded by amended ones filed later, and were not separate or additional claims of right.

The city does not question this conclusion. But it contends that the evidence does not support the further findings to the effect that each of the notices relied upon, with the exception of five, fails in some respect to meet the requirements of section 1415, supra, or else was not followed by prosecution of development work with due diligence.

To state the city's contention more particularly, the trial court found that the city's notices of appropriation designated 1(c), 2(d), 3(b), 3(c), and 4(c) were filed in the form provided by law at a time prior to the initiation of plaintiff's appropriation, and that by virtue of those five appropriations the city is the owner of valid rights, superior in right to plaintiff's appropriative right, to store and divert waters of the Tuolumne and its tributaries at the following places and in the following amounts: (1) To store in Lake Eleanor flows not to exceed 5000 miner's inches, or 100 cu. ft. per second; (2) To store in the Hetch Hetchy reservoir flows not to exceed 35,000 miner's inches, or 700 cu. ft. per second; (3) To store in the proposed Cherry Valley reservoir flows not to exceed 25,000 miner's inches, or 500 cu. ft. per second, provided said proposed reservoir be completed and put into use with due diligence; (4) To divert into the Hetch Hetchy aqueduct at Early Intake flows not to exceed 25,000 miner's inches, or 500 cu. ft. per second.

These findings were carried into the decree, which also adjudged that plaintiff's appropriative right is prior to all other claims of the city. The city asserts that valid notices posted by it or its representatives were sufficient to entitle it, as against plaintiff's appropriative right, to priority of appropriation to the following extent: (1) 289,862.9 acre feet annually to be stored in Lake Eleanor; (2) 345,000 acre feet annually to be stored in Hetch Hetchy reservoir; (3) 62,408 acre feet annually to be stored in Cherry Valley reservoir; (4) 620 second feet to be diverted into the city's aqueduct at Early Intake; and (5) 25,000 inches under four-inch pressure to be stored in Poopenaut Valley Reservoir.

The earliest notices of appropriation on behalf of the city covering storage in Lake Eleanor and Hetch Hetchy reservoirs were notices 1(a) and 3(a), posted by Mayor Phelan on July 29, 1901, for 5000 inches of Eleanor Creek below the outlet of Lake Eleanor and 10,000 inches of the Tuolumne river at the outlet of Hetch Hetchy valley. These notices, the trial court found, were superseded by similar notices 1(c) and 3 (b) respectively, posted by the city through City Engineer Manson on October 1, 1908, and September 29, 1908.

The latter notices were found to be valid. Also found valid was a further notice, 3 (c), posted by the city on February 18, 1911, for 25,000 inches of the Tuolumne at the outlet of Hetch Hetchy valley. Upon these three valid notices, the trial court predicated its conclusion that the city was the owner of an appropriative right, prior to and valid against plaintiff's appropriative right, to store in Lake Eleanor not to exceed 5000 inches (100 cu. ft. per second), and to store in Hetch Hetchy reservoir not to exceed 35,000 inches (700 cu. ft. per second).

The city claims that the three notices were sufficient to entitle it to a larger diversion, i. e., to the right to divert and store to the full capacity, as enlarged, of Lake Eleanor reservoir site shown on the amended map approved under the Raker Act, 289,862.9 acre feet, and to the full capacity, as enlarged, of Hetch Hetchy reservoir, 345,000 acre feet. The city argues that under the code method of appropriation no provision was made for giving notice of diversion for storage; that if an appropriator of water to be stored had specified in his notice the number of inches in the peak flood to be impounded, he would have had to name an amount of water grossly disproportionate to the size of the described diversion ditch; that hence the logical course, and the course followed by the city, was to specify in the notice the amount, corresponding to the capacity of the described ditch, of regulated flow which would be obtained from capacity storage, and then to state as follows: "It is proposed to divert such waters by means of a dam, to allow the same to flow in natural channels, and in canals, tunnels, flumes, wooden and iron or steel pipes to the points of intended use, using such dams and other structures for its recovery from natural channels and its proper control as may be required." In other words, the city contends that under the code method, an appropriation of a specified quantity of water conferred the right to impound and detain not only that quantity but also such additional water as might be necessary to enable the appropriator to obtain from storage a regulated flow up to the amount stated in his notice of appropriation; that, for example, a notice of appropriation of 5000 inches conferred the right to divert, impound, and detain several times that amount of water, in order to secure a continuous regulated flow of 5000 inches out of the reservoir.

This contention should not be sustained. By the express terms of section 1415, supra, the first essential of a notice of appropriation was that the appropriator state therein that he claimed "the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure." The statute contained no intimation that compliance with this clear and definite demand was not just as vital to a valid appropriation for storage as to a valid appropriation for direct diversion, and we are cited to no case which holds that a specified appropriation for storage could not be made. To adopt the view urged by the city would be, in effect, to nullify the express demand of the statute and to overlook one of the primary objects of a notice of appropriation under the code method, which was "to set a limit upon the extent of the water-right claimed, and to preserve evidence thereof by having it recorded." I Wiel on Water Rights, 3d ed., sec. 373. Although the measure of the appropriator's right was neither the amount of water claimed in his notice of appropriation, nor the amount actually diverted, but was the amount necessarily and reasonably used for beneficial

purposes, nevertheless the amount claimed in the notice limited the extent of the appropriator's right and fixed the maximum amount of water which could be taken where the benefit of the doctrine of relation was sought. 26 Cal.Jur., sec. 287, 288, pp. 94 et seq.

A notice of appropriation under the code method is to be liberally construed Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571, but nevertheless it must contain the essential data specified in the statute and must conform substantially to its terms. Particularly is this true where the appropriator seeks the benefit of the "doctrine of relation". As it is only by a compliance with the rules laid down in the code that the "claimant's right to the use of the water relates back to the time the notice was posted" (section 1418), where there is involved the priority of an uncompleted appropriation as against subsequent parties, the question of procedure becomes important. 26 Cal.Jur. p. 66, sec. 251; p. 80, sec. 271. The purpose of the provisions prescribing the code method was to define with precision the conditions upon which an appropriator could have the advantage of the "doctrine of relation", as against other persons also complying with code requirements. The notice of appropriation, in addition to fixing the date to which the water right related, fixed a limit on the amount of water claimed, and acted as a warning to other persons that there were prior rights in case they wished to use the water pending the accrual of those rights. Wells v. Mantes, 99 Cal. 583, 34 P. 324; De Necochea v. Curtis, supra; 26 Cal.Jur. sec. 260, p. 72.

The opinions in the cases last cited imply that one cannot claim the benefit of the "doctrine of relation" unless the code provisions have been strictly complied with, and this, I believe, is the correct view. I Wiel on Water Rights, 3d ed. sec. 375; Taylor v. Abbott, 103 Cal. 421, 37 P. 408; Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 211, 110 P. 927. Suppose that several claimants filed notice for given amounts of water to be diverted by means of a dam and each then claimed the right to impound and detain water to an extent sufficient to give a continuous regulated flow from storage up to the amount claimed. If respective claims to that extent were sustained, how could the constitutional requirement to secure the greatest use of the water for all takers be satisfied? It is plain that an appropriator can not assert an appropriative right through application of the "doctrine of relation" to any water in excess of the amount claimed in his notice, nor can a notice, in the form of those here under consideration, be construed to embrace any greater appropriation than the actual amount of water specified therein; that is, a notice claiming 5000 inches, to be diverted by means of a dam and other structures, conferred no greater maximum right than to divert or store behind a dam such water as needed for beneficial use, up to the amount of 5000 inches.

The city refers to three alleged notices of appropriation at Eleanor Creek, 1(b), 1(d), and 1(e), in addition to those designated 1 (a) and 1(c) and already discussed. Notice of appropriation 1(b) was filed on July 20, 1902, by Wm. Ham Hall for 50,000 miner's inches. The court found that this notice failed to state the place of intended use of the water to be appropriated. Notice of appropriation 1(d) was filed on November 17, 1909, by Sierra Ditch and Water Company for 5000 miner's inches. The city, so the court found, failed to prove transfer or ownership of this appropriation. With respect to both appropriations 1(b) and 1(d), the court further found that there was a lack of due diligence on the part of the owners in prosecuting development work toward completion. The city does not contest these findings. The remaining appropriation, 1(e), was filed on February 27, 1911, by the city through City Engineer Manson, and it claimed *"all the water,* natural or stored, here flowing in Eleanor Creek. * * *."

The city contends that even without appropriations 1(b) and 1(d), appropriation 1(e), claiming "all the water" of Eleanor Creek, was sufficient to allow the taking of water to the full capacity of the Lake Eleanor reservoir as enlarged, 289,862.9 acre feet. The trial court, however, found the notice covering appropriation 1(e) to be invalid as against plaintiff's appropriation for the reason that it did "not state the amount of water claimed". The city argues that the words "all the water" sufficiently stated the amount of water claimed to satisfy the requirements of section 1415, supra; that it served as a declaration of the intention of the appropriator, and as a warning to subsequent appropriators, and that the maximum amount of water which could be claimed under such a notice was limited only by the maximum capacity of the appropriator's works—in this instance,

the capacity of enlarged Lake Eleanor reservoir, 289,862.9 acre feet.

In my judgment this contention cannot be upheld. A sufficient notice of appropriation under the code method must conform substantially to the requirements of section 1415, and must contain a definite statement of the amount of water to be appropriated. A notice claiming "all the water" is nothing more or less than a blanket form of declaration for the taking of as much water as the appropriator can put to beneficial use, and it is equivalent to failing to specify any amount at all. If a claim to "all the water" had satisfied section 1415, what appropriator would not have hastened to adopt that general form of notice in order to insure the obtaining of the fullest possible quota of water for his proposed use? The trial court properly found, I believe, that the notice covering appropriation 1(e) was defective in failing to specify the amount of water claimed, and that therefore that appropriation was invalid as against plaintiff's appropriation.

Other appropriative claims are those for storage in Cherry Valley reservoir, five in number, 2(b), 2(c), 2(d), 2(f), and 2(g). The city contends that without considering three of these appropriations, 2(b), 2(f), and 2(g), which were made by Wm. Ham Hall and Sierra Ditch and Water Company, either of the remaining two, 2(c) or 2(d), was sufficient to cover the appropriation of water to the full capacity of Cherry Valley reservoir as approved, 62,408 acre feet.

The trial court found appropriation 2(d), based on a notice filed by the city on February 27, 1911, for 25,000 miner's inches of water, to be valid, and concluded that said notice entitled the city to store in the proposed Cherry Valley reservoir flows not to exceed 25,000 miner's inches (500 cu. ft. per second), provided that the proposed reservoir be completed and put into use with due diligence. Apparently the city's contention that either appropriation 2(d), or appropriation 2(c), should entitle it to take water to the full capacity of the Cherry Valley reservoir, 62,408 acre feet, is based upon its theory that notice of taking of a specified amount of water for diversion and storage permits the impounding of a sufficient additional flow to provide a regulated flow out of storage of the amount specified. This theory, I have stated, in my opinion is untenable.

Appropriation 2(c) for 50,000 miner's inches of water was based upon a notice filed for the city by City Engineer Manson on October 24, 1909, recorded November 4, 1909. The trial court found that the notice was defective in that it failed to state the size of the flume, ditch, pipe, or aqueduct by which the claimant intended to divert the water, and that no copy of it was recorded within ten days after posting, as required by section 1415, supra. The evidence shows that a copy of this notice was recorded eleven days after posting.

The city urges that under a "liberal construction" of the statute, this was a sufficient compliance. But if this is proper, then who can say where such liberality should cease? For example, would "liberal construction" warrant an extension of five or ten days? It is my view that the stated period of "within ten days" must be held to mean within that time and no other time. To hold otherwise would in effect nullify the clear and unambiguous demand of the statute.

However, the city further urges that the recordation should be held good at least as to those who acquired an interest subsequent thereto and were not injured by the delay. This contention is answered by what has been said with respect to the importance of procedure where there is involved the priority of an uncompleted appropriation as against subsequent parties, and with respect to the duty of an appropriator, who seeks the benefit of the "doctrine of relation", to comply with the rules laid down in the code.

The city also made appropriations on the Tuolumne river at Early Intake and it pleaded two, 4(a) and 4(c), which it alleged provided for direct diversion at this location. The first, made on October 12, 1909, by Sierra Ditch and Water Company for 12,000 inches, was not shown to have been transferred to the city or to have been prosecuted with due diligence toward completion. The city does not contest the finding to that effect. Appropriation 4(c), made by the city on February 21, 1911, for 25,000 miner's inches, was found to be based on a valid notice and was held to entitle the city, as against plaintiff's appropriative right, to priority of appropriation to divert into the Hetch Hetchy aqueduct at Early Intake flows not to exceed 25,000 miner's inches, or 500 cu. ft. per second.

The city plans ultimately to divert to the full capacity of its aqueduct, 31,000 miner's inches or 620 second feet, and it contends that even without Sierra Ditch and Water Company appropriation 4(a) it owns ap-

propriations, prior to plaintiff's appropriation, more than sufficient to supply the full contemplated diversion. In this connection the city claims priority for two appropriations on the Tuolumne near the mouth of Jawbone creek, which two appropriations it inadvertently omitted to describe specifically in its amended answer.

The city's amended answer and amendments thereto alleged: "Defendant now owns forty-seven separate and distinct appropriations on the Tuolumne river and its tributaries in connection with its Hetch Hetchy project. The appropriations of defendant on Eleanor Creek, Cherry River, Tuolumne River at Hetch Hetchy, Tuolumne River at and near Early Intake and Tuolumne River at Poopenaut Reservoir site are as follows (describing briefly eighteen appropriations) * * *." Upon trial of the cause counsel stated that the city would rely only upon the eighteen appropriations expressly pleaded, but that it wished to introduce in evidence exhibit 572, containing a copy of notices of all appropriations, in order to show historical sequence. On this statement exhibit 572 was admitted without objection by plaintiff. Notices covering the two omitted appropriations appear at pages 68 et seq., and 103 et seq., of the exhibit. The first notice, dated October 4, 1908, was made by City Engineer Manson for 15,000 miner's inches of water; the second, dated February 28, 1911, was made by the city for 25,000 inches.

During the course of the trial the city devoted its entire effort to establishing priority of the eighteen appropriations expressly pleaded and relied upon. It made no attempt to put in issue the validity of appropriations based on notices other than the eighteen which have been mentioned. However, when the cause came on for argument before the trial court, the city tried to rectify its inadvertence and urged its rights under the omitted notices. Plaintiff claims that this effort came too late, and I also take that view.

If, under the city's general allegation of ownership of forty-seven appropriations, the cause had been tried upon the theory that all were relied upon, then it may be that a casual declaration of counsel that he wished to offer exhibit 572 for a limited purpose would not have precluded the court, in the absence of any showing of prejudice to plaintiff, from drawing any reasonable deduction from that evidence. Isenberg v. Sherman, 214 Cal. 722, 732, 7 P.2d 1006; 21 Cal.Jur. sec. 181, p. 260; 10 Cal.Jur. sec. 106, p. 817.

But here the trial was had upon the theory that only the priority against plaintiff of the eighteen appropriations specifically pleaded and expressly relied upon was at issue, and all of the evidence was directed solely to that issue. The further issue involving other appropriations, first raised by the city in its argument before the trial court, I believe, came too late for consideration. Plaintiff at that time would have had no opportunity to refute, if it could, the validity of the additional appropriations. The city, apparently, did not ask to amend its pleadings to describe those appropriations, nor did it request a finding upon them. Clearly then, upon appeal it is in no position to urge that this court declare their asserted priority.

Lastly, the court is asked to consider the city's appropriation (No. 5) on the Tuolumne at Poopenaut reservoir site, notice of which was filed by the city on February 20, 1911, for 25,000 miner's inches of water. Admittedly the city undertook no construction work subsequent to filing this notice, and it has not yet applied to the department of interior for a right of way for reservoir purposes in Poopenaut valley. The trial court found that the notice was invalid as against plaintiff's appropriation for the reason that the work necessary to diversion and use of the water sought to be appropriated had not been prosecuted diligently toward completion by the city.

The city recognizes the necessity for diligence, which is of the essence of priority (Sierra Land & Water Co. v. Cain Irr. Co., 219 Cal. 82, 25 P.2d 223; Wiel on Water Rights, 3d ed., sec. 382, et seq.; 26 Cal. Jur., p. 81, sec. 272 et seq.), but it claims that the trial court failed to give it the benefit of the provision added to section 1416 of the Civil Code by the amendment of 1911 (Stats.1911, p. 1419) making that section read as follows: "Within sixty days after the notice is posted, the claimant must commence the * * * works * * * and must prosecute the work diligently and uninterruptedly to completion * * * provided, that whenever any city and county * * * has made * * * any appropriation of any of the waters of this state in accordance with the provisions of section 1415 of this code, it shall not be necessary for such city and county * * * to commence the work for development of more of the water so claimed than is ac-

tually necessary for the immediate needs of such city and county * * * and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county * * * to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed to supply such city and county * * * with the water required for immediate use. Any appropriation heretofore made by any such city and county * * * in connection with which surveys were at any time made, or an issue of bonds authorized for the construction of any portion of the works necessary for a diversion of any part of the water appropriated, is hereby confirmed to the full amount of water stated in the original notice or notices." The city claims that under this provision it is not necessary for any city and county which had made an appropriation to commence work for the development of more of the water claimed than is actually necessary for its immediate needs; that in developing the Hetch Hetchy project there is no present need for the construction of the Poopenaut valley reservoir; that therefore the city's lack of diligence is excusable and will not deny the Poopenaut appropriation priority as of the date of filing notice therefor.

As I read this provision it merely declares that it is not necessary, in the exercise of due diligence, for a city and county to commence development for the *full* amount of water stated in a notice of appropriation, in order to secure priority as of the date of the notice but that it is sufficient to develop *such amount* of water as is necessary for the immediate needs of the municipality. Here, however, apparently the city has not undertaken to develop *any water at all* at the Poopenaut reservoir site, and has not even applied for a right of way for the reservoir, although over twenty-five years have elapsed since the posting of its notice of appropriation in 1911. Furthermore, the evidence in this case shows that the city does not require any of the proposed Poopenaut supply to meet its immediate needs. Moreover, we are not referred to any evidence showing that surveys have been made or bonds authorized for development at this site. Under these circumstances, the trial court's finding of lack of due diligence with respect to prosecution of the Poopenaut appropriation was clearly warranted and to hold otherwise would be to do violence to the plain provisions of amended section 1416. The trial court properly concluded, in my judgment, that this appropriation was not entitled to priority as against plaintiff's appropriation.

The decree, as modified by the decision of this court, while purporting to protect plaintiff's riparian right, does not insure the furnishing of water at El Solyo ranch when the stream flow there is insufficient in quantity and quality. It merely enjoins the city, at such times, from diverting at a point some 120 miles upstream. This, in my judgment, does not afford plaintiff the protection to which it is entitled.

The city's works and point of diversion are situated in the high mountains. The Hetch Hetchy reservoir is over 120 miles by stream channel from plaintiff's lands. Even if there were no natural or artificial influences between the two locations, it would take more than a day before water released by the city could reach plaintiff's land. Moreover, there are intervening takers and users who have prior rights.

A provision to prohibit the city from exercising any subordinate right until plaintiff's water entitlement for reasonable requirements has been satisfied, should be appropriately worded to restrain and enjoin the city from storing and using water in excess of its prescriptive rights or from diverting any water whatsoever to points without the Tuolumne watershed until it has first ascertained that there is present in the stream flow at plaintiff's point of diversion a sufficient supply of water of suitable quality to permit the taking by plaintiff of its full water entitlement at all times. Under such an adjudication the burden would be upon the city to see that the water is in the stream channel at plaintiff's point of diversion. If this required special releases by the city, it would have to make allowance for the time necessary for the water to reach plaintiff's land, and also to so time its releases with the operations of the districts and intervening users as to insure the water reaching plaintiff's point of diversion under a sufficient head for pumping. In other words, the duty rests upon the city to see that plaintiff's prior rights are satisfied before it proceeds to exercise any of its claimed subordinate rights.

This form of relief would meet the city's argument that account must be taken of the waters of the San Joaquin, and of the return flow past plaintiff's property, for

if plaintiff were securing a sufficient suitable supply from these sources, then the city's duty would be met. Indeed, if the evidence in this case and the city's contentions correctly depict the volume of flow in the San Joaquin and the volume of return flow, the injunctive provision would rest lightly upon the city because those sources would always make available at plaintiff's plant a supply of suitable water far in excess of its entitlement. The injunction would also afford plaintiff ample protection in the exercise of its riparian right, and in form would satisfy plaintiff's claim that it must be protected against the contingency of an increased future use of water for irrigation by upper riparians along the river which would lessen both the quantity and quality of the flow past its property.

If, however, for any reason the solution here suggested did not prove sound in present or future actual operation, then the parties, and the trial court under its retained jurisdiction, would have the privilege of working out a more acceptable plan. The city's Hetch Hetchy aqueduct passes over plaintiff's land. Rather than be subjected, now or in future, to the form of injunction above directed, the city might prefer to supply plaintiff with water from this aqueduct. If this plan were adopted, such a delivery should be entirely at the city's expense, even to the installation and operation of the necessary works to make the water available for taking by plaintiff at a point from which it is feasible to use it. Recent decisions in cases of this character have adopted and approved the granting of appropriate relief along these lines. Where the parties themselves have not worked out a plan, or are unwilling to agree upon one, the court has power to make and enforce its own suggestion in the premises. Tulare Dist. v. Lindsay-Strathmore Dist., supra; City of Lodi v. East Bay, etc., 7 Cal.2d 316, 60 P.2d 439. It might also take advantage of the aid afforded by the Water Commission Act. Wood v. Pendola, supra; Peabody v. City of Vallejo, supra; Tulare Dist. v. Lindsay-Strathmore Dist., supra, 3 Cal.2d 489, at page 575, 45 P.2d 972.

Under all of the circumstances shown in this case, in my opinion, the decree should: (1) Declare the extent of the city's prescriptive rights. (2) Declare the extent of plaintiff's riparian right. (3) Enjoin any exercise by the city of subordinate rights until plaintiff has first received its full water entitlement. (4) Declare the extent of the city's rights which are subordinate to plaintiff's riparian right to water for reasonable needs. (5) Enjoin any storage by the city in excess of its prescriptive rights until a need for such increased storage is shown; enjoin any diversion by the city from the Tuolumne watershed to San Francisco and adjacent territory of water in excess of the amount which the city can put to a reasonable beneficial use. (6) Provide for retention of jurisdiction by the trial court.



13 Cal.2d 545

DOUGLAS AIRCRAFT CO., Inc., v. JOHNSON, State Treasurer.

CHANSLOR-CANFIELD MIDWAY OIL CO. v. SAME.

KETTLEMAN NORTH DOME ASS'N v. STATE et al.

Sac. 5205, No. 5208-5214.

Supreme Court of California.

May 18, 1939.

1. Courts ⇐97(3)

Decisions of the United States Supreme Court holding that the Use Tax Act of California does not violate the commerce or due process clauses of the Federal Constitution were conclusive on the Supreme Court of California as to such issue. St. 1935, p. 1297; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

2. Commerce ⇐63
Constitutional law ⇐287
Licenses ⇐7(1)

The statute imposing an excise tax on the storage, use, or other consumption of tangible personal property is not violative of the due process and commerce clauses of the Federal Constitution as applied to property used by companies engaged in producing petroleum substances, and company engaged in manufacturing airplanes. St.1935, p. 1297; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

3. Licenses ⇐7(2, 8)

Constitutional provision requiring uniformity in taxation and prohibiting double taxation is inapplicable to an excise tax. Const.Cal. art. 13, § 1.

4. Statutes ⇐225

Where sales tax and motor vehicle license tax with use tax provided a comprehensive tax system applicable to the sale, use, storage, or consumption of personal property, all three taxes could be considered together in determining validity of use tax statute. St.1935, p. 1297.

5. Licenses ⇐1
Taxation ⇐1

Generally, a "property tax" is for revenue and does not impose restriction on use of property taxed, whereas a "privilege tax," though also passed for revenue and as such to be distinguished from "license tax," is imposed on right to exercise privilege, and its payment is condition precedent to exercise of privilege.

[Ed. Note.—For other definitions of "License Tax," "Privilege Tax" and "Property Tax," see Words & Phrases.]

6. Taxation ⇐1

The character of a tax must be ascertained by its incidents and from natural and legal effect of language employed in taxing statute.

7. Licenses ⇐7(1)

The tax imposed by statute assessing an excise tax on the storage, use, or other consumption of tangible personal property is an "excise tax" rather than a "property tax," and hence statute is not unconstitutional for alleged violation of constitutional provision relating to "property taxes." St.1935, p. 1297; Const.Cal. art. 13, §§ 1, 9a; § 14, as amended in 1933.

[Ed. Note.—For other definitions of "Excise," see Words & Phrases.]

8. Taxation ⇐53

The Legislature's denomination of a levy as an "excise tax" is not conclusive but is entitled to considerable weight in ascertaining the nature of the tax.

9. Constitutional law ⇐87

Constitutional declaration that every person possesses certain inalienable rights including those of acquiring, possessing, or protecting property does not prohibit a tax on the privilege of use so that statute imposing an excise tax on the storage, use, or other consumption of tangible personal property is not unconstitutional for alleged violation of such provision. St.1935, p. 1297; Const.Cal. art. 1, § 1.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Actions by the Douglas Aircraft Company and the Chanslor-Canfield Midway Oil Company against Charles G. Johnson, State Treasurer of the state of California, and by the Kettleman North Dome Association against the State of California and Charles G. Johnson, as State Treasurer thereof, to recover taxes paid by plaintiffs under the Use Tax Act. From judgments sustaining demurrers to the respective complaints, the plaintiffs appeal. The appeals were consolidated.

Affirmed.

H. W. Elliott and Edward P. Fogg, both of Los Angeles, for appellant Douglas Aircraft Company, Inc.

L. W. Butterfield, of Los Angeles, for appellant Chanslor-Canfield Midway Oil Co.

George W. Nilsson, of Los Angeles, for appellant Kettleman North Dome Ass'n.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondents.

PER CURIAM.

The three named plaintiffs noticed these appeals from judgments entered by the court below following the sustaining of demurrers to their respective complaints. By stipulation the appeals have been consolidated.

The actions were instituted under section 29 of the Use Tax Act of 1935 (Stats.1935, chap. 361, p. 1297) by plaintiffs to recover taxes paid by them under that statute. No question is raised regarding the compliance by plaintiffs with the procedural requirements of the act dealing with the recovery of taxes paid under protest. The only issues involved relate to the constitutional authority of the state to impose the tax in question.

From the complaints, which are substantially identical, it appears that the plaintiffs Kettleman North Dome Association and Chanslor-Canfield Midway Oil Company are each engaged in this state in the business of drilling for and producing oil, gas and other petroleum substances; that plaintiff Douglas Aircraft Company, Inc., is engaged in the business of designing, manufacturing and fabricating airplanes and airplane parts; that since the effective date of the Use Tax Act all of the plaintiffs

have purchased and are still purchasing supplies, equipment and machinery used by them in their respective businesses; that these purchases were made outside the state of California and from dealers not maintaining a place of business in this state; that, as required by the terms of the Use Tax Act, plaintiffs filed with the state board of equalization returns disclosing the above purchases, and paid the amount of the tax imposed by the act; that with said returns plaintiffs filed written protests in which the unconstitutionality of the act was alleged. The plaintiff Douglas Aircraft Company, Inc., alleged, in addition, that much of the tangible personal property purchased by it outside the state consists of special tools, machinery, materials and supplies which cannot be purchased in this state, and can be acquired only from sellers not maintaining places of business within this state. It is conceded that in all of the cases the property was purchased by the plaintiffs outside the state for their own use, and not for resale, and was shipped direct to them in interstate transactions.

Appellants urge that the Use Tax Act is unconstitutional for two main reasons:

1. That the tax imposed by the act, in operation and effect, is a property tax, and is therefore unconstitutional because not levied in proportion to the value of the property and because it imposes double taxation, in violation of article XIII, sections 1 and 14 of the state Constitution; further, if the tax imposed is an excise tax, then it violates article 1, section 1, of the state Constitution, in that it is a tax on the right of ownership as such, which is a nontaxable privilege; and

2. The tax constitutes a direct burden upon and discriminates against interstate commerce in violation of the commerce and due process clauses of the Constitution of the United States, U.S.C.A.

[1, 2] This last contention has been exhaustively briefed and vigorously argued by appellants. After the filing of all of the briefs, the United States Supreme Court passed upon this identical question. It held, in cases where the interstate nature of the transactions was much closer than in the instant cases, that the Use Tax Act of California does not violate either the commerce clause of or the fourteenth amendment to the federal Constitution. Southern Pac. Co. v. Gallagher, Jan. 30, 1939, 59 S.Ct. 389, 83 L.Ed —; Pacific Telephone & Telegraph Co. v. Gallagher, Jan. 30, 1939, 59 S.Ct. 396, 83 L.Ed. —; see, also, Felt & Tarrant Mfg. Co. v. Gallagher, Jan. 30, 1939, 59 S.Ct. 376, 83 L.Ed. —. These decisions are conclusive on this court on these issues. On the authority of the above cases it must be held that appellants' second point is without merit.

[3] Equally untenable is the first contention of appellants. The argument on this point is that if the tax is a property tax it violates the provisions of article XIII of the Constitution. Section 1 of that article provides that "all property in the State except as otherwise in this Constitution provided * * * shall be taxed in proportion to its value." Section 9a provides that taxes levied on personal property where not secured by real estate, shall be based on the tax levied on real property for the preceding year. Section 14, as amended in 1933, however, confers upon the legislature wide discretion in classifying or exempting from taxation any and all kinds of personal property. One of respondents' contentions is that even if the tax is a property tax it would be valid under section 14. Appellants contend that any special tax on personal property violates section 1, that section, according to their contention, requiring uniformity and equality in taxation, and prohibiting double taxation. We do not find it necessary to pass upon this point for the reason that we are of the opinion that the tax is an excise tax, and therefore the provisions of article XIII have no application. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 P. 341; Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1.

Before directly discussing the contention of appellants that the statute in question imposes a property tax, some brief reference must be made to the provisions of the statute. The title of the act provides in part as follows: "An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property." Section 2(a) defines "storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer". The term "use" is defined in section 2(b) as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business". Section 3 provides that "An excise tax is hereby

imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property." Section 4 exempts from the operation of the tax, among other things, the storage, use or other consumption of property the gross receipts from the sale of which are taxed under the sales tax; motor vehicle fuel, the gross receipts from the sale or distribution of which are taxed under the Motor Vehicle Fuel License Tax Act; and food products purchased for human consumption which are exempted from the sales tax.

[4] Appellants concede that the sales tax and the motor vehicle license tax are excise and not property taxes. It will be noted that when the use tax is considered in connection with the other two taxes mentioned, the legislature has provided a comprehensive taxing system applicable to the sale, use, storage or consumption of personal property. The three taxes are mutually exclusive, each taxing privileges not taxed by the other two.

There can be no doubt of the propriety of considering all three taxes together, although only one of them is here under attack. The United States Supreme Court has ruled that in considering the validity of a use tax, other taxes to which it is complementary must also be considered. Gregg Dyeing Co. v. Query, 286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232, 84 A.L.R. 831; see, also, Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P.2d 14.

The inherent fairness of the use tax, when it is read in conjunction with the statutes to which it is complementary, is obvious. The United States Supreme Court in Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, upheld as constitutional a Washington statute imposing a use or "compensating tax" substantially similar to the one here involved. In so doing that court had the following to say about the purpose and effect of such statutes (page 581, 57 S.Ct. page 526, 81 L.Ed. 814):

"The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales."

[5, 6] The determination of whether a particular tax is a property or excise tax is not always an easy matter. In discussing this problem in Ingels v. Riley, supra, 5 Cal. 2d page 159, 53 P.2d page 941, 103 A.L.R. 1, it is stated:

"The distinction between a tax on a privilege and a property tax is many times a close one. Generally speaking, the function of a property tax is to raise revenue. Such a tax does not impose any condition nor does it place any restriction upon the use of the property taxed. A privilege tax, although also passed to raise revenue, and as such is to be distinguished from the license tax or regulatory charge imposed under the state's police powers, is imposed upon the right to exercise a privilege, and its payment is invariably made a condition precedent to the exercise of the privilege involved. 37 Cor.Jur., p. 171, § 9, and cases cited.

"It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents and from the natural and legal effect of the language employed in the statute."

[7, 8] Applying this test to the statute here under consideration we have no hesitancy in holding that the tax imposed is an excise tax, for revenue purposes, levied on the privilege of use, storage or consumption. In the first place, as indicated by the quotations from the statute, supra, the legislature has denominated the levy an excise tax. Although not conclusive this is entitled to considerable weight in ascertaining the nature of the tax. In Ingels v. Riley, supra, 5 Cal.2d page 160, 53 P.2d page 942, 103 A.L.R. 1, this rule of construction is stated as follows:

"Although the designation made by the legislature is not conclusive on the courts, some weight must be given such designation in determining the nature of the tax. In San Francisco v. Liverpool, etc., Ins. Co., 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425, this court in discussing the character of a tax, had recourse to this factor. In the opinion of the justices, supra, 250 Mass.

591, 148 N.E. 889, the Massachusetts court, in advising the legislature of that state as to the nature of a proposed taxing statute on motor vehicles, based on value, identical in many respects with the one here involved, stated (250 Mass. 591, 148 N.E. page 891):

"'Avowedly an excise tax is established. The declaration to that effect is explicit. Such statutory statement is to be accepted as true unless incompatible with the meaning and effect of the act as a whole.'

"In Storaasli v. State of Minnesota, 283 U.S. 57, 51 S.Ct. 354, 75 L.Ed. 839, the United States Supreme Court, in interpreting a statute almost identical with the one here involved, emphasized the fact that the legislature had denominated the charge a privilege tax."

In the second place it is obvious, from a reading of the act, that the tax here levied is not imposed on the ownership of property as such. It does not apply to the use of property to be resold. It does not recur annually, but falls due only once. It is not imposed on a fixed day, although it is collectible quarterly—in short, it does not fall upon the owner because he is the owner, regardless of the use or disposition he may make of the property. It is imposed on certain of the privileges of ownership, but not on all of them.

The contention made by the appellants that a use tax, such as is here involved, is in fact a tax on ownership of property and is not a tax on the privilege of use, storage or consumption, is not a new one. It has been made in one form or another in attacking nearly every use tax statute that has been enacted. There is a long line of authorities most of them of recent date, holding that use taxes, including taxes imposed on the privilege of use, or storage, or withdrawal from storage, are excise taxes and not property taxes. In Gregg Dyeing Co. v. Query, supra, the United States Supreme Court upheld as imposing an excise tax a South Carolina statute levying a tax on the storage of foreign gasoline when stored for future use. When the same cause was before the South Carolina court the tax was designated by it (166 S.C. 117, 164 S.E. 588, 594) as "an excise tax and not a property tax". The same court in Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191, upheld a Tennessee statute imposing a tax on the privilege of selling, storing or distributing gasoline, the tax being payable on the withdrawal from storage. In Bowman v. Continental Oil Co., 256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139, the court, in answering the contention that a New Mexico statute levying a tax on the sale or use of gasoline was in fact a property tax and therefore void under the state constitution, stated (256 U.S. page 649, 41 S.Ct. page 608, 65 L.Ed. 1139): "The tax imposed by the act under consideration upon the 'sale or use of all gasoline sold or used in this state' is not property taxation, but in effect, as in name, an excise tax." In West India Oil Co. v. Gallardo, 1 Cir., 6 F.2d 523, the court upheld a 10 per cent tax levied by Porto Rico on all automobiles produced, manufactured, sold or used in Porto Rico. The court stated (6 F.2d page 525): "We think it plain that this is an excise tax on sale or use, and not an import tax. * * * Equally untenable is the contention that this is a tax on property and void for lack of uniformity. The tax is upon automobiles 'manufactured, sold or used in Porto Rico.' It is not a tax upon ownership as distinguished from the production, sale or use." In American Airways v. Wallace, D.C., 57 F.2d 877, the court had under consideration the validity of a Tennessee statute imposing a tax on persons engaged in the business of selling, storing or distributing gasoline. In discussing the nature of the tax the court stated (57 F.2d page 880): "The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax upon the business of storing and withdrawing the gasoline and the amount is computed upon withdrawals." In Central Vermont Ry. v. Campbell, 108 Vt. 510, 192 A. 197, 198, 199, 111 A.L.R. 175, the supreme court of Vermont, in upholding that state's tax upon the "use, distribution or sale" of gasoline, declared: "It is an excise tax upon the domestic sale or use of the gasoline, measured by gallonage." Many of the use tax cases are reviewed in this opinion. In Commonwealth v. Dixie Greyhound Lines, 255 Ky. 111, 72 S.W.2d 1032, 1033, the court described the Kentucky gasoline use tax as "an excise tax on distribution, consumption, or use". It is also worth noting that the United States Supreme Court in Southern Pac. Co. v. Gallagher, supra, in analyzing the nature of the very tax here challenged, refers to it as one that (59 S.Ct. page 391, 83 L.Ed. —) "imposes an excise on the consumer * * for the storage, use or other consumption in the state of such property". There is

an excellent discussion of the problem in Henneford v. Silas Mason Co., supra,—the case which upheld as an excise tax the use or "compensating" tax of the state of Washington, a tax substantially similar to the one here under attack. After holding that the tax was an excise tax, in further discussing the nature of the tax the court stated (300 U.S. page 582, 57 S.Ct. page 526, 81 L.Ed. 814):

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination. * * * For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. * * * The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."

The cases of Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 41 S.Ct. 272, 65 L.Ed. 638, and City of Los Angeles v. Lankershim, 160 Cal. 800, 118 P. 215, 216, cited and relied upon by appellants are not in point. In the Dawson case the court held that a Kentucky statute imposing a gallonage tax on persons engaged in the business of owning and storing whisky in bonded warehouses, such tax being payable when the whisky was either withdrawn from bond or transferred in bond from Kentucky to a point outside the state, was in fact a property tax upon ownership as such, and was not a license tax. This conclusion was predicated upon the peculiar terms of that statute, and upon the fact that the emergency clause of the statute indicated that the legislature of Kentucky considered that it was taxing the whisky and not a privilege. This case is not contrary nor inconsistent with the later Supreme Court cases cited, supra, holding that use taxes are excise taxes. In the Lankershim case this court expressly refused to determine whether a so-called license tax, payable yearly by persons engaged in "maintaining, managing or conducting a building for the purpose of letting office rooms", the tax being measured by the size of the building, was a property or an excise tax.

[9] The appellants' last contention (urged in their closing briefs) is that under the declaration of rights of the California Constitution (art. I, sec. 1) every person possesses "certain inalienable rights, among which are those of * * * acquiring, possessing, or protecting property"; that under this section an excise tax upon the privilege of ownership and use may not be levied by the state, although concededly the section does not prohibit property taxes. The contention is obviously unsound. As already held, the tax is not upon ownership as such, but upon the privilege of use, storage or consumption. The cited provision no more prohibits a tax on the privilege of use than it does a tax on the property itself.

For the foregoing reasons the judgments appealed from should be and each is hereby affirmed.

13 Cal.2d 534

SKIDMORE et al. v. ALAMEDA COUNTY.

S. F. 16156.

Supreme Court of California.

May 16, 1939.

1. Counties ⇐194

A contract whereby a county employed plaintiffs to investigate and report on tax delinquent property and providing that plaintiffs were to be paid, to the extent of $12,000, 50 per cent. of all money received by county for sale or redemption of such property did not obligate county to sell all land recommended to be sold in plaintiffs' reports and which was not redeemed, especially where contract expressly provided that compensation of plaintiffs was to be measured by one-half the county's proportion of proceeds received from actual sales or redemptions.

2. Counties ⇐194

Under a contract whereby a county employed plaintiffs to investigate and report on tax delinquent property and providing

that plaintiffs were to be paid, to extent of $12,000, 50 per cent. of money received by county for sale or redemption of such property, a limitation within which the county was required to sell lands not redeemed could not be inferred for purpose of accelerating due date of plaintiffs' compensation, especially where contract expressly provided compensation was to be measured by one-half the county's proportion of proceeds received from actual sales or redemptions.

3. Accord and satisfaction ⇐10(1)
Compromise and settlement ⇐6(2)
Counties ⇐168(1)

Plaintiffs' acceptance of payment made by auditor pursuant to warrant which county board of supervisors directed auditor to issue to plaintiffs for final payment due plaintiffs under contract with county for an investigation and report on tax delinquent property did not constitute a "final payment" and termination of all obligations under contract or an "accord and satisfaction," where there was no dispute as to amount due plaintiffs; the term "final payment" having reference only to final payment of compensation for items specified by warrant.

[Ed. Note.—For other definitions of "Accord and Satisfaction" and "Final Payment," see Words & Phrases.]

4. Counties ⇐200

Plaintiffs employed by a county to investigate and report on tax delinquent property under a contract for contingent compensation could recover items of compensation based on sales made prior to one year next preceding the filing of their claim, where a year had not elapsed between accrual of items set forth in claim, if items showing amounts actually received by county for sales as a result of plaintiffs' recommendations, as to which plaintiffs had not received their measure of compensation, could be deemed an account or claim within meaning of statute concerning claims against a county. Pol.Code, § 4075.

5. Counties ⇐200

In determining whether items in a claim against a county for a share in money received by the county from sale of lands for delinquent taxes constituted an "account or claim" within statute requiring claims to be presented within a year after the last item of the account or claim accrued, Supreme Court was to be guided by intent of Legislature in adopting the statute. Pol.Code, § 4075.

[Ed. Note.—For other definitions of "Account" and "Claim," see Words & Phrases.]

6. Limitation of actions ⇐5(1)

Statutes of limitation are to be strictly construed, and the court must find the intention of the Legislature from the statute itself.

7. Counties ⇐200

The statute requiring claims against a county to be presented within a year after the last item of account or claim accrues applies to any claim in favor of any person and includes a claim arising under express contract. Pol.Code, § 4075.

8. Counties ⇐200

Under statute requiring claims against a county to be presented within a year after the last item of account or claim accrues, a "claim" is not necessarily restricted to the essential requirements of a formal or technical account, since the words "account" and "claim" are both used in such statute. Pol. Code, § 4075.

9. Counties ⇐200

The statute requiring claims against a county to be presented within a year after the last item of account or claim accrues did not manifest an intention that varying amounts which become due to a claimant for the performance of specified services under express contract should be treated as separate claims, rather than as items of one claim. Pol.Code, § 4075.

10. Counties ⇐200

Under a contract whereby a county employed plaintiffs to investigate and report on tax delinquent property and agreed to pay plaintiffs, to extent of $12,000, 50 per cent. of all money received by county for redemption or sale of such property, items of compensation based on sales made prior to one year next preceding the filing of plaintiffs' claim against county constituted an "account or claim" within statute requiring claims against a county to be presented within a year after last item of account or claim accrued; and hence plaintiffs could recover entire amount of such items as remained unpaid, where one year had not intervened between any of the items and claim had been filed in compliance with law. Pol. Code, §§ 4075, 4078; Code Civ.Proc. § 342.

11. Counties ⇐213

Upon the rejection of a claim by a county board of supervisors, the claimant may bring an action at law and establish his claim against the county as fully and effectively as it would have been established by a favorable order of the board in the first instance. Pol.Code, §§ 4075, 4078; Code Civ.Proc. § 342.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by C. E. Skidmore and another against Alameda County to recover a balance alleged to be due under the terms of a contract entered into by the plaintiffs with the defendant. From a judgment for defendant, plaintiffs appeal.

Reversed.

Prior opinion, 82 P.2d 612.

Frank L. Guerena, Hester W. Webb, and William H. Mackay, all of San Francisco, for appellants.

Earl Warren, Dist. Atty., Alameda County, of San Francisco, and Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., both of Oakland, for respondent.

SHENK, Justice.

The plaintiffs sued on a claim filed with the board of supervisors of Alameda county on May 11, 1932, and rejected. The claim contained a list of items alleged to have accrued to the plaintiffs between April 1, 1922, and February 19, 1932. The defendant interposed the defense of accord and satisfaction by an alleged final payment to the plaintiffs, and pleaded as a bar the provisions of section 4075 of the Political Code, which limit the time for filing claims to one year after the last accrued item of the account. Judgment was rendered for the defendant and the plaintiffs appealed.

On March 30, 1922, the board of supervisors of the defendant county adopted a resolution by which the plaintiffs Skidmore and Kramer were employed to check all deeds and sales to the state of unredeemed or unsold property in said county on which taxes were first delinquent in 1916-17 and prior years. The resolution required the plaintiffs to submit reports covering all such sales to the state, with recommendations as to further disposition of the separate parcels. By the resolution the plaintiffs were to be paid for their services an amount equal to 50 per cent of the county's proportion of all moneys received on the redemptions or sales of such properties, with certain exceptions not material here. Warrants were to be issued monthly up to 75 per cent of the amount shown to be due during the preceding month, the remaining 25 per cent to be paid when the plaintiffs furnished an affidavit to the effect that they had checked "the records of the United States Land office, the State Surveyor's office, County Auditor's and County Recorder's office of the County of Alameda to the extent necessary for a complete performance of the things required to be done and performed by them under this resolution, and have also submitted to the Board of Supervisors of Alameda County their report and recommendation, as hereinbefore provided". It was provided that in no event should the compensation of the plaintiffs for such services exceed $12,000.

The plaintiffs commenced performance at once and as the work progressed furnished lists, reports and recommendations to the board as required by the contract. Sales and redemptions of numerous parcels were made in accordance with the recommendations of the plaintiffs. Warrants representing 75 per cent of the amount due to the plaintiffs were issued periodically. Prior to November 3, 1927, the plaintiffs completed their work of checking and making reports and recommendations, and filed the required affidavit with the board of supervisors. On the date last mentioned the board adopted a resolution reciting those facts and resolving that the services of the plaintiffs were "hereby accepted as full and complete performance of the things required to be done and performed by them", under the contract, and that the "county auditor be and he is hereby authorized to issue his warrant in favor of said A. L. Kramer and C. E. Skidmore for the final payment due said persons under and by virtue of the terms of said contract". The auditor accordingly drew a warrant for the sum of $860.97, and the proceeds thereof were collected by the plaintiffs.

In concluding that the plaintiffs were entitled to nothing, the trial court apparently was of the opinion that the board properly rejected the claim on the ground that the receipt of the sum of $860.97 was full payment to the plaintiffs under the

contract. It appeared beyond dispute, however, that said sum of $860.97 represented the final 25 per cent of the amount reported by the county as due and payable to the plaintiffs up to that time; that sales and redemptions in addition to those accounted for by the periodic and final payments to the plaintiffs were consummated and that the proceeds thereof were retained by the county without any accounting to the plaintiffs; that the items unaccounted for accrued in each of the years 1922 to 1932, inclusive, and that the last item accrued within one year prior to the filing of the claim.

The claim filed with the board contained a list of the unaccounted for items representing sales actually made as a result of the plaintiffs' reports and recommendations. Some of those sales occurred before and some after the alleged "final payment" authorized under the resolution of November 3, 1927. Also included in the plaintiffs' claim was a list of all properties referred to in their reports and recommendations which have not yet been sold or redeemed, but which if sold or redeemed would, it is contended, entitle the plaintiffs to compensation in excess of $12,000. The complaint included a cause of action based on the county's refusal and failure to permit sales of such properties, and under which it was sought to recover the difference between the sums theretofore received by them and the maximum of $12,000 specified in the contract, or $8,264.77.

[1, 2] The cases of Skidmore v. West, 186 Cal. 212, 199 P. 497, and Skidmore v. Dambacher, 6 Cal.App.2d 83, 43 P.2d 1110, have settled favorably to the plaintiffs the question of the validity of the contract herein involved. However, there is nothing stated in those decisions, nor do we find any provision of the present contract, which would warrant a conclusion that the county was bound to sell every parcel of land recommended to be sold in the plaintiffs' reports. There is no limitation of time stated in the contract within which the county must effect a sale of parcels not redeemed. Whether such a provision, if included, would be valid, it is not now necessary to decide. Such a limitation may not be inferred for the purpose of accelerating the due date of the compensation to be paid to the plaintiffs. The contrary intent is in fact expressed by the provision that the compensation of the plaintiffs is to be measured by one-half the county's proportion of the proceeds received from actual sales or redemptions. But the plaintiffs are nevertheless entitled to recover any portion of their claim, less than the whole, which is legally due them. Nelson v. Merced County, 122 Cal. 644, 646, 55 P. 421; Welch v. County of Santa Cruz, 30 Cal.App. 123, 156 P. 1003.

[3] The plaintiffs contend that the resolution of November 3, 1927, authorizing the "final payment" and the receipt by them of the proceeds of the warrant issued thereunder, may not be construed as an accord and satisfaction, or payment in full of all sums due or to become due under the resolution embodying the contract between them and the county.

The terms of the contract, the wording of the resolution of November 3, 1927, the amount of the warrant representing such "final" payment, and the subsequent issue of further warrants to the plaintiffs, all indicate conclusively that by the issuance of the warrant for $860.97 it was intended to discharge only the 25 per cent withheld by the county until the complete performance by the plaintiffs of the services contemplated by the first resolution. There was no dispute between the parties at the time with reference to the actual sales or redemptions effected pursuant to the plaintiffs' report and recommendations. In fact it was only a short time before the filing of their claim that the plaintiffs acquired knowledge of sales of parcels in addition to those as to which compensation had been computed and received. As stated, the amount of the warrant for $860.97 represented exactly 25 per cent of the amounts theretofore reported by the county as payable to the plaintiffs, 75 per cent of which had previously been received by them. In the years 1929, 1930 and 1931, six additional warrants, varying in amounts from $4.50 to $206, were issued to and collected by the plaintiffs, representing further sales made by the county subsequent to the resolution of November 3, 1927. Each of these additional warrants represented a sum equal to 50 per cent of the moneys received by the county on such sales, and therefore admittedly represented 100 per cent of the amount thereby due to the plaintiffs under the contract. There is no evidence which would warrant the conclusion of the board of supervisors or of the trial court that the warrant issued pursuant to the resolution of November 3, 1927, was in full payment and satisfaction of all past and future unpaid claims to compensation which the

plaintiffs might have under the contract. The only proper conclusion on the record is that the payment designated "final", pursuant to the resolution of the board, settled only the claims for items of compensation which the warrant specified and was thus intended to represent.

The question then is whether the plaintiffs are entitled to recover any of the items of compensation based on sales made prior to one year next preceding the filing of their claim. The county asserts that the provisions of section 4075 of the Political Code bar all items of the claim which accrued more than one year prior to the time when the claim was filed with the board. That section specifies that the claim must be presented and filed "within a year after the last item of the account or claim accrued".

[4] There is no question that a year has not elapsed between the accrual of the items set forth in the plaintiffs' claim. If therefore the items showing amounts actually received by the county for sales as a result of the plaintiffs' reports and recommendations, and as to which they had not theretofore received their measure of compensation, may be deemed to constitute an "account or claim" within said section 4075, the plaintiffs would be entitled to recover on all of such items. City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; Nelson v. Merced County, 122 Cal. 644, 55 P. 421.

[5] To support its contention that the plaintiffs' claim was not an "account", but represented separate causes of action embraced within one alleged claim, and that as to each the statute applied independently, the defendant relies on cases such as Millet v. Bradbury, 109 Cal. 170, 41 P. 865; Lee v. De Forest, 22 Cal.App.2d 351, 71 P.2d 285; George Rice & Sons v. Cowan, 46 Cal.App. 225, 189 P. 132, and People v. California Safe Deposit & Trust Co, 41 Cal.App. 727, 183 P. 289. Those cases give the technical definitions of a mutual "account" connoting entries of both debit and credit, the deduction of items on one side of the account from the amount of the items on the other side for the purpose of striking a balance, and exclude express contracts and obligations reduced to writing, and "instalment" contracts. The facts involved the application of the general statutes of limitations. Assuming the pertinency of such decisions under appropriate statutes of limitation, we must here be guided by the intention of the legislature in adopting the Political Code section pleaded by the defendant.

[6-10] As noted in Nelson v. Merced County, supra, 122 Cal. at page 647, 55 P. at page 422, "Statutes of limitation are to be strictly construed, and the court must find the intention of the legislature from the statute itself". The code section applies to any claim in favor of any person, and would include a claim arising under express contract. The words "account" and "claim" are both used, indicating that a claim is not necessarily to be restricted to the essential requirements of a formal or technical account, as defined in the cases relied upon by the defendant. A much broader meaning is very obviously intended. There is no language in the statute to express the intent that varying amounts which become due to the claimant for the performance of specified services under an express contract should be treated as separate claims, rather than as the items of one claim. The statute contains no limitation and must be applied as it plainly reads. It was so applied in Nelson v. Merced County, supra, where the claimant sought payment for services based on a per diem stipend unpaid for more than three years prior to the filing of the claim. It was held that under a similar statute "all employment by the day, under the same contract, at a stipulated compensation, is the proper subject of an account to be embraced in a single cause of action". No controlling distinction may be drawn in the present case because some act on the part of the county was essential before compensation became due to the plaintiffs. There was here but one contract of employment, and several items of compensation became due to the plaintiffs under the terms thereof. Inasmuch as the lapse of one year has not intervened between any of the items, and the claim was filed in compliance with law, the plaintiffs, on this record, are entitled to recover the whole amount of such items accrued and unpaid.

[11] The plaintiffs' action was timely brought pursuant to the provisions of section 4078, Political Code, which permit an action on a rejected claim. Sec. 342, Code Civ.Proc. The decision in the case of Cunning v. County of Humboldt, 204 Cal. 31, 266 P. 522, 523, answers the defendant's contention that the finding of the board of supervisors on factual issues was final and conclusive and cannot be inquired into ex-

cept for fraud or upon a showing that the board acted in excess of or without jurisdiction. In that case it was said: "In the absence of fraud, the approval of a claim by the local board of supervisors is conclusive upon the county. County of Yolo v. Joyce, 156 Cal. 429, 432, 105 P. 125. However, the converse does not necessarily follow, and, upon the rejection of a claim by such board, the claimant may bring an action at law and establish his claim against the county as fully and effectively as it would have been established by a favorable order of the board in the first instance."

The defendant does not refer to, nor does there appear to be included in the statute, any limitation upon the jurisdiction of the court in the trial of an action permitted to be brought on a rejected claim pursuant to section 4078 of the Political Code. The absence of any such restriction on the jurisdiction of the court in the trial of the issues in such a case was thus impliedly recognized by the decision in the case last above cited. Furthermore, as hereinbefore noted, there is no conflict on any material issue of fact in the present case. The law, as applied to the undisputed showing, requires a reversal of the judgment.

The judgment is reversed.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.; HOUSER, J.



13 Cal.2d 541

UNION TRUST CO. OF SAN DIEGO v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

L. A. 16626.

Supreme Court of California.

May 17, 1939.

1. Costs ⇐199

If the prevailing applicant in a mandamus proceeding, commenced in Supreme Court or a District Court of Appeal, desires an allowance for costs, and judgment does not award them, he should apply to the court for the allowance within such time as will enable the court to pass upon the application and, if costs are allowed, to modify the judgment before it becomes final. Code Civ.Proc. § 1095.

2. Costs ⇐199
Mandamus ⇐190

Although provisions of Code of Civil Procedure relating to allowance of costs in mandamus proceedings purport to authorize the awarding of costs to the prevailing applicant only, it may be assumed that a prevailing respondent is likewise entitled to costs, but the same rule with reference to the time of presenting the cost bill should be made to apply as in the case of a prevailing applicant. Code Civ.Proc. §§ 1027, 1034, 1095, 1109, 1110.

3. Costs ⇐199

Respondents in mandamus proceedings instituted in the District Court of Appeal and transferred to the Supreme Court for hearing and determination, in which the writ was denied, were not entitled to an order modifying the judgment to include an allowance of costs where the order denying the writ had become final before application for allowance of costs was made. Code Civ. Proc. §§ 1027, 1034, 1095, 1109, 1110.

4. Costs ⇐199

When a mandamus proceeding is commenced in a District Court of Appeal or in the Supreme Court, no remittitur is issued following the decision, and the time for filing a cost bill in such a case cannot be governed by provisions of the section of Code of Civil Procedure relating to the recovery of costs on appeal. Code Civ.Proc. §§ 1027, 1034, 1095, 1109, 1110.

In Bank.

Proceeding by the Union Trust Company of San Diego for a writ of mandate directed to the Superior Court of the State of California, in and for the County of San Diego, and others. On motion of respondents for allowance of costs incurred in resisting petition for writ of mandate before District Court of Appeal and the Supreme Court.

Motion denied.

For prior opinion, see 87 P.2d 1011.

Stearns, Luce, Forward & Swing, of San Diego, for petitioner.

C. J. Novotny, of San Diego, for respondents.

PER CURIAM.

The respondents, as the prevailing parties, seek to recover their costs in a mandamus proceeding. The petition for the writ was filed in the District Court of Appeal. That court ordered the peremptory writ as prayed. On petition of the respondents the cause was transferred to this court for hearing and determination. This court on June 29, 1938, denied the writ. Union Trust Company of San Diego v. Superior Court et al., 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259. On July 29, 1938, the respondents filed a memorandum of costs together with a notice that a motion would be made during the September session of the court for an order allowing costs, directing the issuance of a writ of execution and the manner of collection, and if necessary amending the order denying the writ so as to provide for the allowance of costs. The motion came on for hearing in September as noticed, and was denied from the bench for the reason that counsel for the moving parties did not appear. Upon the insistence of counsel that his absence was inadvertent a rehearing was granted.

Section 1095 of the Code of Civil Procedure provides that the successful applicant for the writ of mandamus is entitled to his costs. This provision was recognized and applied in Gould v. Moss, 158 Cal. 548, 111 P. 925, wherein it was held that although costs could be allowed the successful applicant under that section, the judgment must contain an order to that effect; that in the absence of such an order the filing of a memorandum of costs would be of no avail to the prevailing applicant; that it could not be assumed that the judgment, without a special order, would carry costs, and that this section applied to mandamus proceedings, whether begun in the superior court, in the Supreme Court, or in a District Court of Appeal. It was also held that the judgment in that case had long since become final and that, even if the court had power to revise it, no request to that end had been made. See, also, Kaufman v. Pacific Indemnity Co., 5 Cal.2d 761, 769, 56 P.2d 504; Clough v. Superior Ct. 19 Cal.App. 2d 745, 65 P.2d 831.

[1] On the present motion we are requested to modify the judgment so as to include an allowance of costs, notwithstanding the fact that the order denying the writ had become final before the motion was made. The holding of the Gould case, above noted, cannot be considered in any sense as an indication that the court, under the circumstances here shown, has the power to revise the judgment after the same has become final. The rule with reference to the prevailing applicant in a mandamus proceeding, commenced in the Supreme Court or a District Court of Appeal, would therefore appear to be that if he desires an allowance for costs, and the judgment does not award them, he should apply to the court for the allowance within such time as will enable the court to pass upon the application and, if costs be allowed, to modify the judgment before the same becomes final.

[2, 3] It is to be observed that section 1095 of the Code of Civil Procedure purports to authorize the awarding of costs to the prevailing applicant only. It may be assumed that a prevailing respondent, pursuant to sections 1027, 1034 and 1110 of the Code of Civil Procedure, is likewise entitled to costs, but the same rule with reference to the time of presenting the cost bill should be made to apply as in the case of a prevailing applicant, namely, that it should be filed within such time as will enable the court to pass upon the application and, if costs be allowed, to modify the judgment to that effect before the same becomes final. The respondents' application for costs herein was not filed within that time.

Part 3, title 1, of the Code of Civil Procedure, relates to the special proceedings of review, mandate and prohibition. Chapter V of that title provides in section 1109 that, except as otherwise provided in that title, the provisions of part 2 of the same code are applicable to and constitute the rules of practice in the proceedings mentioned in the title, and in section 1110, that "The provisions of part two of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title".

[4] If the same rules as to costs to the prevailing applicant in a mandamus proceeding be not applied to the prevailing respondent, the sections of this code in part 2 relative to costs, and incorporated by reference into part 3, title 1, would be inconsistent with the operation of section 1095, as construed in the Gould case. When the proceeding is commenced in a

District Court of Appeal or in the Supreme Court, no remittitur is issued following the decision and the time for filing a cost bill in such a case cannot, therefore, be governed by the provisions of section 1034 of the Code of Civil Procedure.

Motion denied.



BARNEY v. FIRST NAT. BANK OF MONTEREY et al.

Civ. 11024.

District Court of Appeal, First District, Division 2, California.

May 16, 1939.

Rehearing Denied June 15, 1939.

Hearing Granted July 13, 1939.

1. Corporations ⇐198

A "voting trust" vests in trustees the legal title to stock in a corporation and the stockholders receive voting trust certificates in lieu of their holdings so transferred. Civ. Code, § 321a.

[Ed. Note.—For other definitions of "Voting Trust," see Words & Phrases.]

2. Licenses ⇐18½

Voting trust certificates representing beneficial interest of holder in stock of corporation are "securities" within statute prohibiting issuance of "securities" by any "company" without permit of the corporation commissioner and trustees under the voting trust agreement came within definition of "company." Civ.Code, § 321a; Gen. Laws 1931, Act 3814, §§ 2(a)(3, 7), 16, 26.

[Ed. Note.—For other definitions of "Company" and "Security," see Words & Phrases.]

3. Licenses ⇐39

Voting trust certificates issued without permit from the corporation commissioner were void, and equitable title to stock vested in original stockholders, leaving them at liberty to sell or assign their full title and interest. Civ.Code, § 321a; Gen.Laws 1931, Act 3814, §§ 2(a)(3, 7), 16, 26.

4. Licenses ⇐39

The invalidity of provision in voting trust agreement for issuance of voting trust certificates without permit of the corporation commissioner rendered entire agreement void. Civ.Code, § 321a, 1608; Gen.Laws 1931, Act 3814, §§ 2(a)(3, 7), 16, 26.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by George L. Barney against the First National Bank of Monterey, T. A. Work, Jr., Joe Perry and Charles B. Rosendale, to recover possession of certain stock certificates and to quiet title thereto. Judgment for plaintiff and the last three named defendants appeal.

Affirmed.

Rosendale & Thomas, of Salinas, and Silas W. Mack and John Milton Thompson, both of Monterey, for appellants.

J. A. Bardin and J. T. Harrington, both of Salinas, and McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover possession of certain certificates of stock of the Custom House Packing Corporation, and to quiet title thereto as against the defendants. The cause was tried by the court without a jury, and plaintiff had judgment.

The facts are not in material dispute. The stock certificates were purchased by plaintiff from two stockholders to whom they had been regularly issued by the corporation. When the proceeding was commenced they were in actual possession of the defendant bank, which held them for the other defendants, who, in turn, claimed them as trustees under a voting trust agreement to which these two stockholders were parties. This agreement, executed on August 19, 1936, by a majority of the holders of the issued and outstanding stock of the corporation, called for the endorsement and delivery by the subscribing holders of their stock certificates to the three trustees named therein and provided for the transfer of such shares upon the books of the corporation into the names of these trustees. Voting trust certificates were to be issued by the trustees representing the beneficial interest of each holder in the stock of the corporation. These certificates were made transferable and called for the payment by the trustees of proportionate dividends on the corporation's stock, such payments to be made to the "registered own-

ers" of such certificates appearing on the "transfer books" of the trustees. Though the agreement provided that, upon the transfer of the stock to the trustees upon the books of the corporation the trustees should be entitled to vote them, no such transfer had been made at the time of trial. It is conceded that the trustees had no permit from the corporation commissioner to issue the trust certificates, and no permit to take subscriptions for, or make a contract for, their issuance. Just two questions are presented on this appeal —whether these certificates are "securities" within the meaning of the Corporate Securities Act, and whether, if the provision for the issuance of such certificates be void for that reason, it is a separable provision of the entire contract.

[1] The trial judge held adversely to the trustees upon both of these issues, and we are in full accord with his ruling. The parties agree that there are no authorities of this state covering the first question and that the case is one of first impression. It is a question to be resolved by an interpretation of the Corporate Securities Act (Deering's Gen.Laws, Act 3814). The creation of such trusts is authorized by section 321a of the Civil Code, which provides in part: "Shares of stock in any corporation may be transferred to a trustee or trustees in order to confer upon them the right to vote and otherwise represent such shares." Fletcher, in his Cyclopedia of Private Corporation, volume 5, page 267, says: "The modern voting trust, especially one formed under statutes enacted in several states, transfers to and vests in the trustees the stock and the legal title to it, and the stockholders receive voting trust certificates *in lieu of their holdings so transferred.*" (Italics ours.)

[2, 3] Section 16 of the Corporate Securities Act provides that "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect * * * shall be voidable." Section 2(a) 7 provides: "The word 'security' shall include any stock, bond, note * * * *certificate of interest or participation* * * * any transferable share * * * or *beneficial interest in title to* property, *profits or earnings,* * * *." (Italics ours.) Section 26, which fixes the method for the estimate of fees to be charged for filing an application with the commissioner for a permit to issue a "security", provides: "For the purpose of determining the above fees [subd. (c)]: Interim or voting trust certificates shall be deemed to have a value equal to the aggregate value of the securities to be represented by said interim or voting trust certificates."

We can draw but one conclusion from these provisions of the act, and that is that the legislature contemplated the inclusion of such voting trust certificates within its definition of security—either as a "certificate of interest or participation" or a "transferable share", or a "beneficial interest in * * * profits or earnings". It would serve no purpose to further define the term, or to confine it to any one of the specifications above named. It is sufficient to say that under any one of them the certificates in suit would come under the head of "securities" within the meaning of the act. This being so, they were not subject to issuance by the trustees without the commissioner's permit because, the trust having been created in part for the purpose of carrying on the business of the corporation, the trustees come within the definition of "company" (sec. 2 [a], subd. 3) as that word is used in the prohibitory provisions of section 16. Being void for this reason, the equitable title to the stock rested in the original stockholders and, since they had transferred to the trustees under a void agreement, they were at liberty to sell and assign to the plaintiff their full title and interest.

[4] The second question is one of both law and fact. The trial court, upon all the evidence, found that the provision for the issuance of the voting trust certificates was an inseparable part of the entire agreement "without which first parties thereto would not have entered into said contract and that said provision was one of the principal considerations for entering into said contract". With this finding of fact the trial court rightly drew the conclusion that the entire contract was void. Such conclusion is in harmony with section 1608 of the Civil Code, which reads: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

32 Cal.App.2d 673

SANDBERG et al. v. DUBUQUE FIRE & MARINE INS. CO. et al.

Civ. 12086.

District Court of Appeal, Second District, Division 2, California.

May 18, 1939.

1. Insurance ⇐146(3)

A fire policy is to be construed liberally in favor of insured, and any ambiguity is to be interpreted most strongly against insurer.

2. Insurance ⇐163(1)

A clause in a fire policy reciting special premium rate for insurance because of installation of sprinkler system and requiring its maintenance, which does not purport to be a limitation of the coverage, is not determinative of the extent of coverage afforded by the contract.

3. Insurance ⇐163(1)

Under policy insuring against loss by fire, property stored in a building owned by insured and providing for reduced rate of premium based on protection of premises by automatic sprinkler system which insured was required to maintain, insured was entitled to recover for loss when building owned by insured in which no sprinklers were installed was destroyed by fire, where policy could be construed as covering any building at insured's address and sprinkler systems had been maintained in two buildings in the same condition from time of issuance of policy to date of fire.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action on a fire policy by Arthur Sandberg and another, as executors of the estate of Martin S. Sandberg, deceased, and others, against the Dubuque Fire & Marine Insurance Company, a corporation, and another. From a judgment for the plaintiffs, defendants appeal.

Affirmed.

Hindman & Davis, of Los Angeles, for appellants.

Elbert E. Hensley and Malcolm Archbald, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover a sum alleged to be due upon a fire insurance policy defendants appeal.

These are the stipulated facts:

February 1, 1936, defendants issued and delivered to plaintiffs a fire insurance policy, insuring certain property against loss by fire for the term of three years ending February 1, 1939.

The policy read in part as follows:

"Special Hazard Form

"On the following described property, all only while situate No. 6000 Boyle Avenue, Los Angeles, California

"This policy being for $18,000.00 covers 18,000/18,000ths of each of the amounts specified and inserted in the blanks immediately preceding the following items:

" *1.	$ Nil	On the composition roof frame building occupied as Furniture Manufacturing and known as Sandberg Furniture Manufacturing Company.
" *2.	$ 8000.00	On equipment, Furniture & Fixtures while contained in above described building.
" *3.	$10000.00	On stock, while contained in above described building.
" *4.	$ Nil	On machine shop and/or foundry patterns, while contained in above described building.
" *5.	$ Nil	On the building occupied as and known as
" *6.	$ Nil	On equipment, while contained in last above described building.
" *7.	$ Nil	On stock, while contained in last above described building.
" *8.	$ Nil	On machine shop and/or foundry patterns, while contained in last above described building.
" *9.	$ Nil	On the building occupied as and known as
" *10.	$ Nil	On equipment, while contained in last above described building.
" *11.	$ Nil	On stock, while contained in last above described building.
" *12.	$ Nil	On machine shop and/or foundry patterns, while contained in last above described building.
" *13.	$ Nil	On the building occupied as and known as
" *14.	$ Nil	On equipment, while contained in last above described building.
" *15.	$ Nil	On stock, while contained in last above described building.
" *16.	$ Nil	On machine shop and/or foundry patterns, while contained in last above described building.
" *17.	$ Nil	On
" *18.	$ Nil	On Automatic Sprinkler Warranty SF#20 Attached Ninety Per Cent (90%) Average Clause SF#30 Attached.

"*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item."

The policy also contained these provisions:

"The words 'Building' 'Equipment' 'Stock' wherever used herein shall be construed as follows:

" 'Building'. On building and its additions (if any) of like construction communicating and in contact therewith, including foundations and capping and piling immediately thereunder, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also on all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators and equipment belonging to and constituting a part of said building; on materials contained therein and or on the ground within one hundred feet thereof for use in constructing additions or in making alterations or repairs to the building; and on platforms, trestles, gangways and chutes attached thereto and located on the above described premises, provided, however, that if same connect with any other building, then this insurance, as respects such platforms, trestles, gangways and chutes, shall cover only such portion thereof situate on the above described premises, as lies between said insured building and a point midway between it and such other building."

"This policy being written at a reduced rate based on the protection of the premises by an automatic sprinkler system, it is a condition of this policy that, so far as the sprinkler system and the water supply therefor are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order, and that no change shall be made in the said system or in the water supply therefor without the consent in writing of this Company."

There were located on the property described as No. 6000 Boyle avenue, Los Angeles, three composition roof, frame, ironclad buildings, two of them being equipped with an automatic sprinkler system, while the third was not. All three buildings were used by plaintiffs in the business of manufacturing furniture.

April 10, 1936, a fire destroyed lumber stored in the building that was not equipped with an automatic sprinkler system and also in one of the buildings that was equipped with such system. Defendants assumed responsibility and paid the loss resulting from the destruction of the property in the sprinkler equipped building but declined liability as to the property which had been destroyed in the nonsprinkler equipped building.

This is the sole question necessary for us to determine:

Did the fire insurance policy above mentioned extend coverage to the contents of the nonsprinkler equipped building?

This question must be answered in the affirmative, and is controlled by the following pertinent principles of law:

[1] (1) If the language in an insurance policy may be understood in more senses than one, it is to be construed liberally in favor of the insured, and any uncertainty or ambiguity in the contract is to be interpreted most strongly against the insurer. Raulet v. Northwestern Etc. Ins. Co., 157 Cal. 213, 218, 107 P. 292. Meyerstein v. Great American Ins. Co., 82 Cal.App. 131, 134, 255 P. 220.

[2] (2) A clause in a fire insurance policy reciting a special premium rate for the insurance because of the installation of a sprinkler system and requiring its maintenance, which does not purport to be a limitation of the coverage of the policy, is not determinative of the extent of coverage afforded by the contract. Studley Box & Lumber Co. v. National Fire Ins. Co., 85 N.H. 96, 100, 154 A. 337, 339, 75 A.L.R. 248.

[3] Applying the foregoing rules to the facts in the instant case, the policy on its face insured against the loss by fire of property stored in a building situated at No. 6000 Boyle avenue, Los Angeles. Construing this language in one of the senses of which it is susceptible, it covered property located in any building at No. 6000 Boyle avenue, Los Angeles, which was where the property for the loss of which recovery is sought was located when destroyed by fire. It is immaterial whether the building in which the property was located was equipped with an automatic sprinkler system or not, in view of the fact that two buildings located on said property were so equipped at the time the insurance was issued and the sprinkler systems had been maintained in the same condition from the time of the issuance of the policy to the date of the fire. Therefore, the trial court properly rendered judgment in favor of plaintiffs.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

32 Cal.App.2d 671

Ex parte SOMMERVILLE.

Cr. 3218.

District Court of Appeal, Second District, Division 1, California.

May 17, 1939.

Hearing Denied June 15, 1939.

Criminal law ⇐1218

A defendant who pleaded guilty to two counts charging separate violations of State Narcotic Act could be sentenced to county jail for consecutive terms of one year on each count, as against contention that statute prohibiting committal to county or city jail for more than one year on conviction of misdemeanor was intended to prevent any single period of confinement in county jail for longer than one year. Pen.Code, § 19a.

Proceeding in the matter of the application of James Sommerville for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

John S. Cooper, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

This is a proceeding under a writ of habeas corpus for the release of petitioner on the ground that he has been confined in the county jail for more than one year and that his further confinement is illegal under section 19a of the Penal Code, which in part provides: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year."

At the hearing of this writ it was disclosed that in an information filed by the district attorney of Los Angeles county petitioner was charged in two counts with separate and distinct violations of the State Narcotic Act; that on July 29, 1937, he entered pleas of guilty to both counts, pursuant to which guilty pleas he was, on August 13, 1937, sentenced to serve one year in the county jail on each count, the court directing that the sentences run consecutively.

The contention of petitioner is that the purpose of section 19a of the Penal Code is to prevent any single period of confinement in the county jail for longer than one year; that in enacting this section the legislature sought to prohibit protracted terms of imprisonment in a county jail and intended that any period of penal servitude longer than one year should be served in the penitentiary.

Both in principle and directly, this point, in a case involving judgments pronounced on separate counts of a single information, has been ruled upon, and is clearly established contrary to petitioner's suggestion in that regard. People v. Carr, 6 Cal.2d 227, 57 P.2d 489.

As petitioner is now legally detained under the sentence pronounced upon his plea of guilty to the second count of the information, the writ is discharged and the petitioner is remanded to the custody of the sheriff of the county of Los Angeles.

We concur: YORK, P. J.; DORAN, J.



32 Cal.App.2d 697

PIMENTEL v. HALL-BAKER CO.

Civ. 2265.

District Court of Appeal, Fourth District, California.

May 18, 1939.

1. Pleading ⇐93(1)

A defendant may plead inconsistent defenses.

2. Pleading ⇐345(1)

If one separate defense fails to state facts sufficient to constitute a defense, a judgment on the pleadings cannot be supported where another separate defense is sufficient to put the parties on their proof.

3. Pleading ⇐312

Where a cause of action or defense is based upon a written contract, which is made part of a pleading, the terms appearing on the face of the contract cannot be changed by any mere matter of averment in the pleading.

4. Pleading ⇐312

In suit to quiet title wherein defendant attempted to plead its title to and right to possession of the property under an oil lease attached to and made part of defendant's answer, allegations of answer would not be given such construction as would be contrary to clear terms appearing on the face of the lease.

5. Specific performance ⇐32(1)

Where the obligations of an oil lease are not mutual and reciprocal and there is no mutuality of remedies, an action for specific performance cannot be maintained by one party against another.

6. Mines and minerals ⇐73

Where an oil lease is supported by sufficient consideration and is for an indefinite term as for a period of years and as long thereafter as oil or other hydrocarbons may be produced from the leased property, lessee is immediately vested with an interest in the leased land which interest is "real estate."

7. Quieting title ⇐7(2)

Where an oil lease is supported by adequate consideration and a present interest in the leased property is vested in the lessee and the interest has not been terminated, portion of the lease vesting title in the lessee is an "executed" and not an "executory contract," and owner may not quiet his title against such vested interest, even though it appears that lease cannot be specifically enforced by one party against the other, due to lack of mutuality of remedies.

8. Pleading ⇐345(1)

In suit to quiet title wherein defendant claimed title to and right to possession of the property under an oil lease, conditions of which lessee allegedly performed, motion for judgment on the pleadings was improperly granted, since the respective interests of the parties should have been adjudicated after trial and evidence submitted by parties.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to quiet title by Manuel Pimentel against the Hall-Baker Company, a corporation. From a judgment for the plaintiff, defendant appeals.

Reversed.

Leonard R. Seaman, of Los Angeles, for appellant.

Martin J. Weil, of Los Angeles, and F. F. Thomas, Jr., William E. Wright, and McCutchen, Olney, Mannon & Greene, all of San Francisco, amici curiae for appellant.

Siemon & Claflin, of Bakersfield, for respondent.

MARKS, Justice.

This is an action to quiet title to land in Kern county. The complaint is in the form usual in such actions. Defendant, in its answer to the complaint, admitted plaintiff's title and right to possession subject to defendant's interest therein and right to possession thereof, of as much as was conveniently necessary for its operations, under an oil lease. The oil lease was executed by the parties on December 15, 1936. It was attached to and made a part of the answer. In a separate defense defendant pleaded its title and right to possession under the lease and alleged it had "fully complied with all the terms, conditions and covenants contained in said lease by it to be kept and performed".

Plaintiff moved for judgment on the pleadings and the motion was granted. Defendant has appealed from the judgment which was thereafter entered.

The oil lease was executed for the expressed consideration of ten dollars and "other valuable considerations". It granted to the lessee the right of possession and the right "to drill for, produce, extract, take and remove oil, gas, asphaltum and other hydrocarbons (and water without cost for its operations) from, and to store the same upon, said land * * * for a term of twenty (20) years from and after the date hereof and so long thereafter as oil or gas, or casinghead gas, or other hydrocarbon substances, or either or any of them, is produced therefrom". A one-eighth royalty to the lessor was provided in the lease.

The lessee agreed to commence drilling operations within five years from the date of the lease. If such operations were not commenced within one year (by December 15, 1937), the lessee agreed to pay the lessor yearly, in advance, and until drilling had been commenced, a rental of one dollar per acre. The lease also provided that "No implied covenant shall be read into this lease requiring the lessee to drill or to continue drilling on said land, or fixing the measure of diligence therefor. The lessee may elect not to commence or prosecute

the drilling of a well on said land as above provided, and thereupon this lease shall terminate." The lease also contained the usual quitclaim clause permitting the lessee to quitclaim all or any portion of the leased property to the lessor and thereby be released from all or a proportionate part of its drilling obligations, depending on the amount of land quitclaimed.

The lease also contained the following provision: "Upon the violation of any of the terms or conditions of this lease by the Lessee and the failure to begin to remedy the same within ninety days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end, * * *"

Plaintiff urges that the judgment may be supported by the allegations of defendant's second separate defense, wherein it is alleged that the lessee has performed all of the obligations of the lease resting upon it. It is urged that from this allegation we must presume one of the following situations: That defendant has quitclaimed the property to plaintiff; that it has performed all of its drilling obligations and has removed all hydrocarbons from the property; that it has otherwise terminated its interest in the leased property.

[1,2] If, for the purpose of argument, we assume this contention to be sound, it cannot support the judgment. This allegation appears in the second separate defense. The lease is made a part of both defenses. The first defense asserts title and right of possession under the lease. A defendant is permitted to plead inconsistent defenses. If one separate defense fails to state facts sufficient to constitute a defense, a judgment on the pleadings cannot be supported where, as here, another separate defense is sufficient to put the parties on their proof.

Further, it is clear that in the second defense defendant is asserting title to and right of possession of the leased property and is not disclaiming its rights in it. The lease is made a part of that defense. As far as the pleadings show, the only past due obligation of defendant at the time the complaint was filed on January 4, 1938, was payment of the rental due on December 15, 1937. Failure to pay that rental was not then a ground of forfeiture of the lease as the ninety days after notice of breach of a condition or obligation of the lease (which time was given defendant to remedy its default) could not have expired when the complaint was filed.

[3,4] Where a cause of action or defense is based upon a written contract, which is made a part of a pleading, the terms appearing on the face of the contract "cannot be changed by any mere matter of averment in the pleading". Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 147, 47 L.R.A. 334. If any such construction as that contended for by plaintiff could be put on the allegation of the second separate defense, that allegation is not controlling because it is contrary to clear terms appearing on the face of the lease. Further, we do not believe the language of the pleader is subject to any such interpretation. It is clear from the second separate defense that defendant was attempting to plead its title to, and right to possession of the property under what it maintained was a valid and existing contract and was not attempting to allege facts that would show surrender of the property or termination of the lease.

It is admitted that the lease is supported by sufficient consideration. It is contended that as the obligations of the lease are not mutual, and as it cannot be specifically enforced because of lack of mutuality of remedies, it can furnish no defense to plaintiff's action to quiet title.

It must be admitted that the lease lacks mutuality of remedies because the lessor cannot enforce the drilling obligations of the lessee. It has been consistently held that such a lease cannot be specifically enforced. Dabney v. Key, 57 Cal.App. 762, 207 P. 921; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; Moore v. Heron, 108 Cal.App. 705, 292 P. 136; Carlisle v. Lady, 109 Cal.App. 567, 293 P. 686; George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110.

It has also been broadly stated that a contract which lacks mutuality of remedies furnishes no defense to an action to quiet title by an owner against another claiming an interest in property under such a contract. Jolliffe v. Steele, 9 Cal.App. 212, 98 P. 544; Crane v. Roach, 29 Cal.App. 584, 156 P. 375; Archer v. Miller, 73 Cal. App. 678, 239 P. 92; Hedden v. Waldeck, 89 Cal.App. 494, 265 P. 344; Sheehan v. Vedder, supra.

Speaking generally, and until 1935, the foregoing rules have been considered con-

trolling when applied to an oil lease containing a quitclaim clause similar to the one in question here under which the lessee assumed no present enforceable obligation to drill for oil on the leased property. Up to that time there had been no definite and complete inquiry into the nature of the estate acquired by the lessee under such a lease.

In Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 792, 101 A.L.R. 871, the Supreme Court had occasion to carefully consider this question and said:

"Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit à prendre, which is an incorporeal hereditament, * * *.

"Under the usual oil and gas lease, the owner-lessor transfers to his lessee his right to drill for and produce oil and other substances. The rights of the lessee present a clear case of a profit à prendre in gross, a right to remove a part of the substance of the land. If the oil and gas lessee is not granted exclusive possession of the surface by the terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which, in fact, may preclude any other surface possession. This profit à prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years."

The case of Standard Oil Co. v. J. P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797, is to the same effect.

The same question was before the Supreme Court in the case of Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237, 243, where it was said: "The profit à prendre, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real, which is nevertheless an estate in real property, although not real property, or real estate. Callahan v. Martin, supra. * * * Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate. Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title. The grantee of the profit has a right to such possession of the surface as is necessary and convenient for the exercise of the profit, but he has no general estate in the surface."

A further consideration of the interest vested in the lessee by an oil lease is found in Dabney v. Edwards, 5 Cal.2d 1, at page 11, 53 P.2d 962, at page 966, 103 A.L.R. 822, where it is said: "Although we are in accord with the conclusion of the District Court of Appeal holding that the two leases which provide for a definite term of years were not included within the term, 'real estate,' we are of the opinion that the two leases which provide in addition to the definite fixed term specified that the leases are to continue 'so long thereafter as oil or gas or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save' are included in the term, 'real estate.' It follows logically that if the legal interest created by oil and gas leases which provide for a definite term of years, being classified as estates for years at common law, are deemed to be personal property and are therefore excluded from the definition of '"real estate" as used in subdivision 5, § 1624 Civil Code,' that the legal interest created by oil and gas leases which provide for a term of indefinite and uncertain duration, which under the common law are classified as freehold estates in the nature of a qualified or determinable fee, must be deemed to be real property and therefore included in the definition of real estate as used in said section."

These decisions by the Supreme Court have been followed in Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035; Morrow v. Coast Land Co., Cal.App., 84 P.2d 301, and Lever v. Smith, Cal.App., 87 P.2d 66.

[5, 6] Thus we find the following rules established by decisions in California: (1) Where, as is usual, the obligations of an oil lease are not mutual and reciprocal and there is no mutuality of remedies, an action for specific performance cannot be maintained by one party against another. (2) Where an oil lease is supported by a sufficient consideration and is for an indefinite term, that is for a period of years and as long thereafter as oil or other hydrocarbons may be produced from the leased property, there is immediately vested

in the lessee an interest in the leased land. This interest is conveyed to the lessee, is vested by the lease, and is real estate.

The description of the lessee's interest as found in Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, at page 215, 103 P. 927, may no longer be considered correct. The rule that a contract which lacks mutuality of remedies cannot be specifically enforced is too well founded in reason and supported by authority to be questioned. We need not question it here.

There remains for consideration the effect on this case of that rule which, as we have already observed, has been broadly stated as depriving a lessee of a defense against an action to quiet title by the landowner where the lease cannot be specifically enforced by reason of lack of mutuality of remedies.

Jolliffe v. Steele, supra, was an action to quiet title. The defendant asserted an interest in the land under a contract "to render personal services of an indefinite and uncertain character" which contract could not be specifically enforced. The District Court of Appeal announced and applied the rule we are considering. It appears from the opinion that the contract was without consideration and had been revoked before the action was filed which amply supported the judgment quieting plaintiff's title.

The case of Crane v. Roach, supra, was also an action to quiet title against a contract that could not be specifically enforced and which the court held was no defense to the action. It there appears that the defendant had defaulted in performing his obligations under the contract. The same is true in the cases of Archer v. Miller, supra; Sheehan v. Vedder, supra, and Carlisle v. Lady, supra.

The cases of Dabney v. Key, supra, and George v. Weston, supra, were actions for specific performance and did not involve the question of a defense by a lessee to an action to quiet title. From the facts of those cases it appears that the contracts relied upon could have presented no defense to action to quiet title for reasons with which we are not concerned here.

The case of Hedden v. Waldeck, supra, applied the rule to a cause of action which had some of the characteristics of an action to quiet title. While the actual facts of the case are difficult to gather from the opinion, it would appear that there had been at least a partial failure of consideration for the contract. See Waldeck v. Hedden, 89 Cal.App. 485, 265 P. 340.

The cases of Callahan v. Martin, supra, and Dabney-Johnston Oil Corp. v. Walden, supra, were suits to quiet each landowner's title against an assignee of a fractional interest of the landowner's royalty under an oil lease. The Supreme Court held that each assignee held an estate in the land and that the actions to quiet title against such interest could not prevail.

The facts appearing in Scheel v. Harr, supra, cannot be distinguished from those of the instant case. It was an action to quiet title against the assignee of an oil lease. Except as to spudding in the well, the instrument provided that the owner must give the lessee sixty days' notice of default before the lease could be terminated. No such notice had been given. It was held that as the defendants had a vested interest in the land created by the oil lease, which interest had not been terminated by the owner, the action to quiet title against such interest could not prevail. It clearly appears that the lease could not have been specifically enforced because of lack of mutuality of remedies.

In California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297, 300, it was said: "In support of its general demurrer, plaintiff also relies on Archer v. Miller, 73 Cal.App. 678, 684, 239 P. 92, and similar cases holding that a contract of purchase and sale must be specifically enforceable and must therefore be alleged and shown to be just and reasonable in order to constitute a defense to a quiet title action. This line of authorities is without application to this cause, for, as appears from the allegations of the cross-complaint, which are admitted by the demurrer, we are not here concerned with an executory contract of sale which it is sought to have specifically enforced, but rather with an executed transaction, the circumstances of which are legally sufficient, should the proof support the allegations, and the contract be accordingly reformed, to charge plaintiff as trustee for the defendants. The general demurrer is therefore without merit." See, also, Associated Oil Co. v. Myers, 217 Cal. 297, 18 P.2d 668.

From the foregoing authorities it seems clear that the instant case falls without the rule which has been generally stated, that a contract which cannot be specifically enforced furnishes no defense to an action to quiet title. We have here either an

exception to or a modification of that rule under the later cases we have cited.

[7] Under the allegations of the pleadings we must conclude that the true rule to be applied here is, that where an oil lease is supported by an adequate consideration, and where it has vested a present interest in the leased property in the lessee, which interest has not been terminated (and perhaps where the lessee is not in default), the owner may not quiet his title against such vested interest. The portion of the lease vesting the title in the lessee is an executed and not an executory contract.

[8] It follows that as the answer set up an existing estate in the land in defendant the motion for judgment on the pleadings should have been denied. The respective interests of the parties in the land (assuming the evidence will show such an existing interest in defendant) should have been adjudicated after trial and evidence submitted by the parties. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 109 Am.St. Rep. 107; Wilson v. Anderson, 109 Cal. App. 467, 293 P. 627; Williams v. Rush, 134 Cal.App. 554, 25 P.2d 888.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 707

SANDRINI et al. v. BRANCH et al.

Civ. 2267.

District Court of Appeal, Fourth District, California.

May 18, 1939.

1. Evidence ⇐419(11), 432

A failure of consideration or actual consideration for contract may be proved by parol evidence, although a different consideration appears in writing. Code Civ.Proc. § 1962, subd. 2.

2. Contracts ⇐50

A contract is supported by sufficient consideration if there is some benefit to the promisor or detriment to the promisee regardless of the amount of the benefit or detriment. Civ.Code § 1605.

3. Mines and minerals ⇐58

An oil lease executed in consideration of $10 and promise to drill well in vicinity of leased property to depth of 6,000 feet which was done was supported by sufficient consideration, in that there was benefit to the promisor and detriment to the promisee. Civ.Code, § 1605.

4. Quieting title ⇐7(2)

Where there was no compliance with oil lease, providing that upon violation of terms of lease and failure to remedy same within 60 days after written notice from lessor to do so, lease could be terminated at option of lessor, a judgment quieting title in landowners was unauthorized.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to quiet title by Severin B. Sandrini and another against Ed Branch and another. From a judgment for the plaintiffs, named defendant appeals.

Reversed.

Frederick W. Welsh, of Bakersfield, for appellant.

Victor H. Parry and W. R. Bergman, both of Bakersfield, for respondents.

MARKS, Justice.

Plaintiffs brought this action to quiet their title to one hundred sixty acres of land in Kern county. Defendants asserted their title under an oil lease dated March 28, 1935, made by M. Sandrini, now deceased, the then owner of the property and predecessor in interest of plaintiffs, and the United Exploration Company of Los Angeles, lessee and assignor of defendant Ed Branch. The trial court found that the lease was not supported by any consideration and rendered judgment for plaintiffs. This appeal from the judgment followed.

Counsel present two questions for our consideration: (1) Is the finding of no consideration supported by the evidence? (2) Is the oil lease any defense to the action to quiet title where it appears on its face that it could not be specifically enforced because of lack of mutuality of remedies?

The lease recites that it was made "for and in consideration of Ten Dollars, in

hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of Lessee to be paid, kept and performed".

[1] It is thoroughly established that failure of consideration, or actual consideration, for a contract may be proved by parol evidence although a different consideration appears in writing. Sec. 1962, subd. 2, Code Civ.Proc.; 19 Cal.Jur. 1027, and cases cited; 8 Ten-Year Supp. p. 483, sec. 169, and cases cited.

The record shows that the representative of the United Exploration Company of Los Angeles called upon M. Sandrini early in March, 1935, and discussed leasing his property for drilling for oil. The property was in what is known as "Wildcat" territory and Sandrini was informed that no lease would be made unless sufficient other property could be leased to justify the expense of an exploratory well. He was told that no cash bonus would be paid but if the leases were made a well would be drilled to a depth of at least six thousand feet on his or some neighboring property. Sandrini expressed his desire to have the property explored for oil and his willingness to lease on those conditions.

On March 28, 1935, the leasing agent returned. The same representations were made as before, with the addition that the test well would be started within ninety days. The lease in question here was then executed. It is admitted that the ten dollars, the consideration named in the lease, was not paid Sandrini.

About fourteen hundred acres were placed under leases and on or about June 27, 1935, the drilling of a well was actually started on what is called the "Ricomini Property", which lay across a forty-acre tract from the Sandrini property. This well was drilled to a depth of over six thousand feet when it was abandoned because of mechanical difficulties. There is undisputed evidence in the record that this exploratory well showed "there is oil in that district. We had enough showing to show that there was oil there."

The parol evidence points unmistakably to the fact that the Sandrini lease was made on the express promise on the part of the lessee that the Ricomini well, or one on some property in the immediate vicinity of the Sandrini property, would be started at an early date and drilled to a depth of not less than six thousand feet. This well was actually started in about ninety days and drilling was prosecuted until a depth of over six thousand feet was reached in the latter part of July, 1935.

[2] In Brownfield v. McFadden, 21 Cal.App.2d 208, 68 P.2d 993, 997, it was said: "A contract is supported by a sufficient consideration if there is some benefit to the promisor or detriment to the promisee regardless of the amount of the benefit or detriment. Section 1605, Civ. Code; 6 Cal.Jur. 168; 6 Ten-Year Supp. 73-74."

[3] Certainly the facts of this case bring it within the foregoing rule. Sandrini desired to have the locality explored for oil. This was done. The lessee spent many thousands of dollars in drilling this well. There was sufficient benefit to the promisor and detriment to the promisee to establish ample consideration for the lease.

In Pimentel v. Hall-Baker Co., Cal.App., 90 P.2d 588, we have dealt at length with the law governing the second question presented for our consideration. We there held that where an oil lease is supported by sufficient consideration, and where the interest of the lessee has not been terminated, or perhaps where he is not in default, the fact that the lease vests in him a present estate in the real property, is a defense to the action of the landowner lessor to quiet title against the lease even though it appears on the face of the lease that it cannot be specifically enforced by one party against the other because of lack of mutuality of remedies. We will not repeat the arguments made and authorities cited in that case.

The lease we are considering contained the following: "Upon the violation of any of the terms or conditions of this lease by the Lessee and the failure to remedy the same within sixty days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end, * * *"

[4] There is no evidence of a compliance with the foregoing provision on the part of plaintiffs or their predecessor in interest. In the case of Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035, this was held to be a necessary prerequisite to the landowners' suit to quiet title against the lessee or his successor in interest. The lack of

any evidence that the landowners gave this notice of default which was not remedied within the sixty-day period furnishes an additional reason why the judgment must be reversed.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



32 Cal.App.2d 666

PEOPLE v. STEVENS et al.

Cr. 3179.

District Court of Appeal, Second District, Division 1, California.

May 17, 1939.

Hearing Denied June 15, 1939.

1. Robbery ⇐15

Accused, who, though not in actual physical possession of deadly weapon carried by accomplice while committing robbery in which accused aided and abetted, was properly accused, tried, and punished for the acts of the accomplice. Pen.Code, §§ 31, 211a, 969c; § 1168, subd. (2) (a).

2. Statutes ⇐184

Statutes should be construed, whenever reasonably possible, with a view to carrying out the intent and purpose which actuated their adoption, and to secure the objective sought to be achieved.

3. Robbery ⇐15

One participating as a principal in a crime in which a dangerous or deadly weapon is used is liable to the same penalties as are imposed on the codefendant who actually possesses the weapon. Pen.Code, § 969c; § 1168, subd. (2) (a).

4. Robbery ⇐15

Accused who participated in robbery with confederate who was armed with a deadly weapon was equally liable with confederate for the added penalty inflicted for commission of crime while "armed" with a deadly weapon. Pen.Code, §§ 31, 211a, 969c; § 1168, subd. (2) (a).

[Ed. Note.—For other definitions of "Armed," see Words & Phrases.]

5. Robbery ⇐15

One participating in robbery with confederate who is "armed" with a deadly weapon is also "armed" within statute inflicting added penalty for crimes committed while "armed" with a deadly weapon. Pen.Code, §§ 31, 211a, 969c; § 1168, subd. (2) (a).

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George M. Stevens and William Schuffert were convicted of robbery committed while armed with a deadly weapon, and William Schuffert appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an amended information filed by the district attorney, appellant, William Schuffert, and defendant George M. Stevens were jointly charged with two counts of robbery. Pursuant to the provisions of section 969c of the Penal Code, it was further alleged in the amended information that at the time of the commission of the respective offenses "said defendants were armed with a deadly weapon, to-wit, a pistol".

Defendant Stevens pleaded guilty to the charge of robbery as contained in count I and admitted that at the time of the commission of said offense he was armed with a deadly weapon. The court found the robbery to be of the first degree and imposed a penitentiary sentence.

Appellant Schuffert likewise pleaded guilty to the robbery charged in count I, which the court found to be robbery of the first degree, but denied that he was armed with a deadly weapon at the time of the commission of the offense. Count II was dismissed as to both defendants. Determination of the issue raised by appellant Schuffert's denial that he was armed at the time of the perpetration of the robbery was by appropriate waiver of jury submitted to the court, resulting in a finding "that defendant, William Schuffert, was armed with a deadly weapon at the time of the commission of the offense, to-wit, a pistol". From the judgment com-

mitting appellant Schuffert to San Quentin state prison this appeal is prosecuted.

No issue of fact is presented for our consideration, it having been stipulated that appellant, in company with his codefendant Stevens, committed the robbery charged, and that the only weapon used in perpetrating the offense was the single pistol which at all times was in the hands and possession of the defendant Stevens. A gun having been used by one of the principals in the robbery, appellant concedes the correctness of the court's finding that both actors in the crime were guilty of robbery of the first degree. Pen.Code, secs. 31 and 211a. The sole question, therefore, presented to us involves an interpretation of certain provisions contained in section 969c of the Penal Code, enacted in 1935, St.1935, p. 1705, reading as follows:

"Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code relating to 'Certain Minimum Penalties' * * *, the fact that the defendant was so armed shall be charged in the indictment or information or complaint. This charge shall be added to and be a part of the count or each of the counts of the indictment or information or complaint which charge the offense at the time of the commission of which or at the time of the arrest for which the defendant was armed with a weapon. * * * If the defendant pleads not guilty of the offense charged in any count which alleges that the defendant was armed either at the time of his commission of the offense or at the time of his arrest, or both, the question whether or not he was armed as alleged must be tried by the court or jury which tries the issue upon the plea of not guilty.

"If the defendant pleads guilty of the offense charged the question whether or not he was armed as alleged must be determined by the court before pronouncing judgment."

Subdivision (2) of section 1168 of the Penal Code, which is referred to in the provisions of the section just quoted, reads:

"(2) Certain minimum penalties. The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence:

"(a) For a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years; * * *."

From the foregoing it is at once apparent that if appellant was in contemplation of law "armed" with a deadly weapon at the time he participated in the robbery, he was liable under the provisions of section 1168 of the Penal Code to a longer sentence than could have been imposed upon him if he was not "armed" with a deadly weapon. Appellant's claim is that the word "armed" as used in the statute is personal to the individual which it describes, and that only those defendants who are personally equipped with and in possession and control of the weapon are "armed" therewith within the meaning of the law.

[1] If no gun had been used at the time of the hold-up here in question, defendant would not be guilty of first degree robbery. It was the use of the gun by one of the principals that established the offense as first degree robbery. If the presence of the weapon in the hands of appellant's codefendant determined the degree of the robbery with which appellant was charged although the latter was not armed therewith, it would seem to follow that he should be punished for the crime of which he was convicted, to-wit, robbery with a gun, because the purpose of the legislation with which we are here concerned was undoubtedly to deter criminals from using dangerous weapons in the commission of crime. When, therefore, two or more people associate themselves together for the purpose of robbery, thereby becoming principals; and when in furtherance of such plan and to consummate the crime, one of their number is armed with a dangerous weapon, all are concededly equally guilty, and therefore all should be punished in accordance with the statute which provides increased penalties for defendants who are armed at the time of the commission of the offense. Appellant, although not in actual physical possession of the weapon, was nevertheless aiding and abetting his armed accomplice who had the weapon, and therefore is properly accused, tried and punished for the acts of his accomplice.

People v. Jones, 114 Cal.App. 91, 299 P. 559.

[2-4] It is noteworthy that section 1203 of the Penal Code provides that probation shall not be granted to a defendant convicted of robbery when such defendant "at the time of the perpetration of said crime * * * was armed with a deadly weapon", and it has been decisively held that in view of the language just quoted a defendant, though not actually in possession of the weapon, is not eligible to probation if his accomplice in the crime is equipped with a deadly weapon. People v. Gillstarr, 132 Cal.App. 267, 22 P.2d 549; People v. Lewis, 140 Cal.App. 475, 35 P. 2d 561. When a defendant is situated as is this appellant, and not therefore entitled to receive probation because the ineligibility of his armed accomplice attaches to him by reason of his activity and participation as a principal in a robbery accomplished with the aid of a deadly weapon, then his punishment also should be measured by the same rules that govern the penalty imposed upon his partner in the crime. Statutes should be construed, whenever reasonably possible, with a view to carrying out the intent and purpose which actuated their adoption and to secure the objective sought to be achieved by the legislation in question. The laws here in question were designed for the protection of the community and its residents, and not the lawbreaker. They seek to discourage crimes committed with the use of deadly and dangerous weapons by providing additional penalties in cases where such weapons are used to outrage an individual in his personal or property rights. To attain the intended purpose it must be held, and we do so hold, that any defendant participating as a principal in a crime where a dangerous or deadly weapon is used is liable to the same penalties as are imposed upon the codefendant who actually possesses the weapon. If a murder ensues during a hold-up, it could not be contended that the unarmed bandit can be absolved because he did not fire the fatal shot. His participation as a principal and as an aider of the actual murderer makes him equally guilty and equally liable to the imposition of the extreme penalty; and for the same reasons it must be held that the participation of a defendant not actually in possession of the weapon by aiding and abetting the actual possessor in the unlawful use of the weapon makes the former equally liable with his armed confederate to the added penalty inflicted upon defendants who commit crimes through the use of dangerous and deadly weapons. To hold otherwise would to a marked degree nullify, impair and materially weaken the objects sought to be accomplished by this salutary legislation.

We have given careful consideration to the New York cases cited by appellant (People v. Paradiso, 248 N.Y. 123, 161 N.E. 443; People v. Kevlon, 221 App.Div. 224, 222 N.Y.S. 311; People v. Donoto, 142 Misc. 259, 255 N.Y.S. 58; People v. Hess, App.Div., 257 N.Y.S. 1069; People v. Fortino, App.Div., 260 N.Y.S. 960), wherein the courts of that state hold that under statutes similar to ours the extra punishment provided is to be imposed only upon the one in actual and personal possession of the dangerous weapon. We are, however, constrained to hold that the better reasoning and more correct conclusions are found in the cases decided by the appellate courts of our own state. People v. Jones, supra; People v. Lewis, supra; People v. Gillstarr, supra; People v. Kizer, 22 Cal.App. 10, 133 P. 516, 521, 134 P. 346.

[5] From the foregoing, it follows that the finding of the trial court that appellant was armed with a deadly weapon at the time of the commission of the offense to which he pleaded guilty is supported by the evidence and in harmony with the law.

The purported appeal from the finding is dismissed, for the reason that the questions presented by it have been decided upon the appeal from the judgment.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

32 Cal.App.2d 735

PEOPLE v. THOMPSON et al.

Cr. 3183.

District Court of Appeal, Second District, Division 1, California.

May 17, 1939.

Hearing Denied June 15, 1939.

Robbery ⇐15

An accused, who was convicted of robbery of the first degree committed with accomplice who was "armed" with a deadly weapon, was also so "armed" as to make him subject to increased penalty inflicted for commission of crime while "armed" with a deadly weapon. Pen.Code, § 1168.

[Ed. Note.—For other definitions of "Armed," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; A. A. Scott, J.

Riley Thompson and Harry E. Dorant were convicted of robbery committed while armed with a deadly weapon, and Harry E. Dorant appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

Appellant Harry E. Dorant, jointly with one Riley Thompson, was charged with the crime of robbery. Both defendants were found guilty as charged. The evidence showed without dispute that the defendant Riley Thompson was in the actual possession of and equipped with the deadly weapon, while appellant did not actually possess any such weapon. The only issue raised on this appeal is whether or not, having been convicted of the crime of robbery of the first degree and his accomplice having been armed with a deadly weapon at the time, this appellant was also in contemplation of law so armed as to make him subject to the increased penalties of section 1168 of the Penal Code. The trial court found that appellant was so armed.

The facts of this case are similar in all respects to the facts presented in People v. George M. Stevens and William Schuffert, 90 P.2d 595, in which matter we have this day filed an opinion.

Upon the authority of the cited case, and for the reasons therein stated, the judgment from which this appeal is taken is affirmed.

We concur: YORK, P. J., DORAN, J.

32 Cal.App.2d 665

PEOPLE v. THOMPSON et al.

Cr. 3183.

District Court of Appeal, Second District, Division 1, California.

May 17, 1939.

Criminal law ⇐1182

Where, after having given notice of appeal, appellant presented to trial judge request for transcript, but failed to set forth grounds of his appeal and filed no brief in Court of Appeal and made no appearance, judgment and order denying motion for new trial were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding between the People of the State of California, and Riley Thompson and Harry E. Dorant. From the judgment, Riley Thompson appeals.

Affirmed.

Riley Thompson, in pro. per., for respondent.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

PER CURIAM.

After having given notice of appeal in the superior court from the judgment and from the order denying his motion for a new trial, appellant presented to the trial judge his request for a transcript, but failed to set forth therein the grounds of his appeal. He filed no brief in this court, nor did he make any appearance herein.

For the foregoing reasons, and pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

32 Cal.App.2d 634

HUFFINES et al. v. STANDARD BRANDS OF CALIFORNIA et al.

HYATT et al. v. SAME.

Civ. 2258, 2259.

District Court of Appeal, Fourth District, California.

May 11, 1939.

Hearing Denied July 10, 1939.

1. Automobiles ⇐245(78)

In actions for injuries and property damage resulting from intersectional automobile collision which occurred when motorist's automobile, traveling west on arterial highway, at speed estimated by defendants' witness at 50 or 55 miles an hour and estimated by motorist as 20 or 25 miles an hour, was struck by delivery truck entering highway from the north, contributory negligence of motorist who observed the truck and assumed that truck driver would stop at stop sign was for jury. St.1935, p. 177, § 513.

2. Automobiles ⇐244(11)

In actions for injuries and property damage resulting from intersectional automobile collision which occurred when motorist's automobile traveling west on arterial highway was struck by delivery truck entering highway from the north, evidence sustained judgment for plaintiff on ground of negligence of truck driver in failing to make boulevard stop and failing to observe on-coming traffic as he entered intersection. St. 1935, p. 187, § 552.

3. Appeal and error ⇐1046(5)

Remarks of trial judge in ruling on admission of evidence in automobile collision action, which in effect stated that defendant truck driver was required to explain why he was on left-hand side of street as he entered intersection at which accident occurred and to which no exception was made at the time, were not prejudicial, where court subsequently gave proper instructions relating to proximate cause, contributory negligence, doctrine of preponderance of evidence, and burden of proof. St. 1935, p. 181, § 525; Code Civ.Proc. § 647: Const. art. 6, § 4½.

4. Damages ⇐132(1)

$6,000 for injuries to woman who had one tooth knocked out and others loosened and subsequently removed, whose lower lip was cut, leaving scar, whose eyes were blackened and who received some permanent injury and was confined to her bed intermittently for about two months, was not excessive.

5. Damages ⇐132(1)

$1,000 to child whose incisor tooth was broken off diagonally, and who had three other permanent teeth chipped and whose lips were mangled and who sustained slight injury to elbow requiring her arm to be in sling for several weeks, was not excessive.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Separate actions by Ralph Huffines and others and by Barbara Hyatt, a minor, by and through her guardian ad litem, Harvey Hyatt, and another, against the Standard Brands of California and another which were consolidated for trial. From adverse judgments, the defendants appeal. The cases were consolidated on appeal.

Judgments affirmed.

Hoge, Pelton & Gunther of San Francisco, and Harvey, Johnston & Baker, of Bakersfield (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

GRIFFIN, Justice.

These cases were consolidated for the purpose of trial and were likewise consolidated on appeal. They arose out of a collision between two automobiles. Gloria Huffines, one of the plaintiffs, was the driver of one automobile. J. W. Cowan, defendant, was the driver of the other, acting as a servant and agent of the corporate defendant. Two children, Mary Louise Huffines, and Barbara Hyatt, were passengers in the automobile being driven by Mrs. Huffines. Each is a plaintiff in the respective actions. The trial was before a jury. In the Huffines case a verdict was rendered in favor of the plaintiff Gloria Huffines in the sum of $6,000, and in favor of Ralph Huffines, her husband, for consequential damage and injury to his automobile in the sum of $1,350. No damage was found in favor of the plaintiff Mary Louise Huffines. In the Hyatt case, a verdict was rendered in favor of the minor plaintiff in the sum of $1,000. No damage was found in favor of her father and co-plaintiff. Judgments were, in each instance, entered upon the verdicts, and the

appeals are from the judgments so entered.

The collision occurred at the intersection of Robinson and Flower streets in Bakersfield. Robinson street runs north and south and Flower street runs east and west. Respondent Gloria Huffines was traveling west and the appellant Cowan was traveling south. At the northeast corner of the intersection is a market. Flower street (on which respondent Gloria Huffines was driving) is a through street with the appropriate boulevard stop signs at the intersection. This respondent was driving a 1936 Plymouth sedan and the appellant Cowan was driving a Chevrolet delivery truck. For the purpose of describing the manner in which the accident happened the testimony of certain witnesses may be paraphrased as follows:

Gloria Huffines: I was involved in an accident on the 25th of June, 1937, at the intersection of Flower and Robinson streets. I was driving our 1936 Plymouth sedan and at the time my daughter, Mary Louise, and Barbara Hyatt were with me. I had started at the 1500 block on Flower street about three blocks east of the intersection. I was proceeding west. There is a slight rise in the road just east of the intersection, the brow of which is about two blocks west of where I had started. As I started down this rise in the road I was going between 30 and 35 miles per hour. I continued at that speed until I reached about the east wall of the market. At that point I applied my brakes and when I came to the intersection I was going about 25 miles an hour. As I entered the intersection there was nothing within the intersection. I saw Mr. Cowan's pick-up truck heading south and slightly east, just north of the stop sign. He was not quite up to the stop sign and I presumed he was going to stop and I started across. At that time the front end of my car was entering the intersection. I stepped on the gas and was going on and paid no more attention to the truck driver after that. When the front end of my car reached a point just a little beyond the middle of the intersection I felt the jar of the collision at the rear end of my car. I was knocked unconscious from the blow and I do not remember colliding with a tree later. As I approached the intersection and up to the time of the collision there was no other vehicle in the immediate vicinity of the intersection. At the time my car entered the intersection the defendant's truck was several feet away from the intersection just as if he were coming up to the intersection. I looked at him (Cowan) as I came into the intersection and started on. I was looking ahead when he struck me. I did not realize that he would strike me until the time of the collision. I looked at the man, knew there was a boulevard stop there, and I thought he would stop and I started myself and paid no more attention to him. I was traveling on the right hand side of Flower street. In slowing down as I came up to the intersection I applied my brakes, not hard, I just touched my brakes. As the time the collision occurred, I was going 20 to 25 miles per hour. The front end of my car was past the center of the intersection and the rear end was east of the center. Just before losing consciousness I felt the jar. I don't remember anything from then until I came to, "sitting on the outside of my car". The car was stopped at a tree west of the intersection on the south side of the street.

Officer Galyen: I was called to the scene of the accident. The point of impact was 8 feet east of the center of Robinson and 6 feet north of the center of Flower. The length of the 1936 sedan is 12 to 14 feet with the bumper. I inspected the intersection and the approach to the intersection for skid marks. There were no skid marks or tire marks extending from the point of impact toward the east. There were tire burns going from the point of impact to the tree on the pavement showing where the tires when he made the impact had changed the direction of the course of the car, swerved it and went right across the street into the tree. In other words, it showed kind of a skid that turned it kind of sideways and then it looked like they straightened right out and the tires after it straightened out were tire burned, kind of skidding sideways and they came in a little more straight at an angle. It was going rather sideways instead of straight. That is what made the burns on the pavement.

Floyd Walters: I am a mechanic. I went to the scene of the accident to pick up one of the cars. The rear end of the Plymouth was hit on the right rear fender and the right rear bumper and behind the right rear wheel. The cross bar and side of the frame was bent in four inches out of line. This bar was buckled outward. The wheel was crooked and the bumper was torn off.

Mrs. Douglas: I went to the scene of the accident immediately after I heard the crash. I found Mrs. Huffines sitting on the side of the car. She was unconscious. Someone asked how the accident happened, and Mr. Cowan, the truck driver, said: "I didn't see her." That is all he said as far as I remember. He said: "Here I am, here is my card," and "I didn't see her."

Reverend Douglas: I went to the scene of the accident. I saw the driver of the truck. I asked him personally how the accident occurred and he said that he was parked over there in front or to the side of the market and started to drive out onto the street, Flower street, and he didn't see the oncoming car. After that Officer Galyen came up. Officer Galyen told him he was on the wrong side of the street approaching Flower street from the wrong side of Robinson street. Mr. Cowan said he was parked over there and that was the occasion of it being so, because he was approaching the street from his place where he was parked.

The appellant J. W. Cowan was not present and did not testify at the trial. Appellants produced a witness who testified that the Huffines car was traveling at a speed of 50 or 55 miles per hour when it passed in front of the market near the intersection. Appellants claim that disinterested witnesses established the fact that the Chevrolet was actually stopped at the time of the impact and that the respondents' car sideswiped the Chevrolet car in passing. They further contend (1) that respondent Gloria Huffines was guilty of contributory negligence as a matter of law, citing Pattison v. Cavanagh, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945, and Waizman v. Black, 101 Cal.App. 610, 281 P. 1087; (2) that there was no proof of negligence on the part of appellant Cowan which could have been a proximate cause of the accident; (3) that the minor respondents are likewise precluded from recovery because the negligence of respondent Gloria Huffines was the sole cause of the accident and there was no proof of negligence upon the part of the appellants; (4) that the trial court was guilty of prejudicial misconduct in commenting in the course of the trial; and (5) that the verdicts were highly excessive in amount.

[1] Considering the first point raised, we cannot say, as a matter of law, after an examination of the entire record, that respondent Gloria Huffines was guilty of contributory negligence. The question of the contributory negligence of this respondent was submitted to the jury under proper instructions. The jury resolved this question in favor of respondents. That finding, under the facts in evidence, cannot be disturbed. Bate v. Los Angeles Ry. Corporation, Cal.App., 86 P.2d 856; Mairo v. Yellow Cab Company, 208 Cal. 350, 281 P. 66; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Avalos v. Grimale, Cal.App., 87 P.2d 392; sec. 513, Vehicle Code (St.1935, p. 177).

[2] As to the second point, there is evidence that the driver Cowan drove his car from the market on the northeast corner of the intersection in a southerly direction on the east (or wrong) side of Robinson street. From the facts related, it might be properly inferred that he failed to make a boulevard stop and failed to observe oncoming traffic as he entered the intersection. We find sufficient evidence in the record to warrant the conclusion of the jury that the appellant Cowan was guilty of negligence. Keyes v. Hawley, 100 Cal. App. 53, 57, 279 P. 674; Vehicle Code, sec. 552 (St.1935, p. 187).

As to the third point, appellants recognize the rule that any contributory negligence of Gloria Huffines cannot be imputed to the two minors, but contend that whatever negligence inhered in this accident was solely that of Gloria Huffines. The conclusion reached as to the previous points raised sufficiently disposes of this contention.

[3] As to the fourth point, the testimony indicates that the Chevrolet truck, as it left the market on the northeast corner of the intersection, proceeded southerly on the east side of Robinson street as it approached the intersection. Appellants claim that the court committed serious and prejudicial error in a comment, in the course of the trial, upon this phase of the case. The subject was initiated by questions put by counsel for respondents to their witness:

"Q. What did Officer Galyen say to him (Cowan)? * * * A. He said he was parked over there, and that that was the occasion of it being so, because he was approaching the street from his place where he was parked. Mr. Baker. I move to

strike the testimony of these two conversations not binding on the Standard Brands of California * * * and * * * as to the defendant Cowan * * *.

"The Court: It is binding on the driver, and of course what the officer said to him standing alone is not good, but then he gave his response to it, and he explained why. Because of course if the testimony so far is right he was on the wrong side of the street. We will let it stay in as against the driver. * * *

"The Court. I will strike it out as to the corporation.

"Mr. Baker: I don't understand the marks to show he was on the wrong side of the street.

"The Court: If they have it right up there, I am not saying it is right. If he was going south. Mr. Petrini said in his opening statement he was parked on the right in front of the market. It is a fact, and I can state any of the facts, and I am not stating anything as a fact, but I say if it is a fact and he was going south, and he was on the left hand side of the street, he has got to explain why he is over there. That is what the evidence is so far. I can't state any of the facts, but I can state the law that a man is supposed to drive on the right hand side of the street.

"Mr. Baker: Captain Galyen said—

"The Court: * * * If in his conversation he gave that as part of his explanation, so far as the officer is concerned I don't care where he was parked. * * *

"The Court: I will leave that in as to him."

Appellants contend by this colloquy that the court definitely informed the jury that the respondents were entitled to recover unless the driver "could explain" why he was over there; that this amounted to an instruction to the jury, and that the law no longer requires that exception be made thereto at the time, citing section 647 of the Code of Civil Procedure; Lawrence v. Southern Pacific Co., 189 Cal. 434, 208 P. 966; Primmer v. American Car & Foundry Co., Mo.App. 1927, 299 S.W. 825; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995; McMinn v. Whelan, 27 Cal. 300; and 64 Cor.Jur. p. 101.

The trial court in its first instruction given after the submission of the case, read an instruction. The following is an extract therefrom: "I desire to say to you that these instructions embody the law by which you must be governed in arriving at your verdict. * * * Nor are you to infer by any rulings or remarks made by the court during the progress of the trial how the court thinks the case should be decided. * * *" The court then gave the following instruction:

"* * * it is necessary that the plaintiffs prove by a preponderance of the evidence that defendants were guilty of negligence as alleged in the complaint, and that as a proximate result thereof, the plaintiff sustained injuries as alleged in the two complaints * * * and there is no burden resting upon any defendant for the purpose of proving that any defendant was not guilty of negligence in or about the driving or operation of the delivery automobile until plaintiffs shall first have established by a preponderance of the evidence that defendants were guilty of negligence, and that such negligence was the proximate cause of the injury to plaintiffs."

This was followed by another instruction:

"Negligence upon the part of either the plaintiff or defendant is of no consequence in the case unless you find that such negligence was a proximate cause of the injury (defining proximate cause) * * *."

Several other proper instructions were given in addition to the above on the element of proximate cause, contributory negligence and the doctrine of preponderance of evidence.

The statement of the court in response to the argument of counsel might well have been omitted. If properly called to the attention of the court it no doubt would have instructed the jury to disregard it. The court subsequently gave proper instructions bearing on the point. The evidence is conclusive that the driver was on the east (or wrong) side of Robinson street at the time in question. Sec. 525, Vehicle Code (St.1935, p. 181). A proper instruction in reference to the burden of proof was subsequently given.

Considering the entire instructions given, we are not convinced that the remarks of the court had a prejudicial effect. Sec. 4½, art. VI, Const.; People v. Weeks, 104 Cal.App. 708, 286 P. 514; Tierney v. Charles Nelson Co., 19 Cal.App.2d 34, 64 P.2d 1150.

[4] Considering the fifth and last point, the evidence discloses the injury to Gloria Huffines to be this: After the accident she was in a dazed condition; one tooth was knocked completely out and the others loosened and subsequently removed; her lower lip was cut, leaving a scar; her lips were mashed and some of the bone process about the upper teeth was shattered and removed; her eyes were blackened; she was bruised generally. There was a sharp conflict in the testimony, but the evidence discloses some permanent injury to her back, right shoulder and leg; there was an injury to her chest, causing pain; a nervous condition followed; she was confined to her bed intermittently for about two months.

[5] A summary of the evidence concerning the injury to respondent Barbara Hyatt is as follows: This respondent's mother testified that before the accident the condition of her daughter's teeth was good, but that as a result of the accident almost one-half of a front incisor tooth was broken off diagonally and three other permanent teeth were chipped; that considerable work would be necessary to correct the condition of the child's teeth and that it would be six years before any permanent work could be done; that after the accident her lips were bleeding and mangled; there was a slight injury to her elbow; the X-ray revealed a chip broken off in the elbow joint; her arm was in a sling for several weeks.

Appellants cite as authority for their contention that the verdicts were excessive Jordan v. Checker Cab Co., Inc., 1928, 10 La.App. 132, 120 So. 426; Steinbrun v. Smith, 123 Cal.App. 697, 11 P.2d 868; Sundberg v. Ringel, 100 Cal.App. 545, 280 P. 557.

We are of the opinion that the verdicts rendered are not so grossly disproportionate to any reasonable compensation as would suggest passion, prejudice or corruption on the part of the jury. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am.St. Rep. 134.

For the reasons herein expressed, the judgments are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. RYAN et al.*

Cr. 3177.

District Court of Appeal, Second District, Division 1, California.

May 17, 1939.

Rehearing Denied May 31, 1939.

Hearing Granted June 15, 1939.

1. Criminal law ⇐991

A judgment finding defendant guilty of violating statutory subdivision providing for punishment of one receiving, holding, or forwarding money bet or to be bet on results of contests of skill, speed, or endurance was defective and void as adjudging him guilty of offense not alleged in information accusing him of keeping rooms, books, and papers for recording and registration of bets on horse races in violation of different subdivision. Pen.Code, § 337a, subds. 2, 3.

2. Criminal law ⇐258(2)

A trial judge's decision in jury's absence is equivalent of jury's verdict, so that judgment on his decision finding accused guilty of offense not charged in information is void.

3. Criminal law ⇐258(2)

A judgment, finding accused guilty of offense not charged in information after waiver of jury, cannot be affirmed by appellate court on basis of speculation as to whether it was entered by mistake of trial judge or reporter.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jack Ryan was adjudged guilty of violating the statutory subdivision providing for punishment of one receiving, holding, or forwarding money bet or to be bet on the result of any contest of skill, speed, or endurance, and he appeals.

Judgment reversed, and cause remanded for a new trial.

S. W. Thompson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

This is an appeal from a judgment of "Guilty" and from an order denying defendant's motion for a new trial.

Defendant and appellant Jack Ryan, together with two codefendants, was accused

*For subsequent opinion see 102 P.2d 320.

in an information filed by the district attorney with keeping a room with books and papers for the purpose of recording and registering bets upon the result of horse races, in violation of subdivision 2, section 337a, of the Penal Code.

At the trial in the superior court a jury was duly waived by the defendants and, by stipulation, the cause was submitted to the court upon the transcript of the evidence adduced at the preliminary hearing.

After the trial judge had read the transcript of the evidence, the following occurred: "The Court: Going over this record, I think the evidence is ample to warrant the conclusion that there has been a violation of Subdivision 3, Section 337a, as to the defendant Jack Ryan, and the defendant Jack Ryan will be found guilty. As to the other defendants, I think the evidence is insufficient to warrant a conviction, and they will be found not guilty."

The official minutes of the court upon this matter, as prepared by the clerk on the same day, read as follows: "Cause having been heretofore submitted, the Court finds Defendant Ryan, 'Guilty as charged in the information.'"

[1] Appellant's contention that the judgment is defective because the defendant was adjudged guilty of an offense not alleged in the information is sustained by the record.

The respondent concedes that the record is as above noted, but argues that "There was only one offense charged in the information and that offense was a violation of Subsection 2 of Section 337a. There was no evidence in the record tending to show a violation of Subsection 3. The court could not have intended and did not intend to make any reference to Subsection 3. The word 'three' in place of the word 'two' is a patent defect on the face of the record. It may have been a slip of the tongue on the part of the judge or it may have been a slip of the pen on the part of the reporter. In either case, it was a mistake in the record of the proceedings and should be corrected by an order nunc pro tunc. The defendant was not misled. The comment passed by without the notice of the District Attorney, which is some indication that it may have been a mistake on the part of the reporter. It was not called to the court's attention by either counsel at the time so that it could be corrected. All of the proceedings had at the time, as reported on page 41 of the Reporter's Transcript indicate either that the mistake was not made by the Judge but by the reporter, or, that all parties so well understood the judge's intent, that the mistake passed unnoticed until it appeared in the Reporter's Transcript. The entire proceedings cannot be vacated upon such a small and patent phonetic or typographical error." The contention in the foregoing argument that "There was no evidence in the record tending to show a violation of Subsection 3" is a matter of opinion.

Whether the conflict in the record should be regarded as a "small and patent phonetic or typographical error" depends upon the viewpoint. Moreover, in connection with the argument that "it was a mistake in the record of the proceedings and should be corrected by an order nunc pro tunc", it is significant that no such correction has been made and it should be noted in that regard that the official reporter's transcript of the proceedings is certified, approved and signed by the trial judge.

[2] The decision of the trial judge, in the absence of a jury, is the equivalent of the jury's verdict. Manifestly a judgment based upon a verdict finding the accused guilty of an offense not charged in the information is a void judgment.

[3] In the presence of the doubt created by the state of the record herein, the judgment can be affirmed only on the basis of speculation, which, as grounds for any judicial decision, uniformly has been held to be insufficient.

For the foregoing reasons the judgment and the order denying the motion for a new trial are, and each of them is, reversed, and the cause is remanded for a new trial.

We concur: YORK, P. J.; WHITE, J.

PEOPLE v. KELLY.

Cr. 3180.

District Court of Appeal, Second District, Division 2, California.

May 11, 1939.

Hearing Denied June 8, 1939.

As Amended June 9, 1939.

1. Bigamy ⇐8

In bigamy prosecution, testimony to show that accused had erroneously assumed that he was divorced from complaining witness prior to contracting alleged bigamous marriage was properly rejected.

2. Bigamy ⇐2

A second marriage under an erroneous assumption that first marriage had been annulled is no defense to charge of bigamy.

3. Criminal law ⇐419(10)

In bigamy prosecution, testimony that witness had heard prosecuting witness tell accused that she had divorced accused, offered to show that accused was not married to prosecuting witness, and not offered for impeachment, was inadmissible because hearsay.

4. Witnesses ⇐370(1)

In bigamy prosecution, cross-examination of complaining witness with respect to whether she loved accused, or had loved him when she married him, and with respect to whether he had spent quite a lot of money on her, in alleged effort to show bias and prejudice on part of witness, was properly refused.

5. Bigamy ⇐8

In bigamy prosecution, exclusion of contradictory statements by complaining witness on cross-examination with respect to whether she had divorced accused was proper where testimony was not offered for purpose of impeachment, but for purpose of proving the facts contained in the answers, and where no foundation of time, place and persons was attempted to be laid.

6. Criminal law ⇐1170(2)

The exclusion of contradictory statements of prosecuting witness on cross-examination presented no error where accused managed to get into record without objection all evidence alleged to have been improperly excluded.

7. Criminal law ⇐594(1)

In bigamy prosecution, where prosecuting witness on redirect examination testified that she was uncertain whether she had ever been divorced from another than accused, and where she had not previously disclosed to prosecution the fact of prior marriage, continuance for a few days during which prosecution obtained an exemplified copy of decree of divorce from prior husband, presented no error in absence of showing that accused was prejudiced.

8. Criminal law ⇐938(3)

Evidence of which accused had not informed his counsel because of his ignorance of the materiality thereof, to the effect that he had not been divorced from a prior wife, at time of supposed valid marriage on which prosecution for subsequent bigamous marriage was based, did not constitute "newly discovered evidence," entitling accused to new trial.

[Ed. Note.—For other definitions of "Newly Discovered Evidence," see Words & Phrases.]

9. Criminal law ⇐938(3)

A party is not entitled to new trial on ground of "newly discovered evidence," unless it appears that evidence and not merely its materiality is newly discovered.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Leonard Kelly, alias Jack Sinclair, was convicted of bigamy, and he appeals.

Affirmed.

Terrys Olender Gambord, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

Hearing denied; LANGDON and HOUSER, JJ., dissenting.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction of the crime of bigamy and from an order denying defendant's motion for a new trial.

The defendant was married to Louise J. Sinclair and without obtaining a divorce married Virginia Roszkowski and lived with her as man and wife in the state of California.

[1, 2] The defendant's first contention is that the trial court erred in sustaining objections to certain testimony directed to the proposition that defendant had erro-

neously assumed that he was divorced from the complaining witness prior to the time he contracted the marriage alleged to be bigamous. There is no merit in this contention. A second marriage under an erroneous assumption that the first marriage has been annulled or dissolved is not a defense to a charge of bigamy. People v. Hartman, 130 Cal. 487, 62 P. 823; People v. Priestley, 17 Cal.App. 171, at page 177, 118 P. 965; People v. Glab, 13 Cal.App.2d 528, at page 535, 57 P.2d 588. Although there is a conflict in the decisions in other jurisdictions, the California cases are in line with the greater weight of authority. 10 C.J.S., Bigamy, page 367, § 7; State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 792.

[3] The defendant's next contention is that the court erred in excluding the testimony of the witness George Trotter that he had heard the prosecuting witness tell the defendant that she had divorced the defendant. This evidence was offered for the purpose of showing that the defendant was not married to the prosecuting witness, and for such purpose it was inadmissible and hearsay under People v. Hartman, supra. See, also, 8 Cal.Jur. 84. It was not offered for impeachment. No effort was made by the defendant to lay a foundation of time, place and persons present in order to impeach the prosecuting witness. The point is untenable.

[4] The defendant next contends that the court erred in limiting the cross-examination of the witness Roszkowski. In this behalf the defendant sets forth that in an effort to show bias and prejudice on the part of the witness, the witness was asked the following questions: "You don't love the defendant?" "You did not love the defendant when you married him?" "He spent quite a lot of money on you, didn't he?" The answers sought to be elicited would not have shown bias or prejudice on the part of the witness.

[5, 6] The defendant next contends that the court erred in restricting cross-examination of the prosecuting witness to exclude contradictory statements made by her in which she stated she had divorced the defendant. This testimony was not offered for the purpose of impeaching the witness, but for the purpose of proving the facts contained in the answers. No foundation of time, place and persons was attempted to be laid. 8 Cal.Jur. 84. However, a reading of the transcript discloses that defendant finally managed to get into the record without objection all the evidence which he contends was improperly excluded. There is no merit in this contention.

[7] The defendant's next contention is that the court erred in granting a continuance during the course of the trial. During the redirect examination of the prosecuting witness she testified that she was uncertain as to whether or not she had ever been divorced from one George Martin. It also appeared that she had not disclosed to anyone connected with the prosecution the fact of her previous marriage to George Martin. As a result of this uncertainty the prosecution requested a continuance and one was granted for a few days, during which time a duly exemplified copy of a decree of divorce from George Martin was obtained and was received in evidence, and the trial resumed. No showing is made by the defendant that he was in any manner prejudiced by this continuance.

The defendant's next contention is that the court erred in refusing to give certain of defendant's requested instructions and in modifying one of the instructions which he did give. Defendant does not take the trouble to set out these instructions in his brief, and it is not necessary for us to comment upon them in detail. They cover largely the same questions which have heretofore been discussed and found to be without merit. In our view there is no reversible error in the instructions of the court.

[8, 9] Finally, the defendant contends that the court erred in refusing to grant a motion for a new trial on the ground of newly discovered evidence. As a basis for his motion for a new trial defendant filed an affidavit wherein, in substance, he recites that his true name is Leonard Kelly; that on the 31st day of March, 1921, he married one Ella Miller in Louisville, Kentucky; that on two occasions he gave Ella Miller money with which to procure a divorce. But the affidavit is silent as to whether Ella Miller ever actually obtained a divorce, but inferentially it appears from the affidavit that he was not divorced from the said Ella Miller at the time of his marriage to the witness Louise Sinclair. He did not inform his counsel of these facts until after the trial was completely over and a verdict of guilty had been returned. The reason for not so in-

forming his counsel of the facts was because of his total ignorance of the materiality thereof. The defendant now contends that this constitutes newly discovered evidence which would change the result of the trial on the ground that if it should appear that the marriage charged in the information as being the first marriage was itself bigamous, there could be no conviction except upon a new prosecution based on the valid marriage. The facts narrated in the affidavit do not constitute new evidence which would entitle the defendant to a new trial. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence and not merely its materiality be newly discovered. People v. Sutton, 73 Cal. 243, 15 P. 86; People v. Urquidas, 96 Cal. 239, 31 P. 52.

Judgment and order affirmed.

I concur: WOOD, J.

McCOMB, Justice.

I dissent.

In the present case evidence that defendant in good faith believed at the time of his second marriage that prior thereto he had been divorced from the complaining witness was excluded. This in my view of the law was prejudicial error.

In my opinion the earlier rule announced in People v. Hartman, 1900, 130 Cal. 487, 62 P. 823, has been overruled in the Matter of Application of Ahart, 1916, 172 Cal. 762, 764, 159 P. 160. The case of People v. Hartman, supra, announced the rule that a second marriage under an erroneous assumption that the first marriage had been annulled or dissolved was not a defense to a charge of bigamy. This barbaric holding was in line with earlier cases inflicting the death penalty for grand larceny (People v. Tanner, 1852, 2 Cal. 257), and ignores entirely the provisions of section 20 of the Penal Code, which reads as follows:

"To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

Clearly, if defendant in good faith believed that a valid divorce had been obtained from his first wife prior to his second marriage there could not exist a union of act and *intent,* as required to constitute a crime by the provisions of section 20 of the Penal Code, supra.

In the Matter of the Application of Ahart, supra, Mr. Justice Henshaw, speaking for our Supreme Court, says 172 Cal. at page 764, 159 P. at page 161:

"* * * The case comes quite clearly within the reasoning and principle of the English case of Regina v. Tolson (L.R. 23 W.B.Div. 168 [1889], s. c., 40 Alb.L.J. 250), which case itself receives detailed consideration in 2 Lewis' Sutherland Statutory Construction, § 527. The case was a criminal charge against a woman for a bigamous marriage. It had been held that one who marries a second time under an honest but an erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Wharton's Crim. Ev. (8th Ed.) § 1695a. But in the later Tolson case the woman had married five years, instead of seven years, after her husband's desertion of her, under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner 'falls within the very words of the statute.' Cave, J., said: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. * * * So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.'"

It would seem from a reading of the foregoing language that our Supreme Court recognizes now that an honest belief in good faith that a prior marriage has been dissolved constitutes a defense to a charge of bigamy. This rule appears to be in accord with the modern enlightened view of criminal jurisprudence, which looks to the substance rather than to the form and seeks not to punish the innocent, and is well expressed by Mr. Justice Sedgwick of the supreme court of Nebraska in Baker v. State, 86 Neb. 775, 126 N.W. 300, 303, 27 L.R.A.,N.S., 1097, thus:

"* * * But, as stated by Mr. Bishop, when a man is misled without his own fault or carelessness concerning facts, and while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same

as he is innocent morally. 1 Bishop's Criminal Law, 503.

"The defendant should have been allowed to make such proof if he could, and, upon evidence tending to show such a condition, the question as to his information and good faith—that is, as to the sufficiency of his ground of belief—and whether in fact he did believe that the obligations of his former marriage had been removed by a legal divorce, should be submitted to the jury with proper instructions."

The rule just announced is recognized in the following cases: Squire v. State, 46 Ind. 459; State v. Sparacino, 164 La. 704, 114 So. 601; Adams v. State, 110 Tex. Cr.R. 20, 7 S.W.2d 528; Pruett v. State, 98 Tex.Cr.R. 325, 265 S.W. 575; Adams v. State, 94 Tex.Cr. R. 542, 252 S.W. 537; State v. Cain, 106 La. 708, 31 So. 300; Chapman v. State, 77 Tex.Cr.R. 591, 179 S.W. 570; White v. State, 157 Tenn. 446, 9 S.W.2d 702; Brown v. State, 115 Tex. Cr.R. 581, 28 S.W.2d 143; Geisselman v. Geisselman, 134 Md. 453, 107 A. 185, and Baker v. State, 79 Fla. 365, 84 So. 99.

For the foregoing reasons, in my opinion the judgment should be reversed and a new trial ordered.



32 Cal.App.2d 652

In re ELSTON'S ESTATE.

WYCKOFF v. RILEY, Controller.

Civ. 10992.

District Court of Appeal, First District, Division 1, California.

May 15, 1939.

As Amended June 6, 1939.

Rehearing Denied June 12, 1939.

Hearing Denied Aug. 3, 1939.

1. Taxation ⇐878(2)

A statute providing for a tax on legacies, transfers and gifts, and varying the tax as it applies to particular kinds of legacies, transfers and gifts, authorized the imposition of a tax on a legacy subject to a power of appointment. St.1935, p. 1266.

2. Taxation ⇐856

An "estate tax" is somewhat like an ordinary tax, and is levied upon the valuation of the estate and is payable like any claim presented against the estate, and the number of recipients of the property of the estate is immaterial. St.1935, p. 1266.

[Ed. Note.—For other definitions of "Estate Tax," see Words & Phrases.]

3. Taxation ⇐859(2)

Whether Inheritance Tax Act of 1935 subjects all persons under like conditions to the same rule is real test of its natural, necessary or intrinsic qualifications, bringing it within recognized constitutional prohibitions. St.1935, p. 1266.

4. Constitutional law ⇐38

What may reasonably be done under a statute is the test of its validity.

5. Taxation ⇐40(1)

To declare a tax unconstitutional on the ground of discrimination, the discrimination must be unreasonable to the extent that it contravenes constitutional rights.

6. Taxation ⇐881

Where the Legislature has decided that a method of inheritance taxation is natural and just and a more advantageous and workable system than any other, the state cannot object if a testator devises a legitimate means of reducing amount of tax.

7. Taxation ⇐891

While testator cannot bind the state, he can advise that inheritance tax be taken from income instead of principal, and if feasible the state will follow such directions.

8. Taxation ⇐859(1)

Under Inheritance Tax Act of 1935, testator can decrease total tax by naming certain near relatives for direct bequests in large amounts to exclusion of distant relatives, and no complaint of unconstitutionality can be made if tax is reasonably uniform as to recipients named in will. St.1935, p. 1266.

9. Constitutional law ⇐229(1)
Taxation ⇐859(1)

The Inheritance Tax Act of 1935 taxing a transfer subject to a power of appointment is not unconstitutional as denying equal protection of the laws and as destroying property rights. St.1935, p. 1268, § 2, subd. 6;

Const.Cal. art. 1, §§ 1, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

10. Powers ⇐10

Powers of appointment are valid in California.

11. Constitutional law ⇐284(1)
Taxation ⇐859(1)

Where there is a succession of beneficial interests, states, without infringing on Fourteenth Amendment of Federal Constitution, can determine whether property for inheritance tax purposes may be dealt with as passing from estate of donor of power, or from estate of donee of power, but both rules cannot be employed under identical conditions by the same state. U.S.C.A. Const. Amend. 14.

12. Taxation ⇐856

The state may determine where an inheritance tax may fall.

13. Powers ⇐1

A "power of appointment" is a delegation by the donor in the disposition of his property to the donee who does not become the owner and holds only as trustee, and the power in and of itself does not grant an absolute interest, though donee may have an estate interest in addition to power of appointment.

[Ed. Note.—For other definitions of "Power of Appointment," see Words & Phrases.]

14. Powers ⇐1

A power of appointment may exist in conjunction with a transfer in trust or be independent of transfer.

15. Taxation ⇐856

The Legislature can determine whether a transfer through means of power of appointment can be the subject of inheritance taxes, and if such a principle is adopted the Legislature can provide reasonable rules, rates and exemptions for its execution.

16. Taxation ⇐856

An inheritance tax can be imposed upon a transfer to a donee of a power of appointment.

17. Taxation ⇐859(2)

An inheritance tax may be different on a transfer of the same value if the circumstances differ.

18. Taxation ⇐859(1)

A requirement that all transfers should be taxed immediately and finally on death of owner of property transferred is not unfair.

19. Taxation ⇐889

A provision in Inheritance Tax Act of 1935 taxing more than one transfer to one person on aggregate value of all the property so transferred assumed that the one person received property in temporary or permanent ownership with a right to enjoy some emolument or remuneration or the acquisition of a valuable benefit. St.1935, p. 1268, § 2, subd. 10.

20. Constitutional law ⇐42

While taxation must be on some rational basis, only those discriminated against can complain of a discriminatory law.

21. Taxation ⇐889

The assessment of an inheritance tax on amount left to executor individually and amount left to executor in trust for testator's heirs and under power of appointment to distribute such amount to heirs was improper, and tax should be assessed against such amounts separately. St.1935, p. 1268, § 2, subd. 6; p. 1276, § 8, subd. 4; Code Civ. Proc. § 1859.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of John B. Elston, also known as J. B. Elston, deceased. From an order fixing inheritance taxes, A. C. Wyckoff appeals. Harry B. Riley, as Controller of the state of California, is the respondent.

Order affirmed as modified.

Clark, Nichols & Eltse, of Berkeley, for appellant.

W. H. H. Gentry, Inheritance Tax Atty., and T. H. Christiansen and James W. Hickey, Assts. Inheritance Tax Atty., all of Sacramento, for respondent.

WARD, Justice.

This is an appeal from an order fixing inheritance taxes.

John B. Elston died on November 5, 1936, leaving an estate valued in the sum of $75,794.34. A holographic will, dated September 12, 1935, bequeathed a certain

sum to a sanatorium and other amounts to three nieces and two strangers. It also provided as follows: "I appoint A. C. Wyckoff my Executor without bond, he to receive 10% (ten percent) of personal property, and he to handle the residue of the estate, if any, for the benefit of my relatives most in need." On October 30, 1936, by codicil, the following provision was made: "It is intended and I provide that A. C. Wyckoff shall receive what is left to him in my said Will for acting as Executor thereof. As to the residue of my estate mentioned in my said Will, I leave the same in trust to said A. C. Wyckoff with the powers and for the uses and purposes and for the period herein specified. Said trustee shall have title to and hold and manage the trust estate, and to the extent required in the safe and prudent management thereof, invest and reinvest the same, keeping the trust property invested conservatively at all times. The net income of the trust shall be accumulated and added to the trust estate and shall be used and disposed of for the same purposes as the principal of the trust. My said trustee shall among my heirs determine those who, in view of their circumstances and conditions in life, are in need and distribute the trust property income and principal in proportion to such need, provided, however, that it is not intended that question shall be raised as to the exercise of discretion by my trustee. Said trustee is vested with a power of appointment to make distribution of said trust property as said trustee may determine. It is intended that said trust shall terminate in any event within the life of my said Executor, A. C. Wyckoff," Subsequent to admission of the will to probate and the issuance of letters testamentary, the court appointed an official tax appraiser to assess the inheritance tax. The report made certain deductions for funeral expenses, executor's commissions, attorney's fees, expenses of administration and federal estate tax in the total sum of $4,861.67, and fixed the clear market value of the estate at $70,932.67. After deduction of the bequests the amount of the residue was fixed in the sum of $52,932.67 and a tax assessed against legatee and donee Wyckoff on this amount as a single legacy at prevailing rates in the sum of $4,598.42. This "residue" included the gift to Wyckoff of 10 per cent of the personal property amounting to $7,579.43 paid him in lieu of his regular commission of $1,587.94, leaving his individual legacy $5,991.49, as well as the amount left to be used for the benefit of decedent's relatives.

The executor Wyckoff filed objections to the tax report, stating therein that "By virtue of subdivision 6 of section 2 of the Act the amount of this gift was taxable to the extent it exceeded the legal commissions of an executor and no objection is made to this." This statement refers to the deduction of the adjudicated executor's fees from the 10 per cent of the estate given under the terms of the will in lieu of commission for acting as executor. The objections in effect are that the value of the property left in trust to Wyckoff is added to the amount which actually passed to Wyckoff in his individual right, resulting in an increase of the total amount of the tax; that the tax upon the trust fund should have been computed and fixed in accordance with the highest contingency under the provisions of subdivision 4 of section 8 of the act; that subdivision 6 of section 2 as applied in the report is discriminatory and violates the state and federal Constitutions. The objections also set forth that the deceased left no father, mother, surviving wife or direct heirs; that his heirs consisting of four branches were either children or grandchildren of deceased brothers and sisters, twenty-five in number, who would have inherited but for the provision of the trust, and that the interests of these twenty-five heirs ranged from 1/12 to 1/2 of the residue of the estate.

[1] This decision might be confined to the salient points presented upon appeal, namely, does the 1935 amendment to subdivision 6 of section 2 apply to a limited power in trust, and if so, is it discriminatory; but other contentions are urged, and it may be well to pass briefly upon them. The title of the act reads in part as follows: "An act to be known as the 'Inheritance Tax Act of 1935,' to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, transfers, joint tenancies and insurance; to provide for its collection and to direct the disposition of its proceeds." Stats.1935, p. 1266. The title provides for a "tax" on "legacies", "transfers", "gifts", etc., and the act varies the tax as it applies to particular kinds of legacies, etc., which is sufficient to indicate authority to impose a tax upon a legacy subject to a power of appointment.

Subdivision 6 of section 2 of the act of 1935 (Stats.1935, pp. 1268, 1269), applicable to this appeal, provides as follows: "Whenever any person or corporation shall be given a power of appointment by virtue of any disposition of property made before or after the passage of this act, such gift of power of appointment shall, under the provisions of this act, be deemed a taxable transfer made from the donor of said power to the donee thereof at the date of the donor's death." Appellant argues that subdivision 6 of section 2 is discriminatory, violates the state Constitution and denied equal protection of the laws under the 14th amendment of the federal Constitution (secs. 1 and 21, art. I, and sec. 25, art. IV of the Const. of Cal., and amendment 14, Const. of United States, U.S.C.A.), and also that the provisions thereof have no application to the present case, but that the tax should have been assessed to the trust beneficiaries under subdivision 4 of section 8, the highest contingency section. This section deals with contingent transfers generally and would apply to powers of appointment if other provisions of the act did not specifically apply to such powers. Subdivision 6 of section 2 treats particularly with powers of appointment, while the provisions of subdivision 4 of section 8 are general. Code Civ.Proc. § 1859.

[2] Appellant seeks on this appeal to inject the question, was the tax an estate tax, and thereupon argues that if it was, it is void upon constitutional grounds, but respondent controller does not attempt to justify his position on any such theory. An estate tax is somewhat like an ordinary tax. The number of recipients of the property of the estate is immaterial. The tax is levied upon the valuation of the estate and is payable like any claim presented against the estate.

In determining the constitutionality of the present inheritance tax, the history of inheritance tax statutes in this state is enlightening. The 1905 act (Stats.1905, § 1, p. 341) provided for a direct inheritance tax. The passing of property was deemed a passing from the donee's estate. The state was compelled to await the exercise or nonexercise of the power before a tax could be collected. The recipient of the gift did not pay until he actually received the property. This period might cover many years. In 1913, a provision similar to the 1935 amendment appeared. Stats. 1913, § 3, p. 1068. The legislature in 1917 (Stats.1917, p. 880) decided that there should be a return to the 1905 form. Subsequent to the return in 1917 to the 1905 form, the Supreme Court of this state in Estate of Murphy, 182 Cal. 740, 190 P. 46, interpreting the 1911 Inheritance Tax Act, an amendment to the 1905 act, based its opinion in part upon Matter of Lansing's Estate, 182 N.Y. 238, 74 N.E. 882. The Lansing decision was predicated upon the election of the appointees to take under the donor's will. In the Estate of Murphy, supra, 182 Cal. at page 745, 190 P. at page 47, the court said: "It is not necessary for us finally to determine whether this confirmatory clause amounted to the exercise of the power of appointment or is to be treated as a failure to exercise the power. In either event, the result is the same." The Murphy decision appears to have caused some confusion in the minds of the administrators of the inheritance tax statute in this state, and accordingly they levied the tax in the estate of the donor under the highest contingency provision of subdivision 3 of section 8 of the 1921 act. Stats. 1921, pp. 1507, 1508. If the power was exercised, the tax paid from the donor's estate was refunded, and a tax fixed in the estate of the donee.

In 1929 (Stats.1929, pp. 1835, 1836), subdivision 6 of section 2 of the act provided as follows: "Whenever any person, trustee or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." This amendment, unlike the 1905 act, did not contain the provision that the effect of the non-exercise of the power should be treated as a passing in the donee's estate. Under the 1929 act no definite way of estimating the failure to exercise the power of appointment by the donee could be ascertained. Finally in 1935 the present act was passed, fixing the tax payable on a transfer subject to a power of appointment in the donor.

[3, 4] This history has been recited to indicate that the present act is not the result of hasty action arbitrarily assessing an inheritance tax that, as will hereafter ap-

pear, may not perfectly fit every exigency that may arise, but is a return after trial and due consideration to the provisions of an act that was once discarded but now resurrected and approved. Whether the present act, within the sphere of its operation, subjects all persons under like conditions to the same rule is the real test of its natural, necessary or intrinsic qualifications, bringing it within or without recognized constitutional prohibitions. "What may reasonably be done under a statute, is the test of its validity." Abbott v. McNutt, 218 Cal. 225, 230, 22 P.2d 510, 512, 89 A.L.R. 1109.

[5-8] To declare a tax unconstitutional, something more than mere discrimination must appear. The right to impose taxes for the conduct of government is based upon a necessity. Encroaching restrictions often occur. It seems impossible to write a tax law that will not place a burden upon one and give an advantage to another. Hence the generally accepted rule that the discrimination must be unlawful, that is, it must be unreasonable to the extent that it contravenes constitutional rights. The legislative body cannot see in advance all of the contingencies that may arise, but in the passage of subdivision 6 of section 2 of the Inheritance Tax Act of 1935, it must have been apparent to the legislative body that the opportunity to decrease the tax, under a power of appointment to dispose of property, was possible by designating more than one donee. If the legislature in its wisdom decided that such a method was natural and just, and a more advantageous and workable system than any other, then the state cannot object if a testator devises a legitimate means of reducing the amount of the tax. This opportunity is open to all testators. The testator cannot bind the state but he may advise that a tax be taken, for instance, from income instead of principal. If feasible the state will follow directions. In re Matthews' Will, 255 App.Div. 80, 5 N.Y.S.2d 707. A testator might decrease the tax by naming certain near relatives for direct bequests in large amounts to the exclusion of distant relatives, and thereby decrease the total tax. If the inheritance tax is reasonably uniform as to the recipients named in the testamentary document, no complaint may justly be made. In Estate of Watkinson, 191 Cal. 591, 599, 217 P. 1073, 1076, the court said: "In their petitions and briefs upon rehearing and upon oral argument thereon, appellants and amici curiæ earnestly insisted that the act in question was discriminatory, and therefore void, in that it required residuary legatees to pay a larger inheritance tax in proportion to the value of the estate to which they succeeded than was required of other legatees, even though they be all of the same degree of relationship to the testator. The answer to this contention is two-fold, the first being that the act does have a uniform operation, since it applies alike to all residuary legatees, and the second being that any disparity between the net amounts received by different legatees by reason of the operation of the act must be deemed to be chargeable to the testator rather than to the law. The testator is deemed to know the law, and therefore, when in making his will he names one as a specific legatee and another as a residuary legatee, he must be deemed to have intended thereby that the latter should be charged with the amounts required to be paid for the federal tax." Amoskeag Trust Co. v. Trustees of Dartmouth College, N.H., 200 A. 786, 117 A.L.R. 1186.

[9-16] We can find no constitutional or other inhibition against the policy of taxing a transfer subject to a power of appointment. The validity of powers of appointment is recognized in California. In Estate of Davis, 13 Cal.App.2d 64, 69, 56 P.2d 584, 586, the court said: "Whatever doubt has heretofore existed with respect to the validity of powers of appointment in California (21 Cal.Jur., p. 428, sec. 7; 13 Cal.Law Review, 1) has apparently been effectually dissipated by the very recent decision in Re Estate of Sloan, 7 Cal.App.2d 319, 46 P.2d 1007, in which a hearing was denied by the Supreme Court." If there is no transfer, there is no tax, but if there is a succession of beneficial interests, states, without infringement upon the 14th amendment of the federal constitution, may determine whether the property for inheritance tax purposes may be dealt with as passing from the estate of the donor of the power, or from the estate of the donee of the power (Orr v. Gilman, 183 U.S. 278, 22 S. Ct. 213, 46 L.Ed. 196), but both rules may not be employed under identical conditions by the same state. Binney v. Long, 299 U. S. 280, 57 S.Ct. 206, 81 L.Ed. 239. The state may determine where the tax may fall. Young Men's Christian Ass'n v.

Davis, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558. A power of appointment is a delegation by the donor, in the disposition of his property, to the donee who does not become the owner and holds only as trustee. The power in and of itself does not grant an absolute interest, though the donee may have an estate interest in addition to the power of appointment. 49 Cor.Jur., p. 1276. The power of appointment may exist in conjunction with a transfer in trust or be independent of the transfer. Ordinarily under the terms of a power of appointment, which is limited in its scope, the donee is limited in the exercise to the class designated, or limited by direction that the power shall not be exercised in favor of a designated group. The trustee and the donee need not be the same person. In the instant case it is a limited power in trust, in which the trustee of the trust is likewise the donee of the power in trust. In California no prohibition appears in the statute respecting taxation between general and limited powers of appointment. The legislature has the right to determine whether or not transfers through the means of power of appointment may be the subject of inheritance taxes. In re Vanderbilt's Estate, 163 Misc. 667, 297 N.Y.S. 554, see, also, Id., 255 App.Div. 756, 7 N.Y.S.2d 647. If this principle is adopted, the legislature may provide reasonable rules, rates and exemptions for its execution. If the transfer under the power of appointment may be taxed as a transfer *from* the donee of the power, we can see no reason why a tax may not be imposed upon the transfer *to* the donee. The power of appointment is not taxed, but rather the transfer of the property subject to the power of appointment.

[17, 18] A tax may be different on a transfer of the same value if the circumstances differ. Estate of Watkinson, supra; Stebbins v. Riley, 268 U.S. 137, 45 S. Ct. 424, 69 L.Ed. 884, 44 A.L.R. 1454. In California under the present statute a rate of taxation is fixed on transfers in the estate in which they would be taxed if the statute made no mention of powers of appointment. There seems to be no unfairness in a requirement that all transfers should be taxed immediately and finally on the death of the owner of the property transferred. Wachovia Bank & Trust Co. v. Lambeth, 213 N.C. 576, 197 S.E. 179, 117 A.L.R. 117.

[19] We cannot agree with the correctness of the lower court order taxing the independent gift by adding its value to the amount of the estate transferred through the power of appointment. Subdivision 10 of section 2 of the 1935 act (Stats.1935, pp. 1268, 1270) reads: "When more than one transfer within the meaning of any of the preceding subdivisions of this section has been made, either before or after the passage of this act, by a decedent to one person, the tax shall be imposed upon the aggregate market value of all of the property so transferred to such person in the same manner and to the same extent as if all the property so transferred were actually transferred by one transfer made at the date of the transferor's death and with the value, rates and exemptions as of that date." Subdivision 6 is manifestly a preceding section, and subdivision 10 may be applicable under certain conditions, such as a direct gift to a legatee, and an additional, outright bequest as a residuary legatee to the same person. There seems to be no inequitable adjustment of taxes under such a state of facts. The two bequests are merely united so that the tax represents the assessment against the total value of the property received by one person. But this raising of the amount of the tax from the lower bracket, if each bequest should be taxed separately, to the higher amount wherein the bequests are united, assumes that the one person receives the property in temporary or permanent ownership, with a right to enjoy some emolument or remuneration or the acquisition of a valuable benefit.

[20, 21] In the instant case, the donee under the transfer of the power of appointment may enjoy whatever benefits can be derived from the authority to invest the residuary estate and to determine the appointees under the transfer power, but he may not under this particular instrument use any part of the residuary estate for his personal use and advantage. The power of appointment is not only a benefit, but it may be a burden. The independent gift may in whole or in part recompense Wyckoff for the burden assumed. If the independent gift is not sufficiently compensatory, Wyckoff could act as trustee for a period and then refuse to continue and still possibly be entitled to the independent gift. Wyckoff was to "receive what is left to him in my said Will for acting as *Ex-*

ecutor thereof". (Italics ours.) The tax from the residuary trust estate is paid from the funds of the estate and not by Wyckoff individually, but when the amounts are united a higher tax is imposed, which forces Wyckoff to pay an additional amount from his personal estate or to take an additional amount from the residuary estate, which decreases the proportionate share of the twenty-five heirs. This method of uniting the two items in effect penalizes executor and legatee Wyckoff for the acceptance of the position of trustee. Only those discriminated against may complain of a discriminatory law. Wyckoff objects to the addition of the two items. All taxing must be on some rational basis. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054. We think this is inequitable to Wyckoff or the heirs, and that it is an unlawful discrimination that requires not a reversal, but a modification. Accordingly the order fixing the inheritance tax will stand modified and the trial court is directed to make such necessary alterations in the various items as are necessary to conform to the views expressed herein. As modified, the order will stand affirmed.

I concur: KNIGHT, acting P. J.

13 Cal.2d 570

GISH et al. v. LOS ANGELES RY. CORPORATION.

L. A. 17009.

Supreme Court of California.

May 25, 1939.

1. Trial ⇐142

The trial court cannot take case from jury unless, as matter of law, no other reasonable conclusion is deducible from evidence, and unless appellate court would reverse, or trial court set aside, contrary verdict.

2. Trial ⇐178

A defendant's motion for directed verdict is in nature of demurrer to evidence and concedes as true plaintiff's evidence, with all reasonable inferences deducible therefrom.

3. Trial ⇐139(1)

The fact that trial court might be justified in granting new trial would not justify directed verdict on same evidence.

4. Trial ⇐171

The right of trial court to direct verdict is same as right to grant nonsuit.

5. Trial ⇐142

A verdict for defendant may be directed only when, disregarding conflicting evidence and giving plaintiffs' evidence all value to which it is legally entitled, including every legitimate inference deducible therefrom, verdict for plaintiff would not be sufficiently supported by substantial evidence.

6. Negligence ⇐121(2)

The pleading of specific acts purporting to explain underlying reasons for accident, in addition to pleading of general negligence, does not completely deprive plaintiff of benefits to which he is entitled in application of res ipsa loquitur doctrine, but such benefits are merely confined in their operations to a narrower scope, and the inference of negligence of defendant applies only to such specific acts.

7. Negligence ⇐119(4), 121(1)

A plaintiff pleading, in addition to general negligence, specific acts purporting to explain underlying reasons for accident, is restricted, in the matter of "proof," to evidence supportive of his specific allegations, and defendant is ordinarily required to rebut only such evidence.

8. Negligence ⇐121(2)

A plaintiff pleading, in addition to general negligence, specific acts purporting to explain underlying reasons for accident, has burden of "proof" as to cause of action in general, notwithstanding that under res ipsa loquitur doctrine, inference of negligence of defendant applies to such specific acts.

9. Negligence ⇐136(6)

A plaintiff pleading, in addition to general negligence, specific acts purporting to explain underlying reason for accident, and producing but little evidence of substantial character in support of such specific acts, is entitled to have question whether his injuries were occasioned by defendant's negligence submitted to jury, since original inference of defendant's negligence is left undisturbed.

10. Carriers ⇐314(2)

A complaint which alleged the effect of the act of defendant street railroad in causing a street car to be suddenly stopped, resulting in injury to passenger, and which did not describe in detail any negligent act of defendant, or narrate any facts with reference to control by defendant of street car, which either immediately or ever preceded the happening of the accident, was sufficient to state a cause of action under the doctrine of res ipsa loquitur, notwithstanding that both general and special negligence was alleged.

11. Judgment ⇐19

An inference of the truth of facts essential to a cause of action will support a judgment which may be rendered in accordance with such facts.

12. Negligence ⇐136(6, 7)

The ultimate question of weight to be accorded evidence of parties is for exclusive original determination by jury, notwithstanding that to the comprehension of the trial judge, evidence to the contrary of the inference of negligence under res ipsa loquitur doctrine may greatly preponderate.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Katherine M. Gish and Charles C. Gish, her husband, against the Los Angeles Railway Corporation for injuries sustained by Katherine M. Gish while riding on a street car of the defendant.

From a judgment for the defendant, after the trial court had granted defendant's motion for a directed verdict, the plaintiffs appeal.

Reversed.

Prior opinion, 83 P.2d 97.

John F. Poole and H. E. Gleason, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Penn Cummings and John Henry Peckham, Jr., both of Los Angeles, of counsel), for respondent.

HOUSER, Justice.

While riding as a passenger on one of the street cars of the defendant corporation, plaintiff, Katherine M. Gish, assertedly sustained injuries. With relation thereto, as a foundation for an action for the recovery of a judgment for damages against the defendant, the complaint which was filed by the plaintiffs contained the following allegation, to-wit: "That on or about the 30th day of July, 1936, while plaintiff, Katherine M. Gish, was riding as a passenger for pay on the 'L' car of said defendant at or near Ninth and Westlake in the City of Los Angeles, County of Los Angeles, State of California, defendant, without regard to the rights of plaintiff, so negligently, carelessly and recklessly suddenly stopped said car with a tremendous jolt and shock as to throw plaintiff, Katherine M. Gish, against the inner portion of said railway car, severely and seriously injuring said plaintiff physically in such a manner as to cause her severe and grievous physical and mental suffering."

On the trial of the action, concerning the manner in which the accident occurred, in substance, the said plaintiff testified that after she had "boarded" an "L" car and had walked to a place therein at which she had expected to become seated, "there was a man had some packages, and he moved the packages back for me to sit down; and as he was moving those packages back, just as he had it all back, and I bended my knees just enough that I had really lost control of my feet, in a way, and just then the old 'L' car gave a tremendous jerk and lunge and it threw me against an upright post—solid wood post. * * * the car gave a tremendous jerk, jerk or lunge, and landed me against that post, * * *." Thereafter in her testimony the said plaintiff narrated facts which related to an oral complaint which, within a few minutes after the accident had occurred, she had made to the conductor of the street car regarding the happening of the accident, the events which were connected with the manner in which shortly thereafter she had traveled to her home, and the various and sundry injuries and ills which she had sustained and suffered by reason of the accident,—in which latter facts her testimony was corroborated by other witnesses. On behalf of the defendant, both the conductor and the motorman, in substance, respectively testified that neither had knowledge of any unusual jerk or motion of the street car at or about the time when, according to the testimony of plaintiff, the "tremendous jerk" of the street car had occurred. In addition thereto, a physician testified regarding the physical condition of said plaintiff after the accident. Following some rebuttal testimony on the part of plaintiffs, the defendant presented its motion to the court that the jury be directed to return its verdict in favor of the defendant,—which motion was granted. The jury returned its verdict as directed and thereupon judgment was entered in favor of the defendant. From such judgment the instant appeal has been taken.

In making the order for a directed verdict, the trial judge indicated that the reason therefor was that the evidence was insufficient to support a judgment, if any, which might be rendered in favor of plaintiff.

[1-5] Both by statutory provision and by judicial determination, it is well established that "a carrier of persons for reward must use the utmost care and diligence for their safe carriage, * * *." Sec. 2100, Civ.Code, and annotations connected therewith. Likewise, with reference to the authority of the trial court to direct a verdict, the various pertinent rules that relate thereto are of long standing in this state. In the opinion rendered by this court in the case of Hunt v. United Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184, 188, it was ruled as follows: "Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision. Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 263

Pac. 799. Such a motion is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 247 P. 597. Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence. Estate of Caspar, 172 Cal. 147, 155 P. 631. The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. Newson v. Hawley, 205 Cal. 188, 270 P. 364." To the same effect, see McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 P. 324, wherein it is declared (syllabus) that: "Evidence tending to show that plaintiff was injured at a regular station at which the train had stopped, owing to the sudden jerking of the train backward and forward, by reason of which he lost his balance, and was compelled to steady himself by taking hold of the casing of the door, when the door swung to and injured his hand, is sufficient to authorize a jury to find a verdict in his favor, and it is error for the court, upon such evidence, to direct a verdict for the defendant."

It becomes obvious, therefore, that, after according to the evidence which was adduced by the plaintiffs all the value to which in law it was entitled, unless such evidence was insufficient legally to support a verdict in favor of the plaintiffs, no authority was vested in the trial court to direct the jury to return its verdict in favor of the defendant. With that principle of law in mind, appellants direct attention to the language employed by them in the allegation of their complaint (hereinbefore set forth), together with the substance of the evidence that was adduced in their behalf; and in that connection, it is contended by them that, having established the fact that at a time when the said plaintiff was a passenger on a street car, she sustained an injury which was caused by some act of the defendant in operating the same, by application of the doctrine known as res ipsa loquitur, a presumption of negligence on the part of the defendant was created,—which in itself constituted sufficient evidence to entitle plaintiff to have the issue of negligence, and the cause, generally, submitted to the jury for its determination. On the other hand, although not questioning the general effect of the doctrine of res ipsa loquitur in a proper situation, it is urged by the respondent that by reason of the language in which the allegation which relates to the asserted negligence of the defendant was couched, plaintiffs were precluded from relying upon the benefit of the rule in that regard, and, as a consequence thereof, that only in the event the remainder of the evidence was sufficient to support a verdict which might have been returned in favor of the plaintiffs, were the plaintiffs entitled to have the jury pass upon the question of whether the defendant had been negligent in the operation of the street car upon which Mrs. Gish was a passenger at the time when she sustained the injuries of which she had complained. More particularly, in effect, the respondent contends that, having alleged the particular means by, or the manner in which, the said plaintiff sustained the injuries of which she complained, and, within the same allegation or count of the complaint, having declared on the general negligence of the defendant,—the plaintiffs thereby had precluded themselves from the benefit which, in the absence of such form of pleading, ordinarily would or might have accrued to them. In that regard, as authority for its position, the respondent has cited the case of Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462. Therein it appears that while the plaintiff was "acting as a fireman" on a train that then was being operated by the defendant, he sustained injuries which were caused by the derailment of said train at a time when it was crossing a bridge. In ruling upon the question of the applicability of the doctrine of res ipsa loquitur, it was held (syllabus) that: "The doctrine of res ipsa loquitur is not applicable to an action for personal injuries received by a locomotive fireman from the giving away of an abutment of a bridge while his train was passing over it, where, instead of alleging negligence *in*

general terms and proving the happening of the accident, the plaintiff both alleged and proved that the support was washed away by a cloudburst shortly before the accident and predicated his charge of negligence on the failure to inspect the track after the cloudburst and before the train had passed over the bridge." (Emphasis added.) Similar rulings were made where it was alleged: "(1) That the defendant's track was uneven and unsafe; (2) that the defendant's car was not equipped with a rear-view mirror in front of the motorman; (3) that the exit of the car was not guarded by a door or gate; (4) that the motorman negligently failed to stop the car at Q street after having been requested to do so; (5) that he negligently propelled the car past Q street at a dangerous rate of speed" (Moravich v. Central California Traction Co., 191 Cal. 295, 216 P. 595, 596); and that "'* * * at the time the defendants parked said automobile, as aforesaid, they so carelessly and negligently applied the brakes of said automobile as to permit the said automobile to roll down said slope * * * and to strike plaintiff * * *.'" (Porter v. Rasmussen, 127 Cal.App. 405, 15 P.2d 888, 889); also, in an action to recover damages from a lighting company, which damages ensued by reason of the destruction of certain property by fire alleged to have been caused by the negligence of the defendant, where the defendant was specifically charged with negligence, namely: "'(1) In installing transformers improperly and insufficiently grounded. (2) In installing fuses between its transformers and power lines of such size and strength as to afford inadequate or no protection to plaintiffs' property against excessive voltage. (3) In holding closed the breakers at its substation for several minutes after they had kicked out. * * *'" (Harker v. Southern California Edison Co., 83 Cal.App. 204, 256 P. 848, 856). To like effect, see Hall v. San Joaquin Light & Power Corp. 5 Cal.App.2d 755, 43 P.2d 856; Matthews v. Southern Pac. Co., 15 Cal.App.2d 36, 59 P.2d 220.

On the other hand, repeatedly it has been ruled that, notwithstanding the fact that in a single count of a complaint for damages, the plaintiff therein alleges both general negligence and specific acts of negligence, he is not precluded from, but, to the contrary, is entitled to, the benefit in his favor which arises from the application of the doctrine of res ipsa loquitur, —the only requirement in such circumstances being that the plaintiff has the burden of establishing the specific acts of negligence which he alleges.

The respective conclusions which were reached by appellate tribunals in each of the following cases attest and apply the foregoing principle, to-wit: In the case entitled Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 953, 118 A.L.R. 533, in which it was contended that the plaintiff, a passenger, sustained injuries by reason of the jerking of a cable car, the complaint contained allegations of both general and specific negligence. The defendants contended that there was no place in the case for the application of the doctrine of res ipsa loquitur. In refusing to sustain that contention, this court there said: "The point has been directly ruled against the contention of the defendants. McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 697, 12 P.2d 630. The other contentions made by the plaintiff during the presentation of his case * * * if they had also been alleged in his pleading would have constituted *other* specific allegations of negligence and *would not have changed the rule.*" (Emphasis added.) Likewise, it was held that plaintiff was entitled to the application of the rule (Roberts v. Sierra R. Co., 14 Cal.App. 180, 111 P. 519, 521 527) where allegations that were contained in a complaint were to the effect that while the plaintiff was a passenger on a train which was transporting both passengers and freight, which included a carload of dynamite, the "defendant carelessly and negligently allowed its railway track upon which said train was running to become obstructed and said defendant carelessly and negligently allowed certain obstructions to fall or become placed thereon, and so negligently and carelessly managed and operated its said locomotive and train that a portion of said train, to wit, several cars thereof, including said carload of dynamite, became and were on said day last aforesaid wholly derailed; That, by reason of the derailment of said cars and the concussion caused thereby, said carload of dynamite was instantly exploded and by reason thereof a violent explosion occurred." In the case entitled Murray v. United Railroads, 49 Cal.App. 462, 193 P. 596, it was held that the doctrine might be invoked. In that case it was alleged that on a specified date when the street car upon which plaintiff was a passenger "was run or operated around

the curve or loop in defendant's tracks at that point, and while on said curve or loop was stopped by said defendant for the purpose of enabling passengers to alight therefrom; that after said car had been stopped by said defendant for said purpose the plaintiff arose from her seat within said car for the purpose of walking to the end thereof and alighting therefrom, and that after she had thus arisen and was about to walk toward the end of said car in order to alight therefrom the defendant 'negligently and carelessly and without allowing said plaintiff sufficient time to walk toward the end of said car to alight therefrom, suddenly started said car, and then and there and by reason thereof caused said plaintiff to lose her balance and fall with great force and violence upon the floor of said car,' from which she received the injuries complained of. * * *" In a comprehensive opinion in the case of Atkinson v. United Railroads of San Francisco, 71 Cal.App. 82, 234 P. 863, 866, it was ruled that the allegation and "proof" of specific acts of negligence that the defendant " 'negligently and carelessly, and without any notice or warning, ran and operated said street car * * * at a greater speed than fifteen miles per hour, in violation * * *' of the municipal ordinance * * *" did not deprive the plaintiff of the benefit of the doctrine of res ipsa loquitur as far as those specific acts of negligence were concerned. In commenting upon the apparent strictness of the rule that hereinbefore has been stated, in part, the court said: "In adopting a rule for this state, we are of the opinion that it was not intended to declare an absolute and unqualified rule, that is, one so drastic as to deny plaintiffs in all cases, and under all circumstances, the benefit of the doctrine of res ipsa loquitur, merely because they have voluntarily gone further than the law required them to go, in particularizing the specific acts of negligence upon which they relied for a recovery; but that it was intended that the more liberal rule should be followed which restricts plaintiff, in his proof and recovery, to the specific acts alleged, and relieves the defendant from the burden of exculpating himself from any other acts of negligence than those alleged, but which does not, so far as those particular acts of negligence are concerned, deprive plaintiff of the benefit of the doctrine of res ipsa loquitur." The ruling in the case just cited has been followed in many succeeding cases. See Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 616, 300 P. 487, 490, where the allegation in the complaint was "that, due to the negligent operation of the truck by defendant's driver, the same ran off the highway and turned over, causing injury to the plaintiff"; Chauvin v. Krupin, 4 Cal.App.2d 322, 40 P.2d 904, 905, where in addition to an allegation of negligence in general terms, the plaintiff "alleged generally the acts performed by defendants in the course of their work; namely, the adjustment of the heater to the head, the use and manipulation of the heater, and the failure to protect plaintiff sufficiently against contact therewith". Similar rulings appear in each of the following cases, to-wit: McCole v. Merchants Express Corp., 19 Cal.App.2d 149, 64 P.2d 1130; Ellis v. Jewett, 18 Cal.App.2d 629, 64 P.2d 432; Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370; Phillips v. Southern California Edison Co., Ltd., 23 Cal.App.2d 222, 72 P.2d 769; Lynch v. Market Street Ry. Co., 130 Cal.App. 433, 19 P.2d 1009; Lippert v. Pacific Sugar Corporation, 33 Cal.App. 198, 164 P. 810; Soto v. Spring Valley Water Co., 39 Cal.App. 187, 178 P. 305.

[6-9] It thus becomes manifest that, in an appropriate case, in pleading not only general negligence, but also specific acts which lie at the foundation of the civil wrong of which the plaintiff complains, and which purport to account for or explain the underlying reason for the happening of the accident with its consequent injuries to the plaintiff, which may have resulted in the premises, the plaintiff is not penalized by a complete loss or forfeiture of the rights and benefits to which he is or may be entitled under the doctrine of res ipsa loquitur. They still remain intact, but are confined in their operation to a narrower scope; that is to say, that, although in a general way the inference of negligence on the part of the defendant still persists, it applies only to the acts, conduct, manner or means that the plaintiff has particularized or specified in his complaint. In the matter of his "proof", the plaintiff is restricted to evidence that may be supportive of his specific allegations; and ordinarily, in such circumstances, the defendant is required to rebut that evidence only. As to the cause of action in general, the burden of "proof" still remains with the plaintiff. As a consequence, in the instant case, even assuming that, in "proof"

of the specific acts and conduct of the defendant which the plaintiffs alleged, they produced but little evidence of a substantial character,—nevertheless, since (as hereinbefore limited) the original inference of negligence of the defendant was left undisturbed, notwithstanding the assumed strength of the evidence that was presented by the defendant,—the plaintiffs were entitled to have the question of whether the injuries of which they complained were occasioned by the negligence of the defendant, submitted to the jury for its determination. 19 Cal.Jur., p. 717.

However, aside from the legal effect of a pleading of negligence generally, which is coupled with an allegation of the specific act or conduct of the defendant as the asserted cause of the accident, it appears from a consideration of the several adjudications of the appellate tribunals of this state which bear upon the question of the "form" of an allegation of specific acts, where the form of the pleading involved in the respective cases was such that the plaintiff would be deprived of the full and undiminished benefit of the application of the doctrine of res ipsa loquitur,—it becomes apparent that, in the instant case, measured by the pleading in question, the plaintiffs should not be adjudged to have forfeited any part of their original rights in the premises.

Reverting to the essential language employed in the instant case in the allegation of negligence of the defendant, it will be noted that it is charged that the defendant "so negligently, carelessly and recklessly suddenly stopped said car with a tremendous jolt and shock * * *". Admitting the existence of the rule that a specific allegation of the cause of the injury may have the effect of depriving the plaintiff of a part of the benefit of the application of the doctrine of res ipsa loquitur, in each of several cases decided by the appellate court of this state—in which the facts which related to the immediate cause of the injury were alleged more specifically and with greater particularization than were the facts in the instant case—it has been held that the plaintiff was not "prohibited from relying upon the doctrine". To illustrate:

In the case of Soto v. Spring Valley Water Co., 39 Cal.App. 187, 178 P. 305, it appears that the defendant therein was engaged in the work of the construction of a dam, in connection with which it "operated a stationary steam engine which rotated a drum, on which ran a wire cable", which "was attached to a metal scoop, or scraper, which it pulled back and forth over a gravel pit to the top of a sieve, or screen, supported by timbers. On the last-named date, the defendant was employed moving rock under this structure". With respect to the point here under consideration, in part, the court said: "Defendant claims, however, that as the complaint alleged specifically negligence in the operation of this machinery, and defects in the strength of the timbers, that the plaintiff cannot invoke the doctrine of the maxim, and further contends that the evidence showed the specific cause of the accident, and that therefore the maxim may not be invoked * * *. We think, however, that this question is foreclosed in this state by the doctrine of the case of Lippert v. Pacific Sugar Corporation, 33 Cal.App. 198, 164 P. 810. It may be added that in this case the real moving cause of this accident is not shown. It is true that it appears that the scraper, for some reason, was dragged too far by the cable, thus wrecking the timbers, but this *is only the result of some other cause,* which must have been the underlying reason for the accident. This underlying cause is not proven, but it does seem to us that nothing could be clearer than that somebody's carelessness must have caused it." (Emphasis added.) And it was ruled (syllabus) that a "plaintiff is not prohibited from relying upon the doctrine because she alleged specifically negligence in the operation of the machinery and defects in the strength of the timbers".

Likewise, in the case of Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 616, 300 P. 487 (hereinbefore referred to), where, in substance, it was alleged that "due to the negligent operation of the truck by defendant's driver the same ran off the highway and turned over, causing injury to plaintiff", it was held that the plaintiff was entitled to the full and undiminished application of the doctrine.

In the case of Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 411, 18 P.2d 429, 432, it appeared that in weighing anchor of a boat on which the plaintiff was employed and, according to the allegation contained in his complaint "'while plaintiff was engaged in stowing away the anchor chain, in the performance of his duties as aforesaid, the officers, servants and employees of said defendant herein, and each of them, so carelessly and negligently operated a certain winch and its appliances, used

to haul in said anchor and to stow said anchor chain, and said winch and its appliances and said anchor chain were, by reason of the negligence of defendants, and each of them, so defective and insufficient that said anchor chain, while the same was being hauled in by defendant, its officers, agents and employees as aforesaid, and stowed by plaintiff and another employee in the "starboard" chain locker on said steamer "Lebec," suddenly reversed and violently proceeded in the opposite direction, and plaintiff was thereby violently thrown from his feet, against some portion of said chain locker, and as a proximate result thereof plaintiff sustained great bodily injury.'" It was there held that such allegation "did not prevent the operation of the doctrine of res ipsa loquitur where the allegations did not attempt to explain or set out the cause of the accident or the specific manner in which it occurred, but were merely general allegations of negligence".

The syllabus in the case of Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740, contains the following declaration of the law, to-wit: "* * * where the complaint alleged that defendant doctor negligently and carelessly deposited and left an abdominal sponge or gauze pad within the abdomen of plaintiff wife and that he negligently and carelessly closed the incision and sutured the same without first removing said sponge or gauze pad, and no attempt was made to describe the negligence in detail nor charge why or under what circumstances it occurred, the form of the complaint was not such as to prevent the application of the doctrine of res ipsa loquitur; * * *."

Analogously, in an action for the recovery of damages which resulted from injuries caused by falling plaster while the plaintiff was occupying a room in a hotel, it was ruled (syllabus) that, "where the complaint alleged merely that the ceiling 'was of a faulty construction and its condition had been allowed to become defective and unsafe by the defendants through their failure to properly operate, manage, control and maintain said building in which said hotel was conducted,' and there was no attempt to explain or set out in detail wherein the construction of the ceiling was faulty, nor to state specifically the reason why the plaster fell",—the allegations were "nothing more than general allegations of negligence", and the plaintiff was not precluded from invoking the doctrine of res ipsa loquitur. Mintzer v. Wilson, 21 Cal. App.2d 85, 68 P.2d 370.

In an action to recover a judgment for damages sustained by a plaintiff by reason of the wrongful death of her husband, which occurred at a time when he was being transported on an auto stage as a passenger for "reward" by the defendant in the action, it was held (syllabus) that an "allegation in the complaint that defendant operated the stage 'in such a careless, reckless, wanton and negligent manner that said auto-stage was overturned' and deceased was instantly killed, did not deprive plaintiff of the benefit of the doctrine of res ipsa loquitur; neither was plaintiff deprived of the benefit of such doctrine by reason of the fact that plaintiff went further than required in proving her prima facie case in offering some testimony as to the manner in which the overturning occurred, where such proof was a part of the res gestae and did not disclose the cause of the overturning as a definite fact." Seney v. Pickwick Stages, 82 Cal.App. 226, 255 P. 279.

It appears in the case of Murray v. United Railroads, 49 Cal.App. 462, 193 P. 596, 597 (hereinbefore cited), the facts were similar to those that are alleged in the instant case, particularly with reference to the fact that, as far as the plaintiff knew, and as was related by witnesses, the direct cause of the accident was the "suddenness and jerkiness and jolting" which ensued on the starting of a street car on which the plaintiff was being transported. With reference thereto, in part, the court said: "Whether this method of starting a car after it had been stopped for the purpose of enabling passengers to alight, and while passengers were in the act of alighting, was or was not negligence on the part of the defendant was clearly a question for the jury. * * * The trial court, therefore, properly denied the defendant's motion for a directed verdict."

The ruling in the case of Chauvin v. Krupin, 4 Cal.App.2d 322, 40 P.2d 904, hereinbefore referred to, is also in point. That action was for the recovery of a judgment for damages alleged to have been caused by the defendants in negligently inflicting a burn upon the scalp of the plaintiff at a time when she was receiving a "permanent wave" in a "beauty parlor" that was operated by the defendants. It was held (syllabus) that "the original complaint was sufficient to charge negligence in general

terms and to allow the application of the doctrine of res ipsa loquitur, where it alleged generally the acts performed by defendants in the course of their work, namely, the adjustment of the heater to the head, the use and manipulation of the heater, and the failure to protect plaintiff sufficiently against contact therewith, which acts constituted the entire operation undertaken by defendants in which plaintiff might have received her injuries, and they were all charged to have been done in a negligent manner". With reference to the effect of the allegations, in part, the court said: "Under the original complaint, plaintiff was entitled to describe, as she did in her testimony, the acts of the defendants in the course of their work. She was not required under these allegations, nor did she undertake to attribute the injury to any specific act of either defendant; nor did she attempt to explain how it occurred. Both the complaint and the testimony of plaintiff clearly show that she did not know, or claim to know, the particulars in which defendants acted negligently, whether in the placing of the heater upon her head, its use or manipulation, or the inadequate protection provided against injury from burns."

Again, in the instant case, referring to the language which was employed by the plaintiffs in their allegation of the negligent act of the defendant, to-wit, that the street car was negligently and suddenly stopped "with a tremendous jolt and shock", it is apparent that plaintiffs merely alleged the *effect* of the act of the defendant in causing the street car to be suddenly stopped. The particular conditions which may have been the inducing cause of the "tremendous jolt and shock" which occurred to the street car on the sudden stopping thereof were omitted from the allegations that were contained in the complaint. Not a word was used by plaintiffs to describe in detail or otherwise any assumed negligent act of the defendant, or to narrate any facts with reference to the control by it of the street car, which either immediately or ever preceded the happening of the accident. In other words, no attempt in any way was made by plaintiffs to account for the sudden stop, or to explain the cause thereof. All that was disclosed by the facts which were alleged by plaintiffs in their complaint was the result which ensued from some apparently unknown primary cause.

[10-12] It becomes manifest, therefore, that notwithstanding the fact that by their pleading both general and special negligence was alleged, plaintiffs should not have been deprived of the benefits to which they were entitled in the application of the doctrine of res ipsa loquitur.

It is clear that an inference of the truth of facts essential to a cause of action will support a judgment which may be rendered in accordance with such facts. 19 Cal.Jur., pp. 704, 717. And although to the comprehension of a trial judge, evidence to the contrary of such an inference may greatly preponderate, nevertheless the ultimate question of the weight that should be accorded to the evidence which may have been presented by the respective parties to the litigation is one for the exclusive original determination by the jury.

In the instant case, it follows that the jury should not have been directed to return its verdict in favor of the defendant. It becomes unnecessary to devote attention to other contested points of law which have been suggested for consideration.

The judgment is reversed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.



13 Cal.2d 565

PEOPLE v. ONE 1933 PLYMOUTH SEDAN DE LUXE AUTOMOBILE, ENGINE NO. PD165124.

S. F. 16193.

Supreme Court of California.

May 25, 1939.

Rehearing Denied June 22, 1939.

1. Forfeiture ⇐5

The owner of an automobile seized while automobile was being used to unlawfully conceal and convey narcotics contrary to statute was not a "claimant" within statute relating to rights of claimants of seized vehicle. St.1935, pp. 2204, 2210, §§ 1, 15(a–f).

2. Forfeiture ⇐2

The owner of a vehicle who has given consent to its operation by another is not

deprived of any constitutional right by forfeiture of his property on account of the operator's violation of a statute, even though such owner is without knowledge of or has failed to acquiesce in its illegal use. St. 1935, pp. 2204, 2210, §§ 1, 15(a–f).

3. Appeal and error ⇐173(2)

In proceeding for forfeiture of an automobile for violation of state narcotic act where there was no indication in record that judgment was based upon any defect in notice, an erroneous judgment for defendant would not be affirmed on ground urged for first time on appeal that the notice was defective. St.1935, pp. 2204, 2210, §§ 1, 15 (a–f).

4. Appeal and error ⇐854(2)

In proceeding for forfeiture of an automobile for violation of state narcotic act, to justify affirmance of erroneous judgment for defendant because of defect in notice, it must also appear that there is a total absence of some fact essential to the existence of the cause which cannot be cured by amendment or that there is present some averment which destroys the right to a forfeiture. St.1935, pp. 2204, 2210, §§ 1, 15 (a–f).

5. Forfeitures ⇐5

The proceedings under statute for forfeiture of automobile for violation of state narcotic act is one in rem. St.1935, pp. 2204, 2210, §§ 1, 15(a–f).

6. Forfeitures ⇐5

In proceedings for forfeiture of automobile for violation of state narcotic act, notice, which acquainted persons interested with nature of proceedings, stated date and place of alleged violation, statute claimed to have been violated, and character of relief sought, contained averments of all essential elements of cause for forfeiture and was sufficient. St.1935, pp. 2204, 2210, §§ 1, 15(a–f).

7. Forfeitures ⇐5

In proceeding for forfeiture of an automobile for violation of state narcotic act, failure of notice to make any reference to drugs mentioned in section 1 of the act was not jurisdictional and was supplied by allegation in owner's answer that she had not given her consent for a use to conceal or transport any drugs mentioned in section 1. St.1935, pp. 2204, 2210, §§ 1, 15(a–f).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceeding by the People of the State of California for the forfeiture of one 1933 Plymouth Sedan De Luxe Automobile, Engine No. PD165124, wherein Caroline Sarubbi filed an answer. From a judgment refusing to declare the automobile forfeited to the State, the State appeals.

Reversed.

For prior opinion of District Court of Appeals, see 83 P.2d 957.

Earl Warren and U. S. Webb, Attys. Gen., and Siebert L. Sefton and J. Albert Hutchinson, Deputy Attys. Gen., for the People.

A. J. Hennessy, of San Francisco, for respondent.

SHENK, Justice.

The People have appealed from an adverse judgment in a proceeding to obtain a forfeiture of the title and interest of the owners and others in a 1933 Plymouth sedan automobile.

Caroline Sarubbi, as owner of the automobile, was duly served with the notice required by section 15(b) of the State Narcotic Act St.1929, p. 388; as amended. Stats.1935, pp. 2210, 2212. The notice stated that the vehicle "was seized by the Division of Narcotic Enforcement of the State of California on or about the 12th day of August, 1937, while said vehicle was being used to unlawfully conceal, convey, carry or transport narcotics contrary to the force and effect of section 15 of the State Narcotic Act as amended, in the City of San Francisco, County of San Francisco, State of California"; that the state intended to forfeit her interest in said automobile, and that twenty days were permitted within which to file answer to establish any claim pursuant to subdivision (e) of said section 15.

Caroline Sarubbi filed her answer within due time, admitting ownership of the vehicle and denying the other allegations in the notice. She averred specially that on the date mentioned the automobile was being driven without her consent or knowledge; also that she had not given her consent for a use "to conceal, convey or transport any of the drugs mentioned

in Section 1 of the State Narcotic Act of California".

The trial court found Caroline Sarubbi to be the owner of the seized car, and that the automobile had been used at the time and place mentioned unlawfully to conceal, convey, carry and transport narcotics, contrary to the force and effect of section 15 of the State Narcotic Act. The court also made the following finding: "That it is true that said Caroline Sarubbi consented to and gave permission to her son, William Sarubbi, to use said Plymouth Sedan automobile on the 12th day of August, 1937, but that at said time she did not know that said automobile was to be used for the unlawful transportation of narcotics and did not give her permission to her son, William Sarubbi, to use said automobile for said purpose, nor did she at the time that she gave permission to her son to use said car intend that it should be used to unlawfully transport narcotics." From the foregoing findings the court concluded that the plaintiff was not entitled to judgment of forfeiture.

The appeal was taken on the judgment roll. It is the appellant's contention that the findings do not support the judgment; that when the court found that the car was used to transport narcotics contrary to the provisions of the statute, a judgment of forfeiture must follow; that lack of knowledge of the unlawful use or failure to give permission for use for the specific purpose did not absolve the owner who had given consent for the use of the car at the time of the seizure.

[1] The contention of the appellant must be upheld. Section 15 of the act provides that "any automobile or other vehicle used * * * to conceal, convey, carry, or transport any of the drugs mentioned in section 1 of this act * * * shall be forfeited to the State of California as in this section provided". Subsection (a) requires seizure of such an automobile by a peace officer of the state. Subsection (b) provides for notice of seizure and intended forfeiture to be filed with the county clerk and served on all persons claiming any right in the automobile, and for answer of those served within twenty days. Subsection (c) deals with proceedings in default of answer. Subsections (d) and (e) provide for the hearing on the issues raised by the notice and the answers on file, and they permit a claimant under a lien, mortgage or conditional sales agreement to prove the bona fides of his contract. Subsection (f) permits the release of the vehicle under certain circumstances to an innocent claimant as defined in subdivision (e). The owner in this case, however, was not a claimant within the meaning of those sections and did not file a claim as such.

[2] It has long been the settled law that the owner of a vehicle who has given consent to its operation by another, is not deprived of any constitutional right by the forfeiture of his property on account of the operator's violation of a statute such as is here involved, even though such owner is without knowledge of or has failed to acquiesce in its illegal use. Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L. Ed. 354, 47 A.L.R. 1044; Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376; People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 522, 55 P.2d 908; People v. One Ford Coupe, 10 Cal.App.2d 321, 51 P.2d 882.

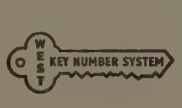
In Van Oster v. Kansas, supra, we find the following applicable language [272 U. S. 465, 47 S.Ct. 134]: "It is not unknown, or indeed uncommon, for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. * * * They [examples cited] suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process."

[3-7] Counsel for the respondent does not question the applicability of the foregoing decisions in support of the conclusion that the findings herein do not support the judgment. He rests upon the presentation of the point that the notice filed and served in the forfeiture proceeding was insufficient. There is no indication in the record that the judgment was based upon any defect in the notice. In the absence of any such showing, an erroneous judgment for the defendant ordinarily will not be affirmed on the ground urged by the respondent for the first time

on appeal that the complaint (or notice, as in this case) failed to state a cause of action. It must also appear that there is a total absence of some fact essential to the existence of the cause which cannot be cured by amendment, or that there is present some averment which destroys the plaintiff's right to prevail. Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 P. 304; 3 Cor.Jur. 785-787. There is no such showing in this record. The notice served on the owner was in conformity with the statutory requirements. The proceeding under such a statute is one in rem. Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 384, 220 P. 306. But it appears that the notice in the present case acquainted the persons interested with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the seized property. Such a notice was sufficient. People v. Lee Foon, 275 N.Y. 229, 9 N.E.2d 847. If the notice be subject to any ground of special demurrer, further particulars could have been supplied upon request. The notice herein, however, contained averments of all the essential elements of the cause for forfeiture. It may be added that the principal defect relied upon, that is, the failure to make any reference in the notice to "drugs mentioned in section 1" of the act, was not jurisdictional and any omission appearing in that respect was supplied by the allegations in the answer of the owner.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; HOUSER, J.



13 Cal.2d 554

LOS ANGELES COUNTY v. JONES, County Surveyor.

S. F. 16187.

Supreme Court of California.

May 22, 1939.

1. Municipal corporations ⇐514(11)

Under statute authorizing refunding in one proceeding of indebtedness to two or more special improvement districts by levy of one specific lien, reassessment and issuance of one issue of refunding bonds which provided that reassessment should be based on "estimated benefits," such benefits were restricted to those determined in original proceeding to have been received and did not include benefits derived from all public improvements in the multiple district refunding proceeding. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

2. Municipal corporations ⇐514(4)

The statute authorizing multiple special improvement district refunding proceedings must be strictly construed. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

3. Statutes ⇐245

Taxing laws must be strictly construed in favor of taxpayer, and tax will not be extended by construction to things not named or described in statute.

4. Constitutional law ⇐93(1), 137, 284(1) Municipal corporations ⇐514(4)

The statute authorizing refunding in one proceeding of indebtedness of two or more special improvement districts by levy of one specific lien, reassessment and issuance of one issue of refunding bonds which was construable as requiring reassessment to be based on benefits which were determined to have been received in original proceeding is not unconstitutional as impairing contract or vested property rights of individual property owners or taking property without due process of law. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31; Const. Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 10, cl. 1; Amend. 14, § 1.

5. Municipal corporations ⇐514(11)

Under statute authorizing multiple special improvement district refunding proceedings, the gross reassessments and credits may be calculated for all districts before the individual reassessment is determined, but in computing the gross amount to be levied on any specific parcel of land, the amount so levied may not be in proportion to benefits received by such parcel from improvements in district in which that parcel was not originally included, and hence as to which it was not originally declared to have been benefited. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

6. Municipal corporations ⇐514(4)

The provision of statute authorizing multiple special improvement district re-

funding proceedings that statute is remedial in nature and shall be liberally construed may not be extended to justify declaration of power to tax not granted either expressly or by necessary implication. St.1937, p. 2381, § 31.

7. Municipal corporations ⇐514(4)

Full scope and broad application may be given to remedial provisions of statute authorizing multiple special improvement district refunding proceedings, in absence of showing that constitutional rights of property owner would thereby be violated. St. 1933, p. 1915, as amended; St.1937, p. 2381, § 31.

8. Municipal corporations ⇐514(11)

In multiple improvement district refunding proceeding, property owner may not object to distribution or redistribution of overages or other credits in reduction of gross reassessment on any appropriate basis determined by legislative body conducting refunding proceeding, since property owner has no vested or contract right to any particular application of overages, contributions, readjustments or reductions from any source in computing the amount of the gross reassessment. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

In Bank.

Original proceeding on an application by the County of Los Angeles for writ of mandate prayed to be directed to the county surveyor of Los Angeles County to compel a reassessment on the real property in certain acquisition and improvement districts.

Writ granted.

Prior opinion, 88 P.2d 133.

J. H. O'Connor, Co. Counsel of Los Angeles County, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, for respondent.

SHENK, Justice.

A rehearing was ordered for the purpose of giving counsel an opportunity to discuss the method of spreading the refunding assessments under the act here involved, and to give consideration to the contention that the interpretation of section 31 thereof (Stats. 1937, p. 2381), announced in our previous decision would make multiple district refunding proceedings unworkable and therefore unavailing for the purpose intended by the legislature.

Our prior opinion with some modification is adopted in part as follows:

"The County of Los Angeles seeks the issuance of the writ of mandamus to compel the respondent, as its county surveyor, to spread a reassessment upon the real property in districts Nos. 32, 40 and 240 in said county pursuant to the Assessment Bond Refunding Act of 1933. Stats. 1933, p. 1915, as amended; Stats. 1937 p. 2381.

"The petition shows that Acquisition and Improvement District No. 32 was organized under the Acquisition and Improvement Act of 1925, St. 1925, p. 849. Bonds were issued on April 4, 1937, in the sum of $48,151.94, bearing interest at seven per cent annually. The bonds represented the cost of installation of an ornamental street lighting system. District No. 40 is a special improvement district organized also under the act of 1925, for the same class of improvements. Bonds of that district were issued on the same date in the sum of $34,864.06, bearing interest at seven per cent. Similarly under the 1925 act, district No. 240 was organized for the purpose of installing a sanitary sewage system and to meet the cost thereof. Bonds of that district were issued on February 3, 1930, in the sum of $170,086.83, with an interest rate of six per cent.

"The board of supervisors of the county of Los Angeles instituted the original proceedings in each instance. On January 18, 1938, the board of supervisors determined that the public interest, convenience and necessity required the refunding of the bonds of all three districts in one proceeding pursuant to the provisions of section 31 of the 1933 refunding act as amended by Statutes of 1937, page 2370, at page 2381.

"The proceeding progressed to the point where, after due demand by the board, the respondent county surveyor refused to make a diagram of the property upon which the reassessment was proposed to be levied and to prepare one reassessment on the various parcels for the proportion of the refunded unpaid balance of the cost of all improvements in proportion to the benefits received.

"The regularity of the proceedings thus far is not questioned. The demurrer filed

by the respondent raises the question of the constitutionality of the 1937 amendment to section 31, which provides for so-called 'multiple district refunding' in one proceeding. The portions of the amended section which are pertinent to the present discussion are:

"'When all or any part of the lands in any district, the indebtedness of which could be refunded under the provisions of this act, lie in any other district or districts, the indebtedness of which could be refunded under the provisions of this act, all or any number of such districts which wholly or partially overlap may be included in one refunding proceeding and the total indebtedness of all of the districts so included in one proceeding may be refunded in such proceeding and one issue of refunding bonds issued and one reassessment levied therefor. It is the intent of this section to permit, but not to require, the refunding in one proceeding of the indebtedness of all districts which wholly or partially overlap, and to authorize the refunding in one proceeding of the indebtedness of any number of districts where some part of the area of each of the districts lies wholly or partially within the boundaries of one or more of the other districts included in the same refunding proceedings, and such refunding in one proceeding of the indebtedness of two or more districts may be called "multiple district refunding." * * * The provisions of this section are to be liberally construed, to the end that jurisdiction to refund in one proceeding the indebtedness of any and every combination of districts now existing shall be full and complete.'

"It is further provided by the section that the resolution of intention and all the required notices shall state 'that the refunding shall not be authorized unless the consent of the owners of a majority in area of the lands included within each of the districts, who shall likewise be the owners of a majority in area of the lands included within the exterior boundaries of the total area which comprises the districts, is filed with the clerk of the legislative body conducing the proceeding * * *. If, at the hearing provided in section 3 hereof, the legislative body determines that the written consent of the owners of a majority in area of the lands in each of the districts, who are likewise the owners of a majority in area of the lands included within the exterior boundaries of the total area comprising the districts, has been filed, it shall be authorized to proceed with such multiple district refunding and to make a reassessment and issue refunding bonds therefor as in this act provided. The reassessment shall be spread over all of the lands in the total area comprising the districts and subject to tax or assessment for the payment of principal and interest of any of the bonds of the districts to be refunded in the proceeding.' The total reassessment is provided to be spread 'against all of the lands subject to reassessment hereunder within the total area comprised by the districts and benefited by the acquisitions or improvements or acquisitions and improvements, and upon each lot, piece or parcel thereof in proportion to the estimated benefits received by each such lot, piece or parcel of land from the acquisitions or improvements or acquisitions and improvements to pay for which the indebtedness proposed to be refunded was incurred'. The section also contains the following provisions: 'In the event that the holders of one or more of the outstanding bonds of any of the districts included in the multiple district refunding proceeding do not enter [into] any contract with the legislative body to refund the same, nevertheless, if the holders of 75% or more of the total amount of the outstanding bonds of all of said districts do contract with the legislative body which conducts the refunding proceedings for the refunding of the bonds owned or held by them, said legislative body shall have authority to refund all of the indebtedness of the districts included in such multiple district refunding proceeding under the provisions of this act, but, in such event, prior to recording the reassessment levied under this act, sufficient moneys to adequately provide for the retirement or payment of the bonds of the nonconsenting holders must be provided and set aside in the proper fund or funds for that purpose.'

"The petition herein also discloses that districts Nos. 32 and 40 do not overlap each other, but that district No. 240 partially overlaps district No. 32 and wholly overlaps district No. 40. The outstanding indebtedness of district No. 32 is $16,815.43; of district No. 40, $16,878.85; and of district No. 240, $190,901; a total for all three districts of $224,595.28. The proposed total maximum reassessment for all three districts is $139,980.29, payable over a nine-year period, with the interest rate

reduced to five and one-half per cent annually. It also appears that a hearing was duly noticed and held at which protests of property owners were considered; that written consents were on file of the owners of a majority in each of the districts who likewise are owners of a majority in area of the land within the exterior boundaries of all three districts. In the pending reassessment proceeding it is contemplated that the ad valorem method of assessment under the 1925 act shall be replaced by a specific lien assessment against the lands included within the exterior boundaries of all three districts in proportion to the benefits received by each parcel from the improvements to pay which the indebtedness proposed to be refunded was incurred. No contention is made that at least 75 per cent of the bondholders have not consented, or that sufficient moneys are not provided for the retirement of the bonds of any nonconsenting bondholders.

"The question posed by the respondent is: 'Do the provisions of the Assessment Bond Refunding Act of 1933, authorizing the refunding in one proceeding of the indebtedness of two or more ad valorem assessment districts by the levy of one specific lien reassessment and the issuance of one issue on refunding bonds, when the owners of a majority in area of the land in each of said districts constituting the owners of a majority in area of the land in all of said districts, have consented thereto, impair contract rights or vested rights of property owners in the respective districts?'

"The respondent concedes the practical necessity for multiple district refunding proceedings, that is, the impossibility, practically, to refund or adjust the indebtedness of one of several overlapping districts without at the same time adjusting the indebtedness of the others. He contends, however, that to spread the multiple district refunding reassessment upon all the lands in the total area comprised of the three original districts in proportion to benefits from all of the acquisitions and improvements of the several districts violates the contract clause of the state and federal constitutions, impairs vested rights, and takes property without due process of law.

"The validity of the refunding statute of 1933 as amended has been considered and determined in the recent cases of County of Los Angeles v. Jones, 6 Cal. 2d 695, 59 P.2d 489; City of Los Angeles v. Aldrich, 8 Cal.2d 541, 66 P.2d 647, and City of Culver City v. Reese, 11 Cal.2d 441, 80 P.2d 992. Each of those cases involved the refunding of the indebtedness of but one improvement district.

"The petitioner relies on cases such as [City of Los Angeles v. Los Angeles Flood Control Dist., 11 Cal.2d 395, 80 P.2d 479; affirmed 59 S.Ct. 622, 83 L.Ed. ——]; Ferry v. O'Brien, 188 Cal. 629, 206 P. 449; Palo Verde Irrigation District v. Seeley, 198 Cal. 477, 245 P. 1092; Cowart v. Union Paving Co., 216 Cal. 375, 14 P.2d 764, 83 A.L.R. 1185, and others, which upheld legislation providing for reassessment for public improvements under special circumstances not here involved.

"If the plan of reassessment proposed by the petitioner contemplates that land in one of the overlapping districts may bear a proportion of the assessment for improvements in another district, although such land was not included in the latter district originally and, inferentially, at least, found not to have been benefited by the improvement, difficulties might be encountered giving rise to questions which are not here necessary to decide. The petitioner emphasizes, however, that the additional assessment will not be levied unless such land in one district is shown actually to have benefited by the improvements in the other district. Both the petitioner and the respondent seem to assume that the language of section 31 as amended directs or authorizes the reassessment on lands not originally found to have been benefited by the improvements. We find no expression in section 31 which would warrant this court in concluding that the legislature intended the authorization thus apparently assumed. The pertinent language of the section which bears upon the extent of the area to be affected by the reassessment is the following:

" 'The reassessment shall be spread over all of the lands in the total area comprising the districts and subject to tax or assessment for the payment of principal and interest of any of the bonds of the districts to be refunded in the proceeding. * * * The total amount * * * shall be assessed upon and against all of the lands subject to reassessment hereunder within the total area comprised by the districts and benefited by the acquisitions

or improvements or acquisitions and improvements, and upon each lot, piece or parcel thereof in proportion to the estimated benefits received by each such lot, piece or parcel of land from the acquisitions or improvements or acquisitions and improvements to pay for which the indebtedness proposed to be refunded was incurred.'

[1] "Does the foregoing language indicate a legislative intent that the 'estimated benefits' shall include benefits derived from all public improvements involved in the multiple district refunding proceeding, even though such land was not determined originally to have been benefited thereby? Or does the language import an intent that the 'estimated benefits' are restricted to benefits which were determined to have been received in the original proceeding? It might be argued that the use of the conjunctive and disjunctive in referring to the acquisitions and improvements of all districts indicated the interpretation suggested by the first question. But that interpretation would contemplate that by the refunding an additional assessment could be levied upon lands for an improvement on account of which they were not theretofore assessable. We take it that if the alternative construction indicates the proper intent and meaning of the statute, no possible objection could be presented against reassessing upon each parcel of land in one sum the proportionate amounts which would be due for each of the improvements from which originally it was determined to have derived a benefit. This conclusion might not permit the petitioner to go the full length intended by the present refunding proceeding; but in our opinion it accomplishes the object of the statute within its express terms.

[2, 3] "The language presented for interpretation by this proceeding is subject to the rule of strict construction. East Bay Municipal Utility Dist. v. Garrison, 191 Cal. 680, 688, 218 P. 43; Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; Merced County v. Helm, 102 Cal. 159, 36 P. 399; Creighton v. Manson, 27 Cal. 613, 614, 629; 23 Cal. Jur., pp. 805, 806; 24 Cal.Jur., pp. 22, 28, and cases cited. The rule of interpretation is stated in Merced County v. Helm, supra, 102 Cal. at page 165, 36 P. at page 400, as follows: 'Any attempt on the part of the state, or of the county as one of the political subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. * * * the proceeding is in invitum, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. [Citing cases.] A tax can never be extended by construction to things not named or described in the statute as the subject of taxation.'

"The application of the foregoing rule would result in confining the 'estimated benefits' intended as the measure of the reassessment, to those benefits determined in the original proceeding or proceedings to have been received by the land within the district or districts. If the legislature intended to authorize the extension of the assessment for the improvement to lands not originally determined to have been benefited thereby, it could have said so in unmistakable terms, in which event other objections not now necessary for determination could be presented.

[4] "It therefore becomes unnecessary to decide in this proceeding the question of the constitutionality of the section had it authorized such additional assessment on lands outside of the district originally determined to include all the lands benefited by the improvement. No contention is made, nor could a contention successfully be made, that the section as amended does not otherwise conform in all respects to the requirements of the Constitution as expounded in the cases hereinabove cited bearing upon the validity of refunding assessment acts. The fact that the outstanding obligations of three improvement districts are permitted to be refunded in one proceeding and by the imposition of an assessment in one sum on each parcel of land affected thereby, may not alone be the basis of any meritorious objection on constitutional grounds."

It is now contended that the foregoing precludes the spread of overages, which occur in computing the specific reassessments, to any district included in the proceedings other than the district as to which the particular overage is applicable. Counsel urge the court to decide the question whether the method of computation and levy of the reassessment in the multiple

district refunding proceeding permits the spread or apportionment of overages amongst all the districts in the refunding proceeding without regard to district boundaries.

Counsel now set forth the method of spread so far used in applying the provisions of section 31 of the act, as follows: "First, the county surveyor takes the total amount of the proposed reassessment and apportions that between the districts in accordance with the outstanding indebtedness of each. Then to the sum so apportioned to each district he adds the amount of the ad valorem assessments, paid into the interest and sinking fund of that particular district. The total of these two amounts is spread upon all of the lands in the district in proportion to the benefits from the improvements constructed for the district. When this separate spread has been made for each of the districts involved in the multiple refunding, the amounts spread upon any parcel of land lying in two or more districts are added together and make a total sum. This spread of the assessment is sometimes referred to by engineer and attorneys as the gross spread or gross assessment. When this gross spread or gross assessment has been made, then the credits to which each parcel of land is entitled, by reason of the ad valorem assessments levied upon it and paid into the interest and sinking fund of all of the districts in the multiple refunding proceeding, are deducted from the gross assessment spread upon the parcel."

It is contended that this or some similar method of gross spread and computation of credits is prescribed by the provisions of section 31 of the act, as opposed to the single district method of arriving at the amount of the net reassessment; that a method of employing a gross spread is necessary in order to accomplish the objects of multiple district refunding, namely, so to reduce and redistribute the burden of the original assessment that all delinquent lands will be restored to the tax roll, and in the process to change the ad valorem method of assessment on one parcel of land lying within several districts to one specific lien for the entire balance due from that parcel on account of the indebtedness of the several districts within which it lies. The provisions alluded to are, that the total amount of the proposed reassessment shall be fixed in the resolution of intention; that the reassessment shall be spread over all of the lands in the total area comprising the districts; that to the total sum of the reassessment shall be added the total sum of all assessments, including interest and penalties, paid into the interest and sinking fund of any of the districts; that the total amount of the two sums thus ascertained shall be assessed upon and against all of the lands subject to reassessment within the total area comprised by the districts and benefited by the acquisitions or improvements in proportion to the estimated benefits received by each parcel of land.

[5] Counsel argue that it is apparent that there is but one assessment to be levied which shall be fixed in the resolution of intention and be spread over all the lands in the total area without any requirement that any individual district be used as a basis for refunding. Nevertheless there is also included in the section the provision that the assessment must be spread "in proportion to the estimated benefits received by each such lot, piece or parcel of land from the acquisitions or improvements or acquisitions and improvements to pay for which the indebtedness proposed to be refunded was incurred". It would appear that the gross reassessments and credits may be calculated for all districts before the individual reassessment is determined. But in computing the gross amount to be levied upon any specific parcel of land, the legislature nowhere has expressly declared that the amount so levied may be in proportion to benefits received by such parcel from improvements in districts in which that parcel was not originally included and therefore as to which it was not originally declared to have been benefited. The legislature has not expressly nor by necessary implication found that the lands in one district have been benefited by improvements in such other districts, as was the case in City of Los Angeles v. Los Angeles Flood Control District, supra.

[6–8] Counsel invoke the further provision of section 31, which reads: "This act is remedial in nature and shall be liberally construed." Liberal construction may be accorded to the remedial provisions of said section and of the act, including provisions pertaining to the regularity of the refunding proceeding and to the method of redistribution on reassessment. But the legislative exhortation is not to be extended to justify a declaration of a power to tax which was not granted either

expressly or by necessary implication. This conclusion is not in disregard of the provision enjoining a liberal construction of the statute. On the other hand, our conclusion defining the extent of the exercise of the taxing power does not prevent full scope and broad application being given to the remedial provisions of the act in the absence of any showing that the constitutional rights of the property owner would thereby be violated. We are of the opinion that such a showing has not herein been made. It is of no legal concern to the property owner that overages may be created and that such overages may be distributed to equalize the burden upon such lands so as to effect the salutary purposes of the act. The property owner has no vested or contract right to any particular application of overages, contributions, readjustments, or reductions from any source in computing the amount of the gross reassessment. He may therefore have no valid objection to a distribution or redistribution of such overages or other credits in reduction of the gross reassessment, on any appropriate basis determined by the legislative body conducting the refunding proceeding.

The petitioner therefore is entitled to the issuance of the writ directing the respondent, as surveyor of the county of Los Angeles, to prepare a diagram and make the reassessment upon the lands involved in the pending proceeding in conformity with the views herein expressed.

Let a peremptory writ issue accordingly.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.



33 Cal.App.2d 6

POORE v. EDGAR BROS. CO. et al.

Civ. 2086.

District Court of Appeal, Fourth District, California.

May 22, 1939.

1. Negligence ⇐62(1)

The liability of a manufacturer or vendor to a third party for such negligence in the construction of an article as renders it inherently dangerous for its intended use does not arise where an article is not inherently dangerous for its intended use and where it becomes dangerous only when something else intervenes.

2. Automobiles ⇐16

Vendor's installation of ordinary glass rather than safety glass in secondhand automobile which, when new, had had safety glass as standard equipment, was not negligence rendering the automobile inherently dangerous so as to impose liability on the vendor for injuries resulting from glass broken in collision, since danger from use of ordinary glass in automobile windows was not probable but merely possible as result of some intervening force.

3. Automobiles ⇐16

Statutes requiring safety glass in new automobiles were adopted not because ordinary glass was inherently dangerous for intended use in automobiles but because of greater likelihood of intervening causes of danger due largely to increased number of automobiles in use. St.1935, p. 224, § 675.5.

4. Negligence ⇐62(1)

Negligence which requires the interposition of new and independent agencies to cause injury is "remote" rather than "proximate" which means direct or immediate.

[Ed. Note.—For other definitions of "Proximate" and "Remote; Remoteness," see Words & Phrases.]

5. Automobiles ⇐16

Complaint stating that vendor of secondhand automobile negligently installed ordinary glass in windows rather than safety glass and that plaintiff was injured when the glass was broken in a collision stated no cause of action against the vendor since injuries were directly caused by the intervening collision and vendor's negligence, if any, was as a matter of law not the "proximate cause" of the injuries.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by John Poore, a minor, by E. D. Poore, guardian ad litem, against the Edgar Bros. Company, a corporation, and others, for injuries from glass broken in automobile collision. From judgment of

dismissal, plaintiff appeals as to the named defendant.

Affirmed.

Wolford & Heald, of Brawley, and C. G. Halliday, of El Centro, for appellant.

S. P. Williams, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries. The appeal is from a judgment of dismissal following the sustaining of a demurrer to a second amended complaint. The sole question presented is whether this complaint stated facts sufficient to constitute a cause of action.

On January 29, 1937, one Dan Poore purchased from the respondent a second-hand 1936 Ford automobile. On February 5, 1937, while riding in this car, the appellant was injured by broken glass from the right front door thereof, the glass being broken in a collision between that car and another automobile. At that time section 675.5 of the Vehicle Code, St.1935, p. 224, required safety glass on any new motor vehicle sold after January 1, 1936, but there was no such provision in connection with the sale of a second-hand car.

The gist of the complaint is that shatter-proof glass was the standard and advertised equipment of 1936 Ford cars; that the respondent was guilty of negligence in that it had knowingly replaced the glass in the right front door of this car with an inferior grade of glass; that without fault of the appellant the glass in this door was broken by a blow which would not have broken shatter-proof glass; and that such negligence on the part of the respondent was the proximate cause of the injuries suffered by the appellant.

The appellant relies upon the principles laid down in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, Ann. Cas.1916C, 440, L.R.A.1916F, 696, and approved in Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, to the general effect that the manufacturer of an article, knowing that it is to be used by others than the immediate purchaser, is liable to such others for injury which is directly traceable to negligence on the part of the manufacturer, if the nature of the article is such that it is reasonably certain to place life and limb in peril when negligently made and, further, that when a manufacturer or vendor sells an article which because of known structural weaknesses will be inherently dangerous to those using it for the purpose for which it was manufactured or sold, such defects and such purpose being known, the manufacturer or vendor will be held liable to respond in damages to one who is injured while using the article for that purpose, in the absence of contributory negligence or other valid defense.

In discussing the MacPherson case, and another similar case, the court in Cohen v. Brockway Motor Truck Corporation, 240 App.Div. 18, 268 N.Y.S. 545, 546, said:

"In each of those cases the defective part in the automobile rendered it, while in motion, a 'thing of danger,' and an accident, which was almost inevitable, resulted.

"Certain defective parts make an automobile either inherently or imminently dangerous; others do not. In MacPherson v. Buick Motor Co., supra, Judge Cardozo stated: 'There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for a jury.' "

[1-3] The liability of a manufacturer or vendor under the rules here relied upon is for such negligence, in the construction of an article, as renders the same inherently dangerous if used for the purpose for which it was intended. These rules have no application where an article is not inherently dangerous for its intended use, and where it becomes dangerous only when something else intervenes. While defective wheels or brakes on an automobile make it inherently or imminently dangerous, danger being a probable rather than merely a possible result of its use, the same may not be said of the use of ordinary glass instead of safety glass in its windows. Automobiles are intended to run upon the highways and to be kept under control, but the glass in their windows is not intended to withstand blows as a part of its ordinary use. While such windows may be broken, and frequently are, this is due to intervening causes and not to the fact that they are inherently dangerous

for the purposes for which they were intended. Cars ran for years with ordinary glass in the windows and the new statutes requiring safety glass were adopted not because other glass was inherently dangerous in the intended use of a car but because of the greater likelihood of intervening causes of danger, due largely to the increased number of cars on the road. The resulting danger is one arising from outside sources rather than from any inherent danger in the article itself.

[4, 5] Even if we assume that the respondent was negligent in installing the glass in question, it appears from the allegations of the complaint that the injuries complained of resulted from a blow from an outside source. In Johnson v. Union Furniture Co., Cal.App., 87 P.2d 917, 919, the court said:

"It is well settled that in order to maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege and prove that the wrongful act of the defendant was a direct and proximate cause of the injury. * * * And in this connection it is held generally that the word 'proximate' is intended to mean direct or immediate, as opposed to remote (Straten v. Spencer, 52 Cal.App. 98, 197 P. 540); and that negligence requiring the interposition of new and independent agencies to cause injury is remote (Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843). Moreover, in determining the question of proximate cause, care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the causa causans, and not merely the causa sine qua non. * * * Furthermore, if, subsequent to the initial cause, a new efficient cause intervenes to affect the injury, having its origin independent of the initial cause, or having its origin therein could not reasonably have been foreseen by a person of ordinary intelligence and prudence as a natural and probable result thereof, it supersedes the initial cause, breaks the connection between the initial cause and the effect, and becomes a proximate cause of the injury rendering the initial cause remote."

The appellant argues that whether or not negligence on the part of the respondent was the proximate cause of his injuries, and whether or not there was an intervening cause without which the injury would not have happened, are questions of fact which should have been submitted as such to the court or a jury. If we assume, however, that appellant's injuries would not have been sustained if safety glass had been installed in this door, the fact remains that such injuries were immediately and directly caused by an outside source with which the respondent had no connection, rather than by any inherent defect in the glass. We think it appears as a matter of law that the respondent's negligence, if any, was not the proximate cause of the appellant's injury. Stultz v. Benson Lumber Co., 6 Cal.2d 688, 59 P.2d 100.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



32 Cal.App.2d 729

DONKIN v. KILLEFER et al.

Civ. 2300.

District Court of Appeal, Fourth District, California.

May 20, 1939.

Rehearing Denied June 19, 1939.

Hearing Denied July 18, 1939.

1. Vendor and purchaser ⇐119

A purchaser of land desiring to rescind on ground of fraudulent representations must act promptly on discovery of the fraud.

2. Vendor and purchaser ⇐310

One who is induced to purchase land by fraudulent representations may, instead of rescinding, affirm the contract and by appropriate allegations set up the fraud and his claim of damages as an offset to that extent, in defense of an action brought for balance of the purchase price.

3. Vendor and purchaser ⇐42

The purchasers of land if they discovered alleged fraud before reselling remainder of land subject to trust deed after prior partial disposition waived the fraud by thus dealing with the land and treating debt as

valid and trust deed as a subsisting encumbrance.

4. Mortgages ⇐200(1)

Generally, a mortgagor or one giving a trust deed on property must pay all taxes and assessments, to preserve the property as security for amount of the debt.

5. Vendor and purchaser ⇐310

The purchasers of land, seeking to affirm contract after discovery of alleged fraud and to offset damage therefrom against claim for balance of purchase price, would be required to affirm entire contract including trust deed, subject only to any offsets which court might allow as compensation for the damage suffered.

6. Vendor and purchaser ⇐310

Purchasers who resold land subject to trust deed and permitted the land to be sold to irrigation district for nonpayment of assessments could not when sued for balance of purchase price offset claim for damage from alleged fraud, since vendor's position was changed by reason of loss of security and purchaser could no longer affirm the contract in its entirety so as to permit such offset.

7. Vendor and purchaser ⇐44

In action for unpaid balance of purchase-money note, where purchasers had resold the land subject to trust deed and had permitted the property to be sold to irrigation district for nonpayment of assessments, evidence in support of defense of fraudulent representations in sale of the land to purchasers was properly excluded.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Ellen Donkin against Wade Killefer and another to recover the unpaid balance of a promissory note. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ratzer, Bridge & Gebhardt, of Los Angeles, and Charles B. De Long, of San Diego, for appellants.

David N. Wemyss, of Vista, and J. C. Hizar, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for the unpaid balance of a promissory note, the complaint alleging that the note was originally secured by a deed of trust the security of which has, without fault of the plaintiff, become valueless.

On May 1, 1931, the plaintiff, through a real estate agent, John H. Kibler, sold 16 acres of land to the defendants for $4,150, taking back a note and trust deed for $3,500. On October 29, 1931, the defendants sold 5 acres of the land to Kibler for $1,200, which amount was paid to the plaintiff and applied upon the note. On November 3, 1931, the defendants sold the remainder of the property to Kibler, subject to the trust deed indebtedness, and received from him other property in exchange for their equity.

The complaint in this action was filed on April 28, 1937. On September 17, 1937, the defendants filed an answer alleging that on May 1, 1931, the plaintiff agreed to sell this property to John H. Kibler; that "as a matter of business convenience" title was taken in the name of the defendants for the use and benefit of said Kibler; that as a part of said transaction the defendants signed the note and trust deed; that the plaintiff knew that the defendants were signing the note under these circumstances; and that the defendants received no consideration for signing said note. On November 17, 1937, a further defense was added to the answer by amendment, alleging that the sale of said land was secured by false and fraudulent representations made by the plaintiff to these defendants to the effect that the land in question was adapted to and suitable for the growing of avocados; that said representations were false in every respect; that the defendants believed the same and in reliance thereon undertook to purchase said real estate; that the defendants had sold 5 acres of the land for $1,200 and paid the entire amount to the plaintiff; and that "the remaining portion of said land is without value and that defendants hereby tender to plaintiff a deed to said property". The only prayer of the answer is that the plaintiff take nothing by reason of her complaint.

At the trial evidence was introduced supporting the allegations of the complaint. Among other things, there was evidence that the land in question had been later sold to the Vista Irrigation District for nonpayment of assessments and that, thereafter, this district brought a quiet title action against Kibler in which its title was quieted by a decree entered on April 10,

1937. After the plaintiff had finished her case the defendants sought to introduce evidence in support of the allegations of fraud contained in their answer. They offered to prove that the plaintiff, at the time she listed the property for sale with Kibler, had told him "that this was good avocado land, that it had been tested and ought to be good avocado land"; that Kibler "conveyed this information to Mr. Killefer who personally did not inspect the land"; that these representations were relied upon; and that the land was not fit for avocado raising. Objections to the introduction of the offered testimony were sustained and a judgment was entered in favor of the plaintiff, from which this appeal was taken.

The sole question for consideration is whether the court erred in refusing to permit the introduction of evidence in support of the defense of fraudulent representations in the sale of this land.

[1, 2] It is well established that a purchaser of land who desires to rescind upon the ground of fraudulent representations must act promptly upon discovery of the fraud. It is equally well established that such a purchaser may, instead of rescinding, affirm the contract and, by appropriate allegations, set up the fraud and his claim of damage as an offset, to that extent, in defense of an action brought for the balance of the purchase price. The appellants here failed to allege when they discovered the alleged fraud, or any facts entitling them to a rescission. Although they attempted to tender a deed by their answer they had placed themselves in a position where they could not make that tender good. There was no attempt in their answer to allege any facts with respect to any damage suffered by them, or the amount thereof or which raised such an issue.

[3] Aside from the matter of pleading, and aside from other considerations, the appellants here are hardly in a position to claim the benefit of the general rule permitting a purchaser of land, after discovery of a fraud, to affirm the contract and offset his damage against a claim for the balance of the purchase price. If they discovered the fraud before they sold the remainder of the land to Kibler, they waived the fraud in thus dealing with the land and treating the debt as valid and the trust deed as a subsisting encumbrance. On the other hand, if they did not discover the fraud until after that sale they got the benefit of their bargain, and sold it in the belief that it was the kind of land it was represented to be. They could not be damaged if they got what they considered as its full value, if it had been as represented. Having sold it and parted with title on that basis, they lost nothing as the result of any representations which might have been made. In selling subject to the trust deed they expected Kibler to pay the amount thereof and, in effect, they are now trying to charge the respondent for a loss they have suffered because their vendee has failed to do what they expected him to do, namely, pay the trust deed indebtedness. If they have no recourse against Kibler it is because they neglected to insert in the deed to him a provision whereby he assumed and agreed to pay the debt.

[4-7] A further consideration is that the appellants have, by their acts or omissions, changed the position of the respondent. In general, it is the duty of a mortgagor or one giving a trust deed upon property to pay all taxes and assessments and, in that respect, preserve the property as security for the amount of the debt. In the instant case the appellants have dealt with the property in such a manner that the respondent's security has been destroyed, thus changing her position. Assuming that the appellants would otherwise have had a right to affirm the contract and offset their claim for damage against the balance of the purchase price, they would have had to affirm the entire contract including the trust deed, subject only to any offset which the court might allow as compensation for the damage suffered. This they are no longer able to do, having made it impossible to affirm the contract in its entirety and leave the respondent in the same position, except for any deduction to which they might be entitled on account of any damage suffered.

For the reasons given the rulings complained of were not erroneous.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

33 Cal.App.2d 21

AGNEW et al. v. WENSTRAND et al.

Civ. 6113.

District Court of Appeal, Third District, California.

May 23, 1939.

1. Automobiles ⇐181(2)

The defendants, who were owners of piano and of truck on which it was being transported, could not avoid liability for death of boy, who was thrown from truck and struck by falling piano, on ground that he was a volunteer, where there was evidence that boy, after having helped load piano, had been impliedly invited to accompany defendants on truck and instructed to hold piano to prevent it from rolling around.

2. Negligence ⇐85(2)

Young people as well as adults must use that degree of prudence and discretion which persons of their age ordinarily have.

3. Automobiles ⇐224(7)

An 18-year-old boy who, after assisting defendants in loading of piano on truck, accepted implied invitation to accompany defendants with piano, and who was directed by one of defendants to hold piano and prevent it from rolling around, was not guilty of contributory negligence so as to preclude recovery for his death occurring when he was thrown from truck and struck by falling piano as truck was making turn.

4. Automobiles ⇐244(20)

Evidence, relating to defendants' failure to tie piano to truck in which it was being transported and to speed at which truck was driven around corner at place where there were holes in road several inches deep, justified recovery for death of 18-year-old boy who was assisting in transporting piano and who was thrown from truck at corner and then struck by falling piano.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Suit by J. H. Agnew and another against Oscar Wenstrand and another to recover for the death of the plaintiffs' minor son sustained when he was thrown from truck belonging to one of the defendants and was struck by falling piano belonging to the other. Judgment for plaintiffs, and the defendants appeal.

Judgment affirmed.

Gilbert Moody, of Turlock, for appellants.

T. B. Scott, of Modesto, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment in favor of plaintiffs awarding them damages for the death of a minor son.

In August, 1936, Oscar Wenstrand was the owner of a small truck and appellant Harold Wenstrand was the owner of a piano weighing some 800 pounds. Oscar Wenstrand was about 63 years of age and the father of Harold Wenstrand, 35 years of age. On the day in question Harold Wenstrand, with the help of Oscar Wenstrand, was moving his household goods from one home to another, about three miles distant. In the course of moving, Harold Wenstrand went to the home of Harold Agnew, a high school student of the age of about 18 years, and asked if he would help him move an upright piano from the porch to the truck of Oscar Wenstrand. Harold Agnew assented, and the three proceeded to place the piano on the truck. After the piano was on the truck Wenstrand, Sr., said to his son Harold: "Well, don't you think it would be better if he (Agnew) would go with us and help us unload?" To which Harold replied, "I have a man there that will help us unload." "Well," said Wenstrand, Sr., "if that is all right it is all right with me. If he doesn't want to go along it is all right." To which implied invitation Harold Agnew replied, "Why, sure I will go along," and took his place on the truck. Mr. Wenstrand, Sr., took his place as driver of the truck, and also in front with him was Vincent Agnew, a brother of Harold; Wenstrand, Jr., and Harold both took their places on the truck near the piano. After proceeding about three miles, in making a turn into a dirt road, the piano, Harold Agnew and Harold Wenstrand were in some manner thrown from the truck; Harold Agnew was struck by the falling piano and later died from the injuries so received.

The complaint charges negligence against the two Wenstrands in failing to tie the piano to the truck and in the manner of driving the truck. The answer denied any negligence and pleaded contributory negligence and unavoidable accident. Judgment, however, was entered in favor of plaintiffs, the father and mother of the

deceased boy, from which judgment this appeal is taken upon the ground that the judgment is not supported by the evidence.

The court found that the defendants Wenstrands requested Harold Agnew, the deceased, to help them load said piano, and also requested said Harold Agnew to help transport said piano, which was on casters and not fastened to any part of the motor vehicle, and that the death of said Harold Agnew was due to the negligence of defendants and each of them in the operation of the motor vehicle, and in the transportation of the piano.

The principal charge of negligence is that the piano, which stood some 55 inches above the floor of the truck and filled practically the entire truck bed, was not tied in some way to the truck. Vincent Agnew testified that after the truck was loaded Wenstrand, Sr., said to Harold Agnew, "You will have to keep it from rolling around; some one will have to hold the piano; you will have to hold the piano."

There was testimony in the record that at the point where the piano fell from the truck there were holes in the road several inches deep, and at the time of the accident the truck was traveling from ten to fifteen miles an hour. The record also discloses that Harold Agnew said to the driver as they approached the point where the accident occurred, "slow down at this corner", but deceased's warning apparently was not obeyed. There may be some doubt as to whether or not the testimony of ten or fifteen miles an hour was fixed as at the point of the accident, but there is testimony that the car was going five miles an hour, and the court was within its power in finding that even that speed was too great under all the circumstances here existing.

[1] Appellants urge that Harold Agnew was a volunteer, and, without direction from anyone, assumed his place on the truck between the piano and the sideboard, and also that he made no effort himself to fasten the piano on the truck. There is testimony, however, that Wenstrand, Sr., impliedly invited Agnew to accompany them on the truck and also instructed him as to his duties there.

[2, 3] While it is true that young people as well as adults must use that degree of prudence and discretion which persons of their age ordinarily have, we have here a situation of an older man's directing an inexperienced boy to assume a particular duty in regard to moving a piano, and under all the circumstances the court was justified in finding that the minor was not a volunteer nor guilty of contributory negligence.

[4] In view of all the facts the court was warranted in finding that both appellants were guilty of negligence in failing to properly secure the piano on the truck, and Oscar Wenstrand in carelessly and negligently driving the truck around the corner where the accident occurred.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.



33 Cal.App.2d 30

In re BOGGS' ESTATE.

KING et al. v. BOGGS et al.

Civ. 12180.

District Court of Appeal, Second District, Division 2, California.

May 24, 1939.

Rehearing Denied June 15, 1939.

Hearing Denied July 20, 1939.

1. Executors and administrators ⇐495(4)

Where most of an estate consisted of realty and corporate stock which were held by bank to secure indebtedness, and never came into possession of executrix, executrix was not entitled to commissions computed on the appraised value of all the property, including that held by the bank. Probate Code, §§ 600, 901, 904, 911, 920.

2. Executors and administrators ⇐495(4)

An executor or administrator cannot be said to have "accounted for" an estate within terms of statute authorizing commissions on the amount accounted for, unless he shall have taken it into possession. Probate Code, §§ 600, 901, 920.

[Ed. Note.—For other definitions of "Account For," see Words & Phrases.]

3. Executors and administrators ⇐109(3)

An executrix should be allowed expert assistance in handling the estate if employment of expert is reasonably necessary, and it is largely within probate court's discretion to determine whether such employment is reasonably necessary. Probate Code, § 900.

4. Executors and administrators ⇐109(3)

Where only $3,000 worth of property came into hands of executrix, but executrix retained tax expert through whose advice and efforts a bank holding large amount of the estate's property in pledge was induced to file amended claim, whereby income tax was reduced, allowing $250 for tax expert's services was not an abuse of discretion. Probate Code, § 900.

5. Executors and administrators ⇐506(2), 507(1)

The probate court's refusal to receive evidence on creditors' exceptions to account of executrix concerning decedent's fraudulent transfer of property to executrix, and decedent's insolvency at time of transfer, and refusal to make a decree concerning title to the property involved, were erroneous.

6. Courts ⇐200½

Where title to property is claimed by a representative of an estate in his individual capacity, the superior court sitting in probate has jurisdiction to determine the validity of such claim upon the settlement of such representative's final accounts.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceeding in the matter of the Estate of Paul N. Boggs, deceased, wherein Joseph I. King and Walter N. Anderson, as executors of the last will and testament of Sarah Louise Clark, deceased, contested the application of Elizabeth B. Boggs, as executrix of the last will and testament of Paul N. Boggs, deceased, and another for payment of fees. From orders for the payment of fees, and settling accounts of the executrix, contestants appeal.

Reversed in part and affirmed in part.

Joseph I. King, of Los Angeles, for appellants.

Brooks Gifford, of Pasadena (Morton H. Eddy, of Pasadena, of counsel), for respondents.

WOOD, Justice.

The appellants, creditors of the estate of Paul N. Boggs, deceased, have appealed from the orders of the court sitting in probate for the payment of fees to the executrix, to her attorney, and to an accountant; also from the order of the court settling the account current of the executrix.

At the time of his death decedent owned certain real estate and certain shares of corporate stock, which were appraised as of the total value of $443,745. The Farmers and Merchants National Bank of Los Angeles held a trust deed covering the real estate and also held all of the corporate stock to secure an indebtedness to the bank of more than $500,000. Before the executrix qualified, the bank had sold some of the stock in partial satisfaction of the obligation and since her qualification, has continued to sell stock from time to time. Under the pledge agreement the bank retains all of the income from the stock and under the terms of the deed of trust collects all of the rents from the realty. The only property of the estate actually held by the executrix is the sum of $3,000. The executrix filed an account current showing as assets of the estate for which she considered herself chargeable all of the pledged stock and encumbered realty as well as the rents, issues and profits from such property which had been collected by the bank and applied in reduction of the debt. In her account she credited herself with all amounts received by the bank as dividends and rents and from sales of stock as having been paid by the estate to the bank.

Six months having elapsed from issuance of letters testamentary the executrix applied to the court for an allowance upon her commissions under the provisions of section 904 of the Probate Code. The attorney for the executrix also filed an application for an allowance of fees under section 911 of the Probate Code. The court made an order allowing the sum of $1,000 to the executrix on account of fees and a similar amount to her attorney. The court also allowed the sum of $250 to be paid to John I. Bolen, an accountant and tax counselor, for services rendered in preparation of the account and in the preparation of tax returns.

[1, 2] Appellants contend that the court erred in allowing the sum of $1,000 each to the executrix and the attorney, arguing that the amounts are excessive in view of the value of the estate. It is apparent that if the entire estate is of the value of $3,000, or thereabouts, the allowance must be considered as excessive. Respondent argues, however, that the value of the estate should be considered as the amount of the appraised value of all of the property including that held by the bank in pledge.

It is provided in section 901 of the Probate Code: "The executor * * * shall receive commissions upon the amount of estate accounted for by him. * * *" In section 920 of the Probate Code it is provided: "Every executor and administrator is chargeable in his accounts with all of the estate of the decedent which comes into his possession, and with all the income, issues and profits of the estate. * * *" In section 600 of the Probate Code it is provided that the executor must file with the clerk an inventory of the estate "which has come to his possession or knowledge". It will be noted that the executrix is required to set forth all of the estate which shall have come to her knowledge but she is chargeable in her account with only that part of the estate which may have come into her possession. In demanding fees for her services she is entitled to payment based upon the value of the estate which is "accounted for." The question here involved was presented to the Supreme Court in Estate of Simmons, 43 Cal. 543, the statutes at the time of that decision being in the same language as are the statutes now governing. In that case the court decided the issues involved adversely to the contention of the executrix and her attorney, the court saying: "We are of opinion that an administrator cannot be said to have 'accounted for' an estate, in the sense of the statute, unless he shall first have taken it into possession. He is charged by the statute, as we have already seen, with the value of 'the whole of the estate of the deceased which may come into his possession,' etc. (Sec. 216); and it is made his duty to 'take into his possession all the estate of the deceased, real and personal.' (Sec. 194.) When he shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value. Unless he take it into possession, he is not charged in his account with its value. He may, and doubtless would, incur a responsibility, should he fail to take it into possession when he lawfully might, if by such failure it should become ultimately lost to those entitled to its benefits; but as affording a basis for the allowance of commissions, the value of the estate which has been taken into possession, and having been in possession has been accounted for, is alone regarded." The same conclusion on similar situations has been reached by the courts of Missouri and New York. Hitchcock v. Mosher, 106 Mo. 578, 17 S.W. 638; In re Mercantile Trust Co., 210 N.Y. 83, 103 N.E. 884.

[3, 4] A different factual situation is presented in the appeal from the order allowing the sum of $250 to the accountant. In section 900 of the Probate Code it is provided that the executrix shall be allowed all necessary expense in the care, management and settlement of the estate. An executrix should be allowed expert assistance in handling the estate if the employment of an expert is reasonably necessary and it is largely within the discretion of the probate court to determine whether such employment is reasonably necessary. In re Levinson, 108 Cal. 450, 41 P. 483, 42 P. 479. In this case difficult problems were presented in the matter of filing income tax returns, problems which ordinarily an executrix could not be expected to solve without expert assistance. Indeed, it is claimed that through the advice and efforts of Mr. Bolen the bank was induced to file an amended claim by which the tax was reduced. We do not perceive an abuse of discretion in the court's order allowing the sum of $250 for Mr. Bolen's services. Estate of Broome, 162 Cal. 258, 122 P. 470.

[5, 6] Appellants filed exceptions to the account, alleging that certain specific property in the possession of the executrix and claimed to be owned by her individually was in fact the property of the decedent and should have been inventoried and accounted for by the executrix; that such property was transferred to the executrix by decedent at a time when he was insolvent in an effort to defraud his creditors. The court refused to receive any evidence concerning the circumstances supporting the alleged fraudulent acquisition of this property by the executrix or the insolvency of decedent and refused to make a decree concerning the title to this property. In this the court erred. Although the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate, it is well established that "when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative." Bauer v. Bauer, 201 Cal. 267, 256 P. 820, 821.

Our disposition of the first point hereinabove discussed makes it unnecessary to

pass upon appellants' contention that the executrix was allowed credits for payments made without the filing of vouchers, since it appears that the sums paid out, with the exception of the payment to Mr. Bolen, never came into her possession but were received by the bank and applied to the reduction of the obligation for which the property was pledged to the bank.

The orders allowing fees of $1,000 each to the executrix and her attorney are reversed. The order allowing the sum of $250 as payment for the services of John I. Bolen is affirmed. The order settling the account current is reversed with directions to the probate court to settle the account in accordance with the views herein expressed.

We concur: CRAIL, P. J.; McCOMB, J.

WEST KEY NUMBER SYSTEM

CONNARD v. PACIFIC ELECTRIC RY. CO. et al.*

Civ. 12198.

District Court of Appeal, Second District, Division 2, California.

May 23, 1939.

Hearing Granted July 20, 1939.

1. Carriers ⇐331(5)

A passenger's presence upon steps of moving street car preparatory to alighting therefrom, being in violation of city ordinance prohibiting persons from riding upon steps, constituted contributory negligence precluding passenger from recovering for injuries sustained when he was thrown off steps by sudden movement of car.

2. Carriers ⇐331(5)

That passenger thrown off steps of moving street car from which he was preparing to alight was in continuous motion from time he began to move toward rear of car did not remove him from purview of city ordinance prohibiting persons from riding upon steps of street car.

3. Negligence ⇐83

The last clear chance doctrine presupposes, among several necessary elements, that as result of plaintiff's negligence he is in a situation of danger from which he cannot escape by exercise of ordinary care.

4. Carriers ⇐340

A passenger injured when thrown from steps of moving street car from which he was preparing to alight was not entitled to application of doctrine of last clear chance, since he could by exercise of slightest care have left steps and returned to position of safety on platform of car.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Charles H. Connard against the Pacific Electric Railway Company and others to recover for injuries sustained when thrown from the steps of a street car. Judgment for defendants and the plaintiff appeals.

Judgment affirmed.

Laurence B. Martin and Curtis G. Bird, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

In this case the plaintiff was injured while riding on the steps of a street car preparatory to alighting therefrom. There was introduced in evidence ordinance 77,000 of the city of Los Angeles, which contained the following sections: 80.46. "No person shall board or alight from any street car or vehicle while such street car or vehicle is in motion." 80.47. "No person shall ride upon the fender, steps, or running board of any street car or vehicle." At the time the plaintiff started down the steps the car was approximately 70 feet from the east side of the open waiting room, moving at a speed of between two and three miles per hour, and the car continued to so move up to the point where plaintiff was thrown off of the steps by a sudden movement of the car. At the conclusion of the evidence the defendants moved the court to direct the jury to return a verdict for the defendants on the ground that the plaintiff was guilty of negligence as a matter of law which contributed proximately to the happening of the accident by violating said sections. This motion was granted; the jury so instructed; the verdict returned; and the judgment entered thereon. It is from this judgment the appeal is taken.

*For subsequent opinion see 94 P.2d 567.

[1] Was the plaintiff guilty of negligence as a matter of law which contributed proximately to the accident by riding upon the steps of a moving car in violation of said ordinance? The question must be answered in the affirmative.

In Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 527, 54 P.2d 49, 50, the same ordinance was expressly upheld as declaring a rule of conduct, the violation of which precluded recovery. The court said: "'In the absence of the ordinance, the question of whether appellants were negligent in riding on the running board would depend upon whether a person of ordinary prudence would have so ridden under the circumstances then existing, and this would have been a question properly to be left to the jury. (Citing cases.) But the ordinance enacted an absolute standard of conduct and removed from the jury the right to speculate as to what that ideal composite the man of ordinary prudence might or might not have done under similar circumstances. It thereby substituted certainty of conduct for uncertainty. If the violation of the ordinance proximately contributed to their injuries, appellants were guilty of negligence as a matter of law.'" See, also, Lorry v. Englander Drayage etc. Co., 108 Cal.App. 116, 291 P. 467.

[2] In the instant case the plaintiff contends that "he proceeded in continuous motion to the rear of the interurban and started down the steps as the car had come almost to a stop. Mr. Connard did not for a moment pause or stand on the step as the street car traveled along," and there is a legal distinction between standing on the steps for some little distance and a mere transitory use of the steps when the passenger is preparing to alight. This question has already been answered against the plaintiff's contention in the case of Reeves v. Lapinta, 25 Cal.App.2d 680, 78 P.2d 465, 466. In that case the plaintiff appealed from a judgment in favor of defendants predicated upon the granting of defendants' motion for a judgment notwithstanding the verdict of the jury in favor of the plaintiff in an action to recover damages for personal injuries. The plaintiff in the Reeves case was a passenger in an automobile bus operated by the defendants. As the bus approached the intersection where the plaintiff planned to get off, he walked to the front of the bus and stood on the steps of the bus as it traveled along the street, the exit door being open at the time. The bus gave a sudden jerk and plaintiff was thrown to the street and injured. In that case this court said: "As plaintiff violated a provision of the foregoing ordinance in riding upon the step of the automobile bus, she was guilty of negligence per se, and since the accident would not have occurred had plaintiff remained in any other portion of the bus, her negligence was one of the proximate causes of the accident, and therefore she cannot recover for her injury. Steinberger v. California Elec., etc., Co., 176 Cal. 386, 394, 168 P. 570; Leek v. Western Union Tel. Co., [20 Cal.App.2d 374, 66 P.2d 1232], supra; section 1714, Civ.Code. The second question must be answered in the negative. It is the general rule that the issue of contributory negligence is one to be left to the determination of the trier of fact, and that such determination will not be disturbed upon appeal, if there is any substantial evidence to sustain it. This general rule, however, is subject to this well-established exception: If the violation of a statute or ordinance contributes directly to plaintiff's injury, the issue is not one of fact but is an issue of law, and is therefore removed from the consideration of the trier of fact."

In our view the question is not how long was the plaintiff riding on the steps of the car. The deciding factor is that he *was* voluntarily riding on the steps in a place of danger and in violation of said ordinance at the time the accident occurred. If the plaintiff was in "continuous motion" in such dangerous place under such circumstances he was the more guilty of negligence.

[3, 4] Finally, the plaintiff contends that in the last analysis he was entitled to an application of the doctrine of last clear chance. The last clear chance doctrine presupposes, among several necessary elements, that as a result of plaintiff's negligence he is in a situation of danger from which he cannot escape by the exercise of ordinary care. Palmer v. Tschudy, 191 Cal. 696, at page 700, 218 P. 36; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 707, 242 P. 703. In this case the doctrine does not apply because the plaintiff could have by the exercise of the slightest care left the steps and returned to the platform of the car and there be in safety.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

33 Cal.App.2d 78

PEOPLE v. AYER et al.

Civ. 6031.

District Court of Appeal, Third District, California.

May 25, 1939.

1. Eminent domain ⇐263

Where reviewing court on appeal in eminent domain proceedings stated that cause should be returned to trial court for further inquiry upon issue as to ownership of certain strip of land, case was remanded for trial as to single issue of ownership only, notwithstanding that former judgment as entered had been reversed.

2. Eminent domain ⇐262(4)

The finding of trial court based upon conflicting evidence in eminent domain proceedings as to ownership of land was binding upon reviewing court.

3. Deeds ⇐118

Evidence that defendant and his adjoining neighbor jointly maintained fence separating defendant's premises from land formed by accretions, and that for many years such land had been cultivated by neighbor who had paid all taxes levied against it, was of considerable weight in solving ambiguities in deed as to whether land belonged to one or the other.

Appeal from Superior Court, Tehama County; Albert F. Ross, Judge.

Action in eminent domain by the People of the State of California, acting by and through the Department of Public Works, against S. E. Ayer and others. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Clifford D. Good, Holloway Jones, George C. Hadley, and Lincoln V. Johnson, all of San Francisco, for appellant.

Pugh & Pugh, of Red Bluff, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action in eminent domain was instituted by the state to condemn an easement through certain property for the purpose of constructing and maintaining a highway. The cause was tried and a judgment was entered upon the verdict of a jury awarding the owner of the lands $100 for the property taken, and $1,400 for severance damages.

During the trial the People contended that Ayer was the owner of a strip of land between the easterly line of block 86 of the townsite of Red Bluff and the Sacramento river, but the ownership or extent of this narrow strip of land which had been built up by accretions of the river was not determined. If such a piece of land was found to belong to Ayer he had a means of ingress and egress to his land that was not cut off by the highway, and it was therefore important to determine that fact in order that the jury might properly fix the severance damages. This particular issue was not presented to the jury and the judgment based upon the verdict was reversed. In a former opinion (People v. Ayer, 18 Cal.App.2d 755, 64 P.2d 769, 771), we said: "Whether or not Mr. Ayer is the present owner of the strip of land in question, we do not know, and whether it extended from Brewery creek to Douglass street is also a question of fact to be determined. We are of the opinion the court erred in holding as a matter of law that Ayer had no title to any lands in section 20 lying south of the mouth of Brewery creek and the cause should be returned for further inquiry upon this issue. It is therefore so ordered. The judgment is reversed."

The action was again brought to trial, and upon the retrial the court limited the issue as to the ownership by Ayer of the strip of land in question. Counsel for plaintiffs demanded a jury and contended there should be a trial de novo, inasmuch as the judgment in the former trial had been reversed by this court. This request was refused and the issues were limited to the ownership and location of the particular strip of land. At the conclusion of the hearing the court made supplementary findings of fact and conclusions of law holding that defendant Ayer had no right, title or interest in the small parcel of land in question, and that such land was not a means of ingress and egress to the property described in the complaint. From this judgment of the trial court the People have again appealed.

[1] The trial court was correct in holding that this court remanded the case for trial as to the single issue of ownership only. It is true that the former judgment as entered was reversed, but that

was necessitated by the essential bearing the single issue had upon the whole.

[2, 3] The evidence as to the ownership of the disputed land upon the second trial was in some particulars conflicting, but those conflicts have been decided by the trial court in favor of the defendants and are binding upon us. However, the evidence in its entirety seems quite clear that the Ayers never claimed or asserted any right in the strip in dispute,—it was separated from the lands of Ayer by a fence which was jointly maintained by Ayer and his adjoining neighbor Mr. Ennis. Also for many years the Ennis family had used and cultivated this strip of land and had paid all taxes levied or assessed against it. Such recognition by the respective owners of these lands and the maintenance of a boundary fence between them is of considerable weight in solving the ambiguities, if any, in the deed as to whether the lands formed by accretions belonged to the one or the other.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.



32 Cal.App.2d 720

PHILLIPS et al. v. LARRABEE et al.

Civ. 6119.

District Court of Appeal, Third District, California.

May 19, 1939.

Hearing Denied July 18, 1939.

1. Master and servant ⇐316(1)

An "independent contractor" is one who, in rendering services, exercises an independent employment or occupation and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

2. Master and servant ⇐316(1), 318(1)

As respects whether relation of "employer" and "employee" exists, employer has right to direct and give orders to employee concerning means and methods of work and to terminate employment before its completion, which in case of independent contractor might constitute a breach of contract, and an "employee" may quit, while an "independent contractor" is legally obligated to complete the contract.

[Ed. Note.—For other definitions of "Employee" and "Employer," see Words & Phrases.]

3. Automobiles ⇐242(6)

In action against sewing machine company and its salesman for injuries and property damage resulting from automobile collision allegedly caused by negligence of salesman, company had burden of proving issue raised by it, that salesman was an "independent contractor." St.1937, p. 258, § 2750.

4. Automobiles ⇐194(4)

As respects liability of sewing machine company for injuries and property damage resulting from automobile collision caused by negligence of company's salesman, fact that salesman's compensation was based upon commissions did not of itself constitute the salesman an "independent contractor" for the company. St.1937, p. 258, § 2750.

5. Master and servant ⇐316(1)

An "independent contractor" has right to delegate to others the carrying out of the contract.

6. Automobiles ⇐194(4)

Where sewing machine company's salesman sold sewing machines on commission basis, in restricted territory and for fixed prices, and did not dictate terms, extend credit or pass upon security if taken, and was subject to dismissal by company's district manager who had power to retake the machines from salesman, salesman who after being notified to turn machines in his possession over to manager was expressly authorized by manager to sell the machines remaining in his possession was "employee" and not "independent contractor," and hence company was liable for damage resulting from negligent operation of automobile by salesman while he was acting within course of his employment. St.1937, p. 258, § 2750.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Homer S. Phillips and another, individually and as persons doing

business under the style of Stilson Bros., against V. A. Larrabee and another for personal injuries and property damage resulting from an automobile collision. From a judgment in favor of defendant Singer Sewing Machine Company, and from an order denying motion for new trial upon issue of liability of the defendant Singer Sewing Machine Company, the plaintiffs appeal.

Reversed, with directions to enter judgment against the Singer Sewing Machine Company in accordance with opinion.

George L. Popert and Butler, Van Dyke & Harris, all of Sacramento, for appellants.

Walter B. Henretty and Gerald M. Desmond, both of Sacramento, for respondents.

PER CURIAM.

Plaintiffs brought this action against defendants Larrabee and the Singer Sewing Machine Company, a corporation, for injuries to person and to property sustained on the 13th day of November, 1936, near the city of Sacramento.

The complaint alleged that at all times mentioned defendant V. A. Larrabee was an employee and agent of the Singer Sewing Machine Company, a corporation, and was at the time of the collision acting within the scope of his employment, and that defendant corporation and Larrabee were jointly liable for the damages suffered by plaintiffs, one of whom suffered personal injuries, and the other damage to his car. These allegations were denied by the Singer Sewing Machine Company and by Larrabee. The case was tried before the court sitting without a jury, and the court found Larrabee liable for damages, which judgment is now final, but also held it was not true that defendant Larrabee was an employee of the defendant Singer Sewing Machine Company at the time of the accident, but on the contrary he was an independent contractor so far as the Singer Sewing Machine Company was concerned. On this finding, and the conclusions drawn therefrom, a judgment was entered in favor of the Singer Sewing Machine Company exonerating it from liability. A motion for a new trial upon this issue was presented and denied. It is from that order and the judgment that this appeal is taken, and the sole question here is whether or not the court was justified in finding that Larrabee was not an agent of the company.

The testimony bearing upon this single question is comparatively brief. On the 13th day of November, 1936, defendant Larrabee, while driving his automobile on Fair Oaks boulevard near the city of Sacramento, collided with another car belonging to Jasper P. Stilson and being operated by Homer A. Phillips.

Mr. J. O. Hubbard testified that for some time prior to November 2, 1936, he was the local sales manager for the Singer Sewing Machine Company in the territory embracing Sacramento county. On October 14, 1936, as such local sales manager, he entered into a written contract with Larrabee whereby Larrabee became a probationary salesman for the company. Probationary salesmen are put into the field under the supervision, direction and guidance of a trained salesman that they may learn salesmanship and the conduct of its business according to the methods of the Singer Sewing Machine Company. The agreement entered into between the company and Larrabee covered the probationary period only. These salesmen were paid commissions on sales of products and collections of accounts made by them, with a minimum guarantee of $12 a week. The salesman was required to devote such time and attention as might be necessary to properly fulfill his obligations under the agreement, and to sell and lease sewing machines, vacuum cleaners and supplies belonging to and furnished by the company for such purpose; to collect such accounts as might be turned over to him by the company, and to personally assume and pay all expenses incurred by him arising out of the transactions of the business he obtained. He was further obligated to replace lost or damaged goods; to make detailed reports from time to time; to keep segregated the funds collected and to pay the same to the company, and other duties particularly set forth in the written agreement.

Larrabee went to work as provided in the agreement as a probationary salesman, under the guidance and direction of a regular salesman. He was in the field as such probationary salesman from October 14th to October 31st. At the end of that time he was told by Hubbard that his contract as probationary salesman was being discontinued, and he was asked to return the machines in his possession. On

November 2d, Hubbard became district manager, and a Mr. Wright succeeded Hubbard as local sales manager.

On November 2d Wright reported to Hubbard that Larrabee still had in his possession three sewing machines. Hubbard immediately got in touch with Larrabee and directed him to return the property of the company. Hubbard related what then took place as follows:

"* * * he told me regarding the dirty deal he thought he was getting, not so much from my hands as at the trainer's that had been with him; that he was a poor salesman in his estimation, that he himself had closed some of the deals they were on, and so the criticism, from one who was starting, to one who has been in the field for quite some time, I called his bluff—I says, 'All right, you go out and sell those people.' * * *

"Q. But Mr. Hubbard, if he had succeeded in selling more machines than he had in his possession, you would have gladly furnished him others to sell, wouldn't you? A. I would not. * * *

"Q. Then, I assume that you were only anxious to have him sell those persons whom he had contacted as a probationary salesman? A. That is right.

"Q. Then, we will get right down to the facts,—I asked you a few moments ago, when you told him to go out and sell those machines in his possession to those people, you had in mind the property of your company which you had theretofore delivered to him under this contract as probationary salesman, and those prospective customers whom he had theretofore contacted under his contract as such, didn't you? A. Yes, sir."

Elsewhere in his testimony, however, Mr. Hubbard said he did not intend to limit Larrabee's activities to those persons only upon whom he had personally called, but to any prospect in the restricted territory. Larrabee was to be paid the regular salesman's commission for any articles sold, and was to furnish his own transportation and pay all his own expenses.

Mr. Larrabee testified as to the conversation with Hubbard of November 2d:

"A. I think I made a little complaint to him about my trainer; I mentioned on one occasion to him where we had put on a demonstration, and he told me—I don't think I mentioned this to him at the time, but he told me if I wanted to that I could go to the places where I had prospects and canvass them out and see if I could make a sale, if I wanted to.

"The Court: Tell me that again.

"A. He told me I could go to the ones I had previously canvassed, that is, prospected, and that I could close the sale on my own, if I wanted to. * * * That was when I complained to him about canvassing the ones we had just canvassed, because I told him I didn't think it would be possible, because if we could have made a sale we would have made it when we canvassed them the first time; and, at that time if my recollection is right, Mr. Hubbard told me that if I wanted to I could go anywhere within the zone that was to be vacated; they hadn't let the man out of this zone, that Mr. Carnahan was going to be the trainer for this zone, but I could go anywheres within that zone if I wanted to, and see if I could make a sale, and he would pay me the regular commission on the sale."

As Larrabee testified, he went out at first with a little enthusiasm and canvassed different homes, but without success, and while he got a few promises he felt he was not meeting with any results, and toward the last did not work very hard.

It is the contention of appellants that as a matter of law the relationship of principal and agent was established. Respondent, on the other hand, contends the evidence justifies a finding that Larrabee was an independent contractor.

In determining the relationship of Larrabee and the Singer Sewing Machine Company it is necessary to examine the agreement or contract of employment between them and to keep in mind the distinction between an employee and an independent contractor. A contract of employment is a contract between an employer and an employee whereby the employee is engaged to do something for the benefit of the employer or a third person. Sec. 2750, Labor Code, St.1937, p. 258.

[1] An independent contractor has been defined as one who, in rendering services, exercises an independent employment or occupation and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. Green v. Soule,

145 Cal. 96, 78 P. 337. Naturally the determination of the question here presented depends upon the particular facts involved, and except for a statement of the general rules, particular cases are not very helpful.

Examining the relationship before us we find that the property to be sold belonged to the Singer Sewing Machine Company, and that the area or zone in which Larrabee was to operate was defined and his activities were restricted to that territory. It is also very definite in the record that for any violation of instructions by Larrabee, Hubbard, as district manager, had the power to dismiss Larrabee and retake all of the stock from him. As Mr. Hubbard testified:

"Q. As a matter of fact from the time you held that conversation with Mr. Larrabee * * * you recognized that at any time and for any reason you could have sent for Mr. Larrabee and taken those machines away from him? A. I could have gotten them at any time I wanted to.

"Q. In other words you had that control over your products in his possession, didn't you? A. I had control over our products, yes."

It was also testified by Hubbard that all proceeds from the property sold by Larrabee were to be delivered by him to the company and the company would then pay the commission.

During Larrabee's probationary training period the company was protected by a surety bond. This bond was not cancelled at the end of that period nor was the bonding company notified of any change in relationship during the succeeding interval of time from November 2d to November 13th.

[2] Respondent emphasizes in its brief that after the termination of the probationary period no orders were given Larrabee as to whom he should call upon, or his hours of work, or his methods of salesmanship; but Hubbard testified with respect to his powers with regard to Larrabee, that if for any reason the company wanted the machines he could have sent for Larrabee at any time and have taken them in. In other words, Hubbard, acting for the company, had control over the company products at all times. The test of authority is not its use but the existence of the power to exercise it. As said in Los Flores School District v. Industrial Accident Commission, 13 Cal. App.2d 180, 56 P.2d 581, 583:

"Several important rules are well recognized for determining whether a laborer is an employee or an independent contractor. Where there is an employment, the employer has the right to direct and give orders to the employee concerning the means and methods of work. It is the existence of this right, and not its use or lack of use, that is important. * * * An employer has the right to terminate the employment before the work is completed, which, in the case of an independent contractor, would amount to a breach of contract if done without just cause. An employee may quit, but an independent contractor is legally obligated to complete his contract."

In Chapman v. Edwards, 133 Cal.App. 72, 24 P.2d 211, 213, the court said:

"The power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so."

To the same effect is Cook v. Sanger, 110 Cal.App. 90, 293 P. 794, where it is pointed out the power to discharge made obligatory the carrying out of any instructions given, or in other words, the right to discharge involves the right of control.

That the Singer Sewing Machine Company looked upon the relationship as that of employer and employee and not that of an independent contractor is also emphasized by the informality of the arrangement out of which the relationship arose. No details as to the respective duties and obligations of one toward the other were mentioned as would be expected in entering into a contract with an independent contractor. Here the employer, knowing it had the right of control and immediate discharge, did not concern itself with details.

[3] Inasmuch, also, as the company has asserted that Larrabee was an independent contractor, the burden of proof

is upon the party raising such issue. Hartford, etc., Co. v. Industrial Accident Commission, 93 Cal.App. 313, 269 P. 733.

[4, 5] It is true that the compensation of Larrabee was based upon commissions, but that of itself does not create the relationship of an independent contractor, nor could Larrabee, as is the right of an independent contractor, have delegated to others the carrying out of his contract. It called for his personal services.

In Hiner v. Olson, 23 Cal.App.2d 227, 72 P.2d 890, 893, 73 P.2d 945, it was held under the facts of that case that the relationship there established was one of agency and quoted from 1 Mecham on Agency, 2d Ed., page 30, as follows:

"The essence of agency to sell (personal property) is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to fix the price and terms, to recall the goods, and to demand and receive their proceeds when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent."

In Fischer v. Havelock, 134 Cal.App. 584, 25 P.2d 864, a situation very similar to that here involved was considered, and the elements distinguishing an agent from an independent contractor were considered, and assists considerably in determining this case. It was there again stressed that the right to control was one of the governing elements of agency.

[6] Larrabee, it is to be remembered, had just completed a three weeks' training course in policy and salesmanship under a trainer furnished by the company and he knew the rules of the company. It was not necessary to instruct him in those details.

In the instant case Larrabee did not buy and resell the products of the Singer Sewing Machine Company. He merely sold the property of the company. He could not fix the price, dictate the terms, extend credit or pass upon security if taken. In making a binding sale he acted for his principal. If Larrabee had attempted to proceed in any other manner or had failed or refused to carry out any instructions given him as to the manner of his operations he could have been immediately discharged.

Larrabee testified that he was told by Hubbard that he could go to the ones he had formerly canvassed and close the sale on his own if he wanted to. Respondents stress the words "if he wanted to", but that is not material, for there is no question but what he wanted to, and did attempt to make the sales.

Respondents rely strongly upon three cases: Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510; Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 5 P.2d 694; Barton v. Studebaker Corp., 46 Cal.App. 707, 189 P. 1025.

Each of these cases may be distinguished upon the facts. Bohanon v. James McClatchy Pub. Co., supra, grew out of a collision between two automobiles, one driven by plaintiff and the other by Smith, who was at the time delivering newspapers published by the McClatchy Company, in accordance with the terms of a written agreement entered into between Smith and Engebrecht, who had a contract with the McClatchy Company whereby he agreed to distribute papers within the prescribed area under certain terms and conditions. The trial court held that both Smith and Engebrecht were employees of the publishing company. Upon appeal the agreement between the publishing company and Engebrecht was held to establish the relationship of independent contractor and not master and servant, but the facts there involved are so different from those here presented that this case is not particularly helpful.

In Counihan v. Lufstufka Bros. & Co., supra, the court held there was no relationship of master and servant as there was no right of control reserved.

In Barton v. Studebaker Corp., supra, there was no control exercised over the salesman by the company, nor did he have any property of the company in his possession. He could employ others to assist him in selling cars for the company and he was apparently not restricted to selling the products of the Studebaker Corporation only. Under these and other elements pointed out in the opinion, Barton was held to be an independent contractor.

From the foregoing it appears as a matter of law Larrabee was not acting for himself but as agent for defendant Singer Sewing Machine Company.

The judgment is reversed and the trial court directed to enter judgment against

Singer Sewing Machine Company, and in favor of Homer A. Phillips in the sum of $7,500, and the sum of $138 in favor of Jasper P. Stilson, such amounts having been fixed by the trial court as the amounts for which Larrabee, the joint tort-feasor with the Singer Sewing Machine Company, was liable. It is so ordered.



32 Cal.App.2d 678

LANGAZO v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Civ. 6071.

District Court of Appeal, Third District, California.

May 18, 1939.

Rehearing Denied June 17, 1939.

Hearing Denied July 17, 1939.

1. Electricity ⇐16(1)

A telephone wire which had not been used for 16 years and had not been in usable condition for a number of years preceding accident was "permanently abandoned" within order of railroad commission requiring removal of permanently abandoned overhead public utility wires, as respects whether electric power company was negligent in permitting unused fragments of telephone lines to remain on power line poles so as to be liable for death of boy who was electrocuted when he touched telephone wire. St. 1911, Ex.Sess. p. 59, § 73.

[Ed. Note.—For other definitions of "Permanent Abandonment," see Words & Phrases.]

2. Electricity ⇐16(1)

An order of railroad commission requiring the removal of permanently abandoned overhead public utility wires had the force of law within rule that violation of law which directly causes injury to another is negligence as a matter of law.

3. Electricity ⇐16(1)

An electric company's failure to remove permanently abandoned telephone wire from its power line poles as required by order of railroad commission was a violation of law, and hence was "negligence per se" so as to render company liable for death of boy who was electrocuted when he touched telephone wire. St.1911, Ex.Sess. p. 59, § 73.

[Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

4. Electricity ⇐19(5)

In action against electric company for death of boy who was electrocuted when he touched abandoned telephone wire attached to electric power line poles, evidence was sufficient to sustain finding that boy was not contributorily negligent in that he did not jerk telephone wire with such force as to cause it to contact electric wire.

5. Electricity ⇐19(3)

In action against electric company for death of boy who was electrocuted when he touched abandoned telephone wire attached to electric power line poles, burden of establishing defense of contributory negligence was on electric company.

6. Trespass ⇐1

In a general sense, any invasion of another's rights is a trespass.

7. Easements ⇐40

The rights of any person having an easement in land of another are measured by purpose and character of that easement, and right to use land remains in owner of fee so far as such right is consistent with purpose and character of easement.

8. Electricity ⇐15(1)

A power company having an easement to maintain wires over land could not escape responsibility for negligence resulting in death of boy who was electrocuted when he touched abandoned telephone wire attached to power line poles, on ground that boy was trespasser as against landowner, where power company had no right to possession of land upon which easement was imposed and was never in actual possession of land over which wires were placed.

9. Negligence ⇐32(1), 33(1)

The violation of a statutory duty with respect to condition of property imposed for safety of individuals composing general public may result in liability to one who is injured in consequence thereof, although he is a mere licensee or a trespasser.

10. Electricity ⇐15(1)

A power company failing to remove permanently abandoned telephone wire as required by order of railroad commission could

not escape liability for death of boy who was electrocuted when he touched telephone wire which was attached to power line poles, on ground that boy was trespasser on land over which company had easement to string wires, where failure to remove telephone wire was a violation of law with respect to condition of property. St.1911, Ex.Sess. p. 59, § 73.

11. Negligence ⇐121(2)

The "res ipsa loquitur" doctrine is applicable where plaintiff shows by preponderance of evidence that accident would not usually occur without negligence, and that defendant was in control of instrumentality, and that plaintiff is not in position to know cause of accident.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

12. Electricity ⇐19(3)

Evidence that injury resulted from contact with live electric wires or other appliances when out of proper condition or out of their proper place raises prima facie presumption under "res ipsa loquitur" doctrine that electric company was negligent in performance of its duty and places burden of overthrowing presumption on company.

13. Electricity ⇐19(3)

In action against electric company for death of boy who was electrocuted when he touched abandoned telephone wire attached to electric power line poles, case was properly submitted under "res ipsa loquitur" doctrine where company was in control of electric current and telephone wire, and plaintiff could not tell how current got into telephone wire.

14. Appeal and error ⇐882(12)

An appellant who offers an instruction which is given by the court cannot complain of a like instruction offered by respondent.

15. Appeal and error ⇐901

The District Court of Appeal would not examine transcript to determine if trial court made a particular announcement, where no reference was made in the transcript as to when and where such announcement was made.

16. Electricity ⇐19(13)
Trial ⇐194(16)

In action against electric company for death of boy who was electrocuted when he went on third person's land over which company had easement to string wires and touched abandoned telephone wire attached to electric power line poles, instruction that electric company owes legal duty, to a person in a place where he has a legal right to be, to see that wires are properly placed, was proper as a mere statement of the law and was not error as stating that boy was lawfully on the land.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by George Langazo against San Joaquin Light & Power Corporation, for damages for the death of Gilbert Langazo, the minor son of plaintiff. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Thomas J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, and F. H. Pearson, of Fresno, for appellant.

Louis T. Milburn, of Mariposa, and Preston & Braucht, of Merced, for respondent.

PER CURIAM.

This is an action brought to recover damages arising out of the death of Gilbert Langazo, the minor son of plaintiff. Judgment upon the verdict of the jury was entered against appellant in the sum of $15,400. Upon motion for new trial, the sum of $5,000 was remitted therefrom. The appeal is taken from the judgment.

On the afternoon of February 22, 1937, the deceased, Gilbert Langazo, while walking across a field near Mariposa, traversed by a power line of the appellant, San Joaquin Light and Power Corporation, met his death by electrocution from contact with a sagging portion of an abandoned telephone line, attached to poles of the power line. The only witnesses to the fatal accident were his two girl companions, Phyllis Richardson and Hazel Swanzey. When the party reached the point where it became necessary to pass under the power line, Phyllis Richardson was walking a short distance ahead of Gilbert Langazo, the deceased, and Hazel Swanzey was a few feet behind. Hazel Swanzey is, therefore, the only person who saw all that happened. She testified that as Phyllis, who was ahead of the others, went underneath the telephone wire, she touched it with her hand and went over and sat down under a tree.

"and as Gilbert (the deceased), reached the line he took hold of it with one hand to lift it over his head, and as he started to do that, to lift it over his head, he let out a scream" and fell, and that the witness "was just within one foot or two from his head when he fell". She further testified that she and Phyllis are each about five feet two or three inches in height, and that the sagging telephone wire, with reference to Phyllis' height, "was not quite to the top of her head; it was along her forehead". After the deceased fell, the witness observed that the grass at his feet was on fire, and she stamped the fire out.

Dr. John B. Webster, who was called to the scene of the accident immediately after it happened, testified that the deceased died as a result of electric shock, and that fact is not disputed.

The land on which the accident occurred is owned by the Mariposa Commercial and Mining Company, and has been leased to E. J. Gann for twenty-six or twenty-seven years. The scene of the accident is a wooded hillside about one hundred yards from the Mariposa High School, and was frequented both by the general public and by high school students. The general public had been accustomed for many years to walk over the land. This land was under lease to the lessee, Gann, for grazing purposes only, and at the time of the accident, was not plowed or under cultivation. In addition to the fact that the general public had had free access to the field in which the accident occurred, and that they walked over and across it at will, it was shown that the field was used occasionally as a playground by a small number of high school students. The telephone line was disconnected in the year 1921. For some years prior to the accident the defendant had permitted unused fragments of the line to remain on the power-line poles at various points along the right of way. The portion of the abandoned telephone line which was the wire the deceased took hold of at the time of the accident, was attached to two of the poles carrying high tension line, and there was an intervening pole from which the cross-arm which formerly carried the sagging wire had become broken, and the insulator and a part of the cross-arm had fallen to the ground, and the wire had thus become detached and permitted to sag between the other two poles to which it was still affixed. On the day of the accident the insulator attached to the broken part of the cross-arm which had fallen from the power-line pole was found imbedded in the dry, dead grass. This cross-arm had been broken a long time before the accident on February 22, 1937, as was evidenced by the appearance of the cross-arm which was admitted in evidence, and from the fact that the grass had grown up over the cross-arm and the insulator affixed thereto, and from the photograph in evidence showing such condition.

The appellant had a right of way for its transmission line over and across the tract of land which was leased to Gann, the grant of the power company providing "that the party of the second part, its successors and assigns, shall exercise the rights hereby granted, in such manner as shall cause the least possible interference with the use of the said strip of land by the party of the first part, its successors and assigns, for pasture, agricultural, horticultural and mining purposes, or any thereof". Just how the old telephone wire became charged with the fatal current of electricity is not disclosed by the evidence.

It is first contended by appellant that the evidence is insufficient to support a finding of negligence. Respondent takes the position that the case comes within the general rule "that a violation of a statute or of a county or municipal ordinance, which directly causes injury to another, constitutes negligence as a matter of law". 19 Cal. Jur., p. 632, sec. 65.

In this connection the latter relies upon a violation of the following general orders of the railroad commission of this state:

"Lines or portions of lines permanently abandoned shall be removed by their owners so that such lines shall not become a public nuisance or a hazard to life or property." Par. 31.7 of section III of General Order No. 64-A of California Railroad Commission. "The owners and employees of such systems shall at all times exercise due care to reduce to a minimum the hazard of accidental injury to their own or fellow employees, to the public and other utilities due to the presence of overhead wires." Par. 31.1 of section III of General Order No. 64-A of California Railroad Commission.

"Lines shall be inspected frequently and thoroughly for the purpose of insuring their maintenance in a good condition so as to conform to these rules. Any defects found shall be promptly rectified. Lines temporarily out of service shall be inspected and maintained in such condition as not

to create a hazard". Par. 31.2, sec. III, of above order.

[1] As to the sufficiency of the evidence to bring the case under the first order above quoted, the facts proven show clearly that the jury were justified in finding that the telephone line in question was "permanently abandoned". It had not been used for over a period of sixteen years, nor had it been in a condition where any use whatever could be made of it for a number of years preceding the accident. The span of wire with which the decedent came in contact lead nowhere. Each end thereof had been cut and wrapped around the cross-arm of the power pole to which it was attached. Under the middle pole, where the wire had become detached, an insulator which formerly supported the wire at that point, was found imbedded in the dry grass. The cross-arm was broken and a portion lay upon the ground, in a similar situation.

[2] It is urged, however, that the regulations of the railroad commission mentioned above do not have the force of law, and hence are not within the rule quoted above from California Jurisprudence. This court decided the question adverse to appellant's contention in the case of Morris v. Sierra, etc., Power Co., 57 Cal.App. 281–289, 207 P. 262, 266: "We presume it will not be questioned that the Legislature, in the exercise of the power conferred upon it by the provisions of sections 22 and 23 of article 12 of the Constitution, may rightfully invest the Railroad Commission with plenary power to regulate the manner in which railroad corporations and other public utilities shall maintain and conduct their business and the essential appliances thereof, and that said Commission may prescribe such regulations with respect to the carrying on of such utilities as may be necessary to safeguard and protect any rights of the public which may be affected thereby. And it will not be doubted that, upon the adoption of such regulations as it is within the legal competence of the Railroad Commission to promulgate with respect to public utilities and the maintenance of the essential equipments thereof, such regulations immediately acquire the force of law. Indeed, it is so declared by the Legislature itself in section 30 of an act of the extra sessions of the Legislature of 1911 (page 18), entitled, in part: 'An act to provide for the organization of the Railroad Commission, to define its powers and duties and the rights, remedies, powers and duties of public utilities,' etc. Said section reads: 'Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.'"

The same rule was followed in Howell v. San Joaquin Light & Power Corp., 87 Cal. App. 44, 261 P. 1107, 1111, where it is stated: "Likewise, as held in the case of Morris v. Sierra, etc., Co., supra, and as also held in the case of Sickles v. Mt. Whitney Power & Electric Co., 177 Cal. 278, 170 P. 599, the failure of the Power Company to maintain its line carrying 11,000 voltage with a minimum clearance of 25 feet, as provided by the order of the railroad commission, and its disregard of the order of the railroad commission in this respect, must be held as showing negligence per se on the part of the defendant."

[3] The case of Winkie v. Turlock Irr. Dist. 24 Cal.App.2d 1, 74 P.2d 302, is not inconsistent with the foregoing authorities. We merely held there that the irrigation District was not subject to the jurisdiction of the railroad commission, and that therefore the rules of the commission, which had no legal application, could not be set up as the measure of care in determining the question of negligence of the district. We are of the opinion, therefore, that there was sufficient evidence of negligence upon the part of appellant to justify a finding in favor of plaintiff on that issue.

[4, 5] It is next contended that "the physical facts demonstrate, against any testimony to the contrary, that the sole cause of the accident was the wilful act, or at best the negligent act of decedent himself". Expert testimony upon the part of appellant was to the effect that in no other way could the telephone wire become charged with current from the power line except by being brought in contact therewith. A witness who saw the accident in its entirety, being but a few steps away, testified that the deceased merely lifted the telephone wire, or was in the act of lifting it, (apparently endeavoring to pass under it), *and that he did not pull* on it or jerk it. Relying upon such expert

testimony, the position of the body after the accident, (parallel to the power lines), and a burn on the right side of the neck, appellant contends that the testimony of plaintiff's witness is inherently impossible, and must be disregarded. Having disregarded it, we are asked to accept its version of the accident, which is that decedent *jerked the wire uphill* so far and with such force as to cause it to rise and flip into the power wires in a span over two succeeding poles. They contend that we must recognize that certain facts are controlled by immutable physical laws which cannot be contradicted by positive testimony to the contrary, citing Coughlin v. Great Western Power Co., 183 Cal. 548, 191 P. 920, which lays down such a rule. In *that case,* all experts testified that a current of 22,000 volts, (twice the voltage here), could not jump or "arc" more than 1.2 of an inch from the wire, and testimony to the effect that it jumped 21 inches was eliminated upon appeal. Expert testimony *here* was to the effect that the accident could only occur through jerking and flipping the telephone wire. We believe that expert testimony as to the distance an electric spark will jump is in a different category from the expert testimony in this case. Here, the expert did not confine himself to a demonstrated law of physics. He told the jury that the telephone wire could not be charged with electricity without contact with a power line, but it does not necessarily follow, nor were the jury *bound* to find from such testimony, that *decedent* made such contact. That was clearly a matter for the jury, and they impliedly found that he did not. We do not believe that the rule stated by appellant is applicable to the situation here; hence, we hold that there was sufficient evidence to sustain a finding that deceased was not guilty of contributory negligence. We might add that appellant does not dispute the fact that the current which killed the young man came from its power line overhead, and it must be remembered that the burden of establishing a defense of contributory negligence is upon the defendant. Such burden has not been sustained to the degree that "from the facts, reasonable men can draw but one inference, which inference points unerringly to the negligence of plaintiff proximately contributing to his own injury". Crawford v. Southern Pacific Co., et al., 3 Cal.2d 427, 45 P.2d 183.

[6-8] It is further urged that decedent was a trespasser, or at most, a mere licensee, and that defendant owed him no legal duty, except that while upon the premises, no wanton or wilful injury should be inflicted upon him. Means v. Southern California R. R. Co., 144 Cal. 473–477, 77 P. 1001, 1 Ann.Cas. 206. There is evidence in the record that the tenant of the real property where the accident occurred, permitted students of the high school a short distance away, and other members of the public to walk across his land. There is evidence that some students used the land for athletic activities. "In a general sense, any invasion of another's rights is a trespass." 63 C. J. 886. Did the decedent invade any right of the power company? We must first determine what the rights of the *company* were in respect to the land where the accident occurred. If the rights of the *latter* were not invaded by decedent in being upon the real property involved, there obviously could be no trespass committed as against the power company. The record shows that the owner of the real property granted "a right of way" to the power company over a strip of land 20 feet in width, with the right to erect a single line of towers or poles thereon and wire suspended thereon. "The rights of any person having an easement in the land of another are measured and defined by the purpose and character of that easement; and the right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement." 17 Am.Jur. 993. Appellant had no right to fence the right of way, nor did it have any right to the use or possession thereof, except for limited purposes, such as repair, maintenance and construction, as set forth in the grant. Thus, except for the reservations made in the grant, the owner had the same complete dominion and control over this 20-foot strip as he had over the remainder of his property. For the reasons given, the weight of authority in this country is to the effect that although decedent may have been a trespasser as to the owner of the real property, the power company cannot take advantage of that fact. The general rule, deduced from a long line of cases referred to in a note, is thus expressed by the editor in 56 A.L.R. 1030: "The doctrine that a power company or person maintaining wires over another's land cannot take advantage of the fact that the injured person was a trespasser on the property where he was injured has gained addition-

al support from a considerable number of recent decisions in addition to those cited in the previous annotation,—some of which, it will be noted, are in jurisdictions which had theretofore not passed upon this troublesome question; and these accessions, perhaps, give that doctrine the weight of authority, although, as stated in the earlier annotation, the cases were then quite evenly divided upon it."

This is the law laid down in 20 C.J., page 350: "The doctrine of non-liability to trespassers or licensees has been applied to relieve defendant of liability where the trespass or license was with respect to the property of a third person and not to that of defendant. But according to the apparent weight of authority, that doctrine has no application to such class of cases, because, conceding that plaintiff was a trespasser as to the owner, he was not a trespasser as to defendant, and defendant may be held liable for negligence in failing to exercise proper care and precaution to prevent injury, not only to persons who had a right to be at the place where the injury occurred, as to whom liability for negligence is unquestioned, but also to persons whom defendant should reasonably have anticipated might be present and exposed to danger at that place, as in the case of places to which children or other persons are accustomed to resort, although without technical right to be at such places."

One of the leading cases upon this point is Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 A. 440, 442, 56 A.L.R. 1011. We quote from that decision: "The parties disagree as to the plaintiff's standing while he was on the Thomas land: The plaintiff says he was there by an implied license; the defendant says he was a trespasser. We do not stop to consider this question. He was not an invitee, and for the purposes of this discussion we will assume that he was a trespasser. Being such, he could recover nothing from Thomas for injuries resulting from the condition of the premises, though these existed through the latter's carelessness. This result follows from the fact that Thomas owed him no duty to keep the premises safe for his unlawful use. The defendant takes the position that, so far as the plaintiff's rights go, it stands in Thomas' position and can make the same defense that he could; that it owed the plaintiff no duty, and consequently any negligence proved against it is not actionable so far as the plaintiff can assert. * * * A trespass is an injury to the possession; and, as it is only he whose possession is disturbed who can sue therefor, so it should be that he, alone, could assert the unlawful invasion when suit is brought by an injured trespasser. One should not be allowed 'to defend an indefensible act' by showing that the party injured was engaged in doing something which, as to a third person, was unlawful."

Another case where the matter is given exhaustive treatment is that of Guinn v. Del. & A. Tel. & Tel. Co., 72 N.J.L. 276, 62 A. 412, 413, 3 L.R.A.,N.S., 988, 111 Am.St.Rep. 668, where it is said: "The exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with. There is no proof that the defendant had any right to maintain the pole and wire; but, even if it had, the deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not include the right to have the wire swing loose or occupy another portion of the field. Whoever interfered with the pole and wire in place, might be a trespasser, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere."

Turning to California, this court, in the case of Roberts v. P. G. & E. Co., 102 Cal.App. 422, 429, 283 P. 353, 355, disposed of a similar situation in the following language: "The fact that the deceased was a trespasser with respect to the defendant City of Chico by virtue of his wrongful violation of its property rights, in no sense exempts the defendant Pacific Gas and Electric Company from liability for negligence. The electric company had no property rights in the fallen tree which were interfered with. In spite of the exemption from liability on the part of the owner of the tree, the electric company still owed the deceased the duty of exercising due caution for his safety. In 2 Joyce on Elec.Law, 986, it is said: 'The fact that one is a trespasser as between himself and a landowner is held not to relieve an electric company from the duty to exercise care towards the former and

the jury may infer negligence from the omission of a guard wire.' In the case of Guinn v. Delaware & A. Tel. Co., 72 N.J.L. 276, 62 A. 412, 413, 3 L.R.A.(N.S.) 988, 111 Am.St.Rep. 668, a guy wire had been stretched by the defendant electric company over an open field across which people were accustomed to travel at will to and from a ball ground in an adjoining field. The guy wire broke and fell across a live electric wire. Thus charged with electricity, the guy wire dangled down into the grass where a boy who was crossing the field without license came in contact with it and was killed. The defendant electric company contended it owed the deceased no duty to preserve his safety for the reason, that he was a trespasser. This theory was denied by the court, which held that, although the landowner might set up this defense in a proper action, the defendant electric company could not avail itself of this exemption from liability. The court said: 'If (the deceased were) a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant. The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. * * * The exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with.'"

It is the position of appellant that it "stood in the shoes" of the landowner, and if decedent was a trespasser as to the owner, it was likewise a trespasser as to the power company. There are a number of authorities which so hold, but we believe that both reason and logic favor the opposing view. The owner of the easement must stand upon his own rights, and no wave of the wand can transmit the landowner's rights to the easement owner, for the sole purpose of permitting the latter to escape responsibility for negligence. The case of Borgnis v. California-Oregon Power Co., 84 Cal.App. 465, 258 P. 394, is not authority for the rule which appellant would have us adopt. In denying a hearing in that case the Supreme Court expressly refused to approve a rule which tended to uphold the appellant here; hence, what was said in the main opinion on the question of the status of the plaintiff there, has no authoritative effect whatever. It is possible that the Supreme Court, in thus limiting the effect of that decision, had in mind the rule which we have set forth, and which we believe to be the correct one. In the case of Lindholm v. Northwestern Pacific, 79 Cal.App. 34, 248 P. 1033, cited by appellant, the defendant was repairing boat machinery on the premises of Moore Shipbuilding Company, using its own workmen. The evidence showed that defendant was there with the permission and consent of the Moore company, and the court held that plaintiff was a trespasser not only in respect to the owner of the premises, but also as to anyone else who was rightfully and lawfully in possession under the owner. Here, the power company not only had no right to the possession of the land upon which the easement was imposed, but it never was in actual possession of the strip covered by the right of way. We have carefully reviewed other California cases relied upon by appellant to sustain their contention, but in none of them is the question squarely raised or decided, and we therefore adopt the view sustained by the weight of authority in this country.

[9, 10] The status of plaintiff, if we assume that he was a mere trespasser, cannot be used to limit the measure of care in this case for another reason which is explained in the rule laid down in 45 C.J., page 730, where it is said: "Notwithstanding the general rule that the owner or person in charge of property owes to trespassers or mere licensees thereon, no duty to keep the premises safe, it has been held that violation of a statutory duty with respect to the condition of property, imposed for the safety of the individuals composing the general public, may result in liability to one who is injured in consequence thereof, although he is a mere licensee or even a trespasser."

As we have stated above, the violation of the order of the railroad commission in respect to the duty of appellant to remove the abandoned telephone line was, in effect, a violation of the law, and therefore negligence per se. The order quoted above specifically recites that its purpose is to remove a hazard to "life or property". Section 73 of the Utilities Act (above),

St.1911, Ex.Sess., p. 59, gives a right of action in damages to any person who is injured through an omission to comply with any order of the commission. The action of the company in permitting the telephone wires to remain, was clearly "a violation of a statutory duty with respect to the condition of the property"; hence, the facts bring the case directly within the scope of the rule laid down in Corpus Juris. The cases which support this rule are based upon the fundamental concept that the question of the status of the party injured cannot be raised, for the reason that the law is a police regulation designed to protect the public. The case of Conway v. Monidah Trust Co., 47 Mont. 269, 132 P. 26, 27, L.R.A.1915E, 500, lays down this rule with clarity and thoroughness. There, the statute provided that all mining shafts within certain limits of a town or city, must be enclosed by a substantial fence. Plaintiff, a child of seven years, while trespassing upon the property where the shaft was situated, fell down the shaft and was injured. There was no fence, and the defendant thus violated the law in failing to maintain one. We quote from the opinion:

"The question, then, is whether or not a trespasser upon private property may recover damages for injury suffered by him while so trespassing, because of the property owner's failure to comply with section 8535, Revised Codes. This section is found in title 10 of part 1 of the Penal Code, under the heading: 'Crimes Against the Public Health and Safety,' and, so far as pertinent to this case, reads as follows: 'Every person who sinks any shaft * * * or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town * * * and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars. The owner of any property * * * shall be deemed to be within the provisions of this act if he permit any such shaft * * * to remain open, exposed or unprotected upon his property * * * for a period of more than ten days.' * * * Does the duty imposed by section 8535 apply for the benefit of persons who may by chance be technical trespassers upon mining property? This question, both directly and in its analogies, has been before many courts with apparent diversity of result; but no real difficulty is encountered in extracting a consistent rule out of the apparent conflict of decision, when it is observed that the various statutes involved are interpreted according to substantially this classification: (a) Those imposing duties to or for the benefit of the municipality or to the public considered as an entity. From such statutes no private right of action arises. Heeney v. Sprague, 11 R.I. 456, 23 Am.Rep. 502; Taylor v. L. S. & M. S. Ry., 45 Mich. 74, 7 N.W. 728, 40 Am.Rep. 457; Frontier Steam Laundry Co. v. Conolly, 72 Neb. 767, 101 N.W. 995, 68 L.R.A. 425. (b) Those imposing duties to persons of a particular class. To have a right of action from such a statute one must clearly belong to the contemplated class. Osterholm v. Boston & Mont., etc., Co., supra [40 Mont. 508, 107 P. 499]; Toomey v. Southern Pacific Ry., 86 Cal. 374, 24 P. 1074, 10 L.R.A. 139; Flanagan v. Sanders, 138 Mich. 253, 101 N.W. 581. (c) Those imposing duties to the public, considered as a composite of individuals, in which case a right of action does arise in one of the public when, and only when, he has sustained some special injury by reason of noncompliance. Hayes v. M. C. R. Co., 111 U.S. 228, 239, 240, 4 S.Ct. 369, 28 L.Ed. 410; P. W. & B. Ry. v. Stebbing, 62 Md. [504] 516, 517; Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648, 5 L.R.A.(N.S.) 187; Union Pacific Ry. v. McDonald, 152 U.S. [262] 282, 14 S.Ct. 619, 38 L.Ed. 434. It may be said, and perhaps correctly, that these are essentially restatements of the same thing, looked at from different angles (Note, 9 L.R.A.[N. S.] 343); but that is unimportant. The important thing is that there are statutes such as we have mentioned under (c), and these statutes usually bear the aspect of police regulations for the protection of the public relative to matters with which the public contact is commonly through individuals, and as to which the individuals are entitled to assume that the law has been observed. South & North Alabama R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Jackson v. Kansas C., etc., Ry., 157 Mo. 621, 58 S.W. 32, 80 Am.St.Rep. 650. * * The benefits to be derived from its performance inure to the public through the added safety assured to individual person and property, and can affect the public in no other way. That the failure to observe the requirements of such a statute will, if the proximate cause of injury, support an action even by a trespasser is sustained by an abundance of authority. Richardson v.

El Paso C. G., etc., Co., 51 Colo. 440, 118 P. 982; Erb v. Morasch, 8 Kan.App. 61, 54 P. 323; Alabama & Va. R. Co. v. Carter, 77 Miss. 511, 27 So. 993; Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N.W. 796 [57 N.W. 522]; Keyser v. Grand Trunk Ry., 66 Mich. 390, 33 N.W. 867; Meeks v. Railway Co., 56 Cal. 513, 38 Am.Rep. 67; South & North Alabama Ry. v. Donovan, supra; Hayes v. M. C. R. Co., supra; Jackson v. Kansas C., etc., Ry. Co., supra."

A similar law was enacted in the state of Colorado, and was construed in Richardson v. El Paso C. G., etc., Co., supra. The matter there was thus disposed of [51 Colo. 440, 118 P. 986]: "On this state of facts it is contended that plaintiffs, as well as the deceased, were mere licensees, which did not entitle either of them to the use of the dump in the immediate vicinity of the shaft, which was about 110 feet from the house; that deceased was, therefore, a trespasser when upon the dump, and at the shaft, or, if the license extended to the immediate vicinity of the shaft, which was there when the house was constructed, the defendant violated none of its obligations growing out of the relationship of owner to licensee or trespasser. The proposition is wholly inapplicable. Plaintiffs' action is not based upon the ground of a failure on the part of defendant to fulfill any obligation which it owed them or the deceased, because they occupied a house on the Australia claim, but upon the failure of the defendant to comply with a statutory requirement the purpose of which was to protect the public from injury, which neglect, they claim, caused the death of their son. * * * The failure to perform a statutory duty imposed by a valid statute under the police power of the state for the protection of the public is negligence per se. Platte & Denver C. & M. Co. v. Dowell, 17 Colo. 376, 30 P. 68. The party upon whom such duty is imposed must not only exercise reasonable care in the first instance to comply with the requirements of the statute, but must thereafter exercise such care in complying with the statutory requirements. Jones v. Flint & P. M. R. Co., 127 Mich. 198, 86 N.W. 838."

Appellants attempt to distinguish these last two cases because in each the plaintiffs happened to be children, but it clearly appears that these adjudications were not based upon the "attractive nuisance" theory, which would limit the recovery to children. The case of Texas-Louisiana Power Co. v. Webster, Tex.Civ.App., 59 S.W.2d 902, 905, affirmed, Supreme Court, 127 Tex. 126, 91 S.W.2d 302, also holds that under the circumstances we have here, the question of the status of the injured party cannot be urged in defense of the liability of the power company. By statute in the state of Texas it is provided, with reference to power lines, that "Such lines shall be constructed upon suitable poles in the most approved manner, and maintained at a height above the ground of at least twenty-two feet". Vernon's Ann.Civ.St.Tex. art. 1436. Plaintiff, while driving his automobile, ran out of gasoline. In search of a supply, he started toward a barn in a field adjoining the highway, and ran into a high voltage wire which had *sagged* to some three feet from the ground, due to damage done by a recent storm. The power company was the owner of an easement across the field, as explained by the court in the following portion of the opinion, which reviews exhaustively many cases upon all phases of this question: "Obviously, one of the purposes of the quoted provision of the statute is to protect from injury all persons while using the premises in a manner consistent with the easement rights of the power company. What are these rights? The generally accepted doctrine is that the owner of the fee or proprietor of the premises has dominion over and the right to use the land in a manner consistent with the reasonable enjoyment of the easement by its owner. 15 Texas Juris., p. 802, § 59. See annotations 46 A.L.R. 1463–1465. Appellant acquired the right of way through the Carter farm by a deed from the owner, granting the right of ingress and egress over adjacent lands to or from said right of way for the purpose of constructing, reconstructing, inspecting, controlling, hanging new wires on, maintaining, and removing said line and appurtenances, the right to relocate along the same general direction of said line, etc. Neither under this express grant, nor under the statute did appellant have the right to prevent the owner of the fee, or proprietor, from using the ground under the power line so long as it was not put to a use inconsistent with the reasonable enjoyment of the easement. We do not think it can be said that, in attempting to pass under appellant's power line at the time and place in question, deceased was interfering with or trespassing upon any right of the appellant, in fact, if deceased was trespassing, it was upon the rights and premises of the owner or tenant."

[11] We now come to the instructions. It is first claimed that the court erred in giving an instruction upon the doctrine of res ipsa loquitur, upon the ground that such instruction was inapplicable. The fundamentals of that doctrine are as follows: "'In order that the doctrine of res ipsa loquitur should apply to a given case the plaintiff must have first shown by a preponderance of the evidence that certain conditions existed, amongst these conditions are the following: 1. That the general experience of mankind shows that the accident was such that it does not usually occur in the ordinary course of events without negligence upon the part of those in control, and 2. The person against whom the doctrine is sought to be invoked must have been in control of that instrumentality, and 3. The person invoking the doctrine must not be in a position to know the cause of the accident. * * *" Parker v. Granger, Inc., 4 Cal.2d 668, 674, 675, 52 P.2d 226, 228.

[12, 13] As to the first condition, it is clearly the general experience of mankind that telephone or other wires within several feet of the ground are not charged with a deadly current of electricity. As to the second, the instrumentalities—the electric current and the wire—were in control of the power company. As to the third condition, neither the plaintiff nor anyone else could tell exactly how the current got into the telephone wire. In making this reference to the facts, we, of course, are bound to accept the testimony of respondent to the effect that the deceased did nothing to cause a contact between the telephone wire and the power line, and to hold that the contention of the appellant that deceased jerked the wire, is untrue. The following quotation from 18 American Jurisprudence, 504, expresses our views, and clearly authorized the giving of the instruction: "The mere introduction of the facts surrounding an injury from electricity, showing that such injury resulted from contact with live electric wires or other appliances when out of proper condition or out of their proper place, may suffice under the doctrine of res ipsa loquitur to raise a prima facie presumption that the electrical company having such appliances in charge was negligent in the performance of its duty and to place upon the company the burden of overthrowing such presumption. Even though a fallen wire received the electricity by coming in contact with another wire upon which it sagged, the doctrine may apply. The exceedingly dangerous character of live electric wires lends force to the strict application of this rule of law to accidents occurring through contact with them under such circumstances; and unless the rule of res ipsa loquitur is applied, it is evident in a large number of cases that liability for the resulting injury will be escaped. It is within the power of electric companies at all times to show whether they have exercised due care in the erection and subsequent supervision and maintenance of their wires and appliances, while in many cases it would be almost impossible for the person injured to prove an actionable failure of duty in these things."

[14, 15] Furthermore, an instruction on this doctrine was offered by appellant and given by the court. It is a fundamental rule that under such circumstances appellant cannot complain of a like instruction given by respondent. Appellant states that this rule is not applicable because the trial court announced that it "intended to apply the doctrine". No reference is made in the transcript as to when and where such announcement was made, and we do not feel that it is incumbent upon us to examine the hundreds of pages of such transcript to ascertain the facts.

[16] The court gave the following instruction at request of respondent: "You are instructed that from the very nature of its business, an electric company using highly charged wires owes a legal duty toward every person who, in the exercise of a lawful occupation in a place where he has a legal right to be and is liable to come into contact with the wires, to see that such wires are properly placed with reference to the safety of such persons."

Other instructions defining the rights of a licensee were given. It is contended that in the first instruction the jury were told that the deceased had a lawful right to be upon the property, while in another they were told that deceased was not an invitee. The first instruction was not one on the facts, and consequently it did not, as appellant contends, have the effect of telling the jury that decedent was lawfully upon the property. It was a mere statement of the law, and was therefore proper, and no conflict resulted.

Lastly, the court instructed the jury that a violation of the rule of the railroad

commission constituted negligence as a matter of law. This correctly stated the law, as we have fully explained above.

Other points raised by appellant have either been disposed of without specific mention being made of them, or have been found so devoid of merit as to require no discussion.

The judgment is affirmed.



33 Cal.App.2d 35

CRABTREE v. WESTERN PAC. R. CO.

Civ. 6026.

District Court of Appeal, Third District, California.

May 24, 1939.

Rehearing Denied June 23, 1939.

Hearing Denied July 20, 1939.

1. Appeal and error ⇐989

Only credible testimony may be considered on appeal in support of a judgment, and evidence which is inherently improbable or clearly false must be disregarded.

2. Trial ⇐139(1), 140(1)

It is usually the sole province of jury to determine credibility of witnesses and the weight and sufficiency of evidence.

3. Appeal and error ⇐994(2)

In action for personal injuries sustained by laborer who fell from running board of locomotive without clear and convincing evidence disclosed by record, appellate court could not overrule judgment of jury and trial judge regarding credibility of laborer or truthfulness of his testimony that he slipped on a lump of grease which some other workman had dropped on running board. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

4. Master and servant ⇐204(3)

Laborer engaged in washing out boiler of locomotive in roundhouse for railroad engaged in interstate commerce did not assume risk of employment so as to preclude him from recovering for injuries sustained from slipping upon grease deposited and left on running board by negligent fellow servant unless laborer knew or by exercise of reasonable care should have known that grease was there. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

5. Master and servant ⇐204(3)

A railroad employee working for railroad engaged in interstate commerce does not assume risk of negligence of a co-workman regarding whose careless acts he has no knowledge unless as a reasonably prudent person under similar circumstances he would be presumed to have observed and appreciated them. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

6. Master and servant ⇐279(6)

In action for injuries sustained by laborer who fell from running board of locomotive while engaged in washing out boiler, evidence established prima facie case of negligence on part of some coemployee in leaving a lump of grease on the running board. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

7. Master and servant ⇐265(12)

In laborer's action for injuries sustained when he fell from running board of locomotive because of alleged negligence on part of some coemployee in leaving lump of grease on running board, it was not necessary for laborer to prove just who dropped grease on running board. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

8. Master and servant ⇐265(13)

In absence of proof of habit of workmen to leave grease on running boards of railroad locomotives, a fellow servant may not be presumed to anticipate that dangerous practice. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

9. Master and servant ⇐204(1)

A servant employed in an interstate commerce industry does assume all normal risks incident to his particular task which are actually known to him, or which in the exercise of ordinary care of a prudent person under similar circumstances, are reasonably ascertainable. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

10. Master and servant ⇐204(3)

A servant employed in an interstate commerce industry is not precluded from recovering damages for negligence of a fellow servant who carelessly leaves a large lump of grease on running board of railroad locomotive which rules and custom of railroad require to be kept clean and free from such dangerous substance when injured serv-

ant relies upon that custom and looks at board before stepping upon it, but fails to discover grease because of existing shadows or prevailing dusk. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

11. Appeal and error ⇐930(1)

On appeal from judgment for plaintiff, appellate court must construe plaintiff's testimony in support of the judgment.

12. Appeal and error ⇐882(11)

In laborer's action for injuries sustained when he fell from running board of locomotive because of grease dropped by fellow employee, defendant railroad could not complain because of employee's failure to explain incident in greater detail where employee was apparently twice interrupted at critical time in his testimony and prevented from doing so. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

13. Master and servant ⇐284(1)

In railroad employee's action for personal injuries, it was exclusive province of jury to determine weight to be given to written statements of plaintiff which were subsequently procured by agents of employer. Federal Employers' Liability Act, 45 U.S.C. A. § 1 et seq.

14. Master and servant ⇐285(7)

In railroad employee's action for injuries sustained when he slipped from locomotive running board because of grease, where employee testified that he had informed railroad's agent three days after accident that he had stepped in some grease and slipped, but statement written by agent merely stated that employee lost balance because there might have been something on bottom of shoe, whether railroad's agent had correctly written down employee's answers to questions was for jury. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

15. Evidence ⇐589

In railroad employee's action for personal injuries sustained when he fell from locomotive running board because of grease, employee was not unworthy of belief and his story of presence of grease was not inherently improbable. Federal Employers' Liability Act, 45 U.S.C.A. § 1 et seq.

16. New trial ⇐143(3)

In personal injury action by railroad employee against railroad, juror's affidavit, offered for purpose of impeaching verdict, that, in spite of verdict which he had rendered against railroad, he believed railroad was not guilty of negligence contributing to employee's injuries but that he agreed to verdict only because he thought employee sustained injuries in course of employment and that he should receive some compensation, was properly stricken from record. Federal Employers' Liability Act, 45 U.S.C. A. § 1 et seq.; Code Civ.Proc. § 657, subd. 2.

17. New trial ⇐143(1)

Affidavits or oral evidence of either concurring or dissenting jurors which tend to contradict, impeach, or defeat their verdict cannot be received except to show that the verdict was secured by chance as distinguished from the independent judgment of individual jurors. Code Civ.Proc. § 657, subd. 2.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Personal injury action by Benjamin H. Crabtree against the Western Pacific Railroad Company. From a judgment for plaintiff, and from orders denying defendant's motions for judgment notwithstanding the verdict and for a new trial, defendant appeals.

Affirmed.

Jerome D. Peters, of Chico, Seth Millington, of Gridley, and C. W. Dooling and J. H. Sapiro, both of San Francisco, for appellant.

Clifton Hildebrand, of Oakland, Albert M. King, of Oroville, and Goodman & Brownstone, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $10,000 which was rendered against it in a suit for personal injuries sustained by plaintiff while he was engaged in washing out the boiler of an engine in the roundhouse at Oroville. The company owns and operates a railroad business which involves interstate commerce. This suit was instituted under the Federal Employers' Liability Act. Title 45, U.S.C.A., § 1 et seq., Railroads. The cause was tried with a jury. Defendant's motion for a judgment notwithstanding the verdict, pursuant to section 664 of the Code of Civil Procedure, was denied. A

motion for new trial was also refused. From the judgment and from these orders the defendant has appealed.

Among the properties and equipment owned and used in the defendant's railroad enterprise is a roundhouse located at Oroville, California, where locomotive engines are cleaned and repaired. The plaintiff, who was an able-bodied man six feet in height and 46 years of age, had been employed by the company as a laborer in that roundhouse for eleven years. At the time of the accident he was engaged in washing out the boilers of engines. This was done by first removing certain plugs which permitted the water to drain from the boilers. There are also four washout plugs located above the running boards on either side of the boilers. The running boards extend along both sides of the boiler from the cab to the front of the engine. They are constructed of steel 14 inches in width and are located eight feet and four inches above the ground. About four feet above the running boards a handrail is fastened to the boiler and extends full length and parallel therewith. The cab at the rear end of the locomotive connects with the boiler and contains the levers and apparatus for operating the engine. The cab is constructed the entire width of a car and extends beyond the boiler on either side a distance of about one foot and a half. The engineer's cab is provided with open windows on both sides. Above and below these windows and along the lower outside edges of the cab there are parallel handrails extending its entire length. A tender car is attached immediately back of the engine. The front of the tender is equipped with steps to enable the engineer and fireman to enter the cab. Vertical hand-rails are fastened to both the front of the tender and the rear of the cab. Upon some of the engines vertical handrails were also attached to the front of the cabs as safety devices to which workmen could cling in passing from the cab to the running boards in the performance of their duties. Engine number 203, upon which the plaintiff was employed at the time of his accident, did not possess these last-mentioned rails. Most of the engines lacked them. Beneath the cab and above the rear wheels, foot-plates or steps extend on either side of the engine to enable workmen to mount the running boards from the ground.

In removing and replacing the washout plugs in the boilers above the running boards, and in flushing the boilers by means of forcing water with a hose into those openings, the boilermen were accustomed to climb through the cab windows, standing upon the lower foot-rails and working their way to the front of the cab and while clinging to the upper rail they would step up and stand upon the running boards to perform their work.

The plaintiff was employed as a hostler or washer of boilers at the round-house from 4 o'clock p. m. of each day until midnight. March 4, 1935, on which day the accident occurred, was cloudy and the sun went down at 6:15 o'clock in the evening. The boiler of locomotive number 203 was washed and the engine had been groomed and greased. It was then the duty of the plaintiff to replace the washout plugs above the running boards. He testified that it was a dark and cloudy day; that it was dusk and difficult to see clearly in the roundhouse when he attempted to mount the running board. He climbed through the window of the cab at 4:45 p. m. for the purpose of replacing the plugs as he had previously done hundreds of times. With wrench in hand, he walked on the foot-rail at the bottom of the outside of the cab and clung to the rail above the window. When he reached the front of the cab he raised his right foot and placed it upon the running board, at the same time reaching for the handrail above it. When he placed his weight upon that foot to elevate himself to the board, it slipped and he grasped for the vertical hand-rail in front of the cab, which in the emergency he assumed was there, but finding it missing, he fell to the ground, fracturing the heel-bone or os calcis of his left foot at the point where it articulates with the lower end of the tibia. The ligaments of the foot were torn. He also sustained an injury in the nature of a hernia. As a result of the fracture he suffered a fallen arch and permanent disability of the left foot from lack of mobility. There exists a tendency to deformity of the foot and danger of subsequent arthritis.

In falling from the running board the plaintiff struck with his full weight on his left foot and then toppled over upon his back. He lay on the ground a moment, not realizing that he was seriously in-

jured. His ankle did not at first pain him. As he rose and sat there he noticed a large gob of grease protruding from the sole of his right shoe. He testified that it was nearly the size of his fist; that he picked up some waste cotton and wiped it from his shoe; that he then stood upon his feet and being curious regarding the source from which the grease came, he stepped upon the foot-place over the rear wheel of the engine, and reaching up he ran his hand over the edge of the running board in the locality from which he slipped; that as a result thereof his fingers were covered with grease and oil; that he then wiped the grease from the running board with the waste which he held in his hand and threw it away. When he fell from the board he dropped his wrench, which was later found beneath the cab window. He said that before he stepped upon the running board, he glanced down and saw no grease. There is evidence that another workman observed the running board a few moments before the accident occurred and he saw no grease upon it. No grease was found upon it when the washout plugs were replaced half an hour later.

After wiping the running board the plaintiff got down from the plate upon which he stood, and stepping upon his left foot he discovered that it pained him greatly. He then thought that he had sprained his ankle. He climbed into the cab and sat there for about ten minutes, intending to return when the pain ceased and replace the washout plugs. The pain in his foot increased greatly and the ankle soon began to swell. Observing two fellow workmen near by, he called them to come to his aid and merely told them he had fallen from the running board and hurt his ankle. They finally lifted him from the cab and carried him in a wheelbarrow to the office, where he changed his clothes and was taken to his home in an automobile. Medical aid was promptly rendered. In due time he moved about by means of crutches. The left foot is permanently injured. This suit for damages was commenced in July, 1936. It is not contended the award of damages is excessive.

Only two issues are raised on this appeal. It is contended the verdict and judgment are not supported by credible evidence and that the plaintiff is precluded from recovering damages for his injuries by the doctrine of assumption of risk incident to his employment. Regarding the asserted absence of evidence to support the judgment the appellant says: "We ask the court to disregard the testimony of the respondent because it is unsubstantial, unbelievable and fabricated to meet the occasion."

[1-3] While it is true that only credible testimony may be considered on appeal in support of a judgment, and that evidence which is inherently improbable or clearly false will be disregarded, it is usually the sole province of the jury to determine the credibility of witnesses and the weight and sufficiency of the evidence. In spite of circumstances which may be open to serious criticism or justifiable suspicion, in accordance with the established rule controlling the consideration of an appellate tribunal, we are precluded under the facts of this case from substituting contrary conclusions, even though we possessed them, for the judgment of the jury in rendering its verdict and for the opinion of the trial judge in denying the motions for a judgment notwithstanding the verdict and in refusing a new trial. Without clear and convincing evidence disclosed by the record we are not authorized in overruling the judgment of the jury and the trial judge with respect to the credibility of the plaintiff or the truthfulness of his testimony to the effect that he slipped upon a lump of grease which some other workman had evidently dropped upon the running board, and fell to the ground. His failure to first mention that fact is susceptible of plausible explanation which may have controlled the jury and the trial judge in their conclusions. Even though reasonable minds may differ regarding that omission in the beginning, we are not at liberty to upset the verdict and judgment on that account.

The appellant strenuously asserts that the plaintiff fabricated his story about stepping on a lump of grease on the running board as a last resort to save himself from defeat when his first cause of action based on the absence of a vertical hand-rail in front of the cab was effectively destroyed by proof that most of the engines never had them installed. Appellant insists that the plaintiff "never complained of any such gob of grease being on the running board" until after the taking of his deposition within one week of the trial. In that statement the appellant is in error. In the second cause

of action contained in the complaint, which was filed a year before the trial, the plaintiff specifically alleged that the accident occurred from slipping on grease and oil negligently left upon the running board. That theory was evidently not conceived after the taking of the deposition.

It is true that the first cause of action was based on the theory that the company was guilty of negligence in failing to provide the plaintiff with a reasonably safe place at which to work by neglecting to attach the vertical hand-rails to the front of the cab on engine number 203, which would have saved him from the fall if they had been so installed. It is also true that the plaintiff testified he was of the impression most engines contained that rail, and that, in the emergency, when he slipped on the running board, he grasped for that rail, but finding it missing, he fell to the ground. When evidence was adduced that only a few of the engines possessed those vertical rails in front of the cab, and a motion was made for a nonsuit of the action as to that count, it was dismissed by the plaintiff, and he was then compelled to rely solely on his second cause of action.

The second cause of action alleges that: "Prior to plaintiff's going upon the said running board, defendant, through its servants, agents and employees, other than plaintiff, had carelessly and negligently deposited upon and left upon the said running board, a large quantity of grease, and had carelessly and negligently failed and neglected to remove the same. That the presence of said grease on the said running board was unknown to plaintiff, and when plaintiff stepped upon the said running board in the performance of his duties, he slipped upon the said grease and fell from the said running board to the ground, and as a proximate result of the carelessness and negligence of the defendant, its agents, servants and employees, plaintiff suffered the injuries herein enumerated."

[4, 5] The plaintiff did not assume the risk of his employment under the circumstances of this case so as to preclude him from recovering damages for injuries sustained from slipping upon grease deposited and left upon the running board by the negligence of a fellow servant, unless he knew, or by the exercise of reasonable care should have known that it was there. A railroad employee, working for a company engaged in interstate commerce, does not assume the risk of the negligence of a coworkman regarding whose careless acts he has no knowledge, unless as a reasonably prudent person under similar circumstances he would be presumed to have observed and appreciated them. Title 45, U.S.C.A., p. 378, sec. 52, and sec. 54, note, p. 463; Erie Ry. Co. v. Purucker, Ohio, 244 U.S. 320, 37 S.Ct. 629, 61 L.Ed. 1166; Montgomery v. Baltimore & O. R. Co., 6 Cir., 22 F.2d 359; Chapman v. U. S. Express Co., 192 Mich. 654, 159 N.W. 308.

It is said in that regard in Gila Valley, G. & N. Ry. Co. v. Hall, 232 U.S. 94, 34 S.Ct. 229, 231, 58 L.Ed. 521, that: "An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it."

[6-10] In the present action the plaintiff established a prima facie case of negligence on the part of some coemployee in leaving a lump of grease on the running board. It was not necessary for him to prove just who dropped that grease upon the board. It does appear that the locomotives, including engine number 203, were washed, groomed and greased in that roundhouse by employees of the defendant other than the plaintiff, before it became his duty to replace the washout plugs. It also appears that it was the duty of the other workmen to wipe off surplus grease and leave the running board clean. This is not disputed by the defendant. The case was tried on that theory. The only defense to that charge of negligence was an effort on the part of the defendant to prove that no grease was left on the board. Witnesses were called to show that fifteen minutes before the accident occurred and half an hour afterward the board was free from grease. In the absence of proof of a habit of workmen to leave grease on the running boards, a fellow servant may not be presumed to anticipate that dangerous practice. While it is true that a servant

employed in an interstate commerce industry does assume all normal risks incident to his particular task which are actually known to him, or which, in the exercise of ordinary care of a prudent person under similar circumstances, are reasonably ascertainable (45 U.S.C.A., p. 448, note 24), he is not precluded from recovering damages for negligence of a fellow servant who carelessly leaves a large lump of grease on a running board, which the rules and custom of the company require to be kept clean and free from such dangerous, slippery substance, when the plaintiff relies upon that custom and looks at the board before stepping upon it, but fails to discover the grease because of existing shadows or prevailing dusk. There is sufficient evidence in this case to show that the grease was left upon the board by a fellow servant and that the plaintiff did not assume that risk as a necessary incident to his employment.

[11] We do not think the evidence of the plaintiff is inherently improbable. We must construe his testimony in support of the judgment according to the prevailing rule. It does not seem to be improbable that the plaintiff at first thought he was not seriously injured, and upon the contrary that he had merely sprained his ankle. He said that he climbed into the cab and sat for ten minutes on the engineer's seat waiting for the pain to abate, intending to go back and replace the washout plugs; that when the pain continued and he observed the rapid swelling of his ankle, upon seeing his fellow workmen, Howard Gaskins and Louie Torasso, near by, he hailed them and said he had "slipped and fell and hurt my foot". It does not seem unreasonable that he did not then discuss the details of the cause of his accident. He was asked nothing about it at that time. He was anxious to have his duty of replacing the washout plugs performed. Gaskins said "Well I will go ahead and put the plugs in and you sit there awhile and maybe you will get better". It is not true that the plaintiff neglected to mention the grease as the cause of his accident during the taking of his deposition on Thursday preceding the trial. In the course of his deposition the plaintiff stated that his foot slipped from the running board on account of the presence of grease and oil. When he attempted to explain that matter in further detail, he was interrupted by the attorney for the defendant, and was not further interrogated in that regard. On cross-examination of the plaintiff at the trial the following occurred:

"Q. Do you know why your right foot slipped? A. It was grease and oil.

"Q. Where was the grease and oil? A. When I felt—

"Q. (interrupting). I did not ask you that * * *

"Q. Where did you get the grease and oil that was on your foot? A. I don't know, it evidently came from the running board.

"Q. Which running board? A. The iron one. * * *

"Q. Why didn't you say then that you knew it was on the running board, didn't you know that Thursday, that that big gob of pin grease was on the running board? A. Yes sir. * * *

"Q. Why did you say that you did not know? A. When you interrupted me there—

"Q.(interrupting) Pardon me now. * *

"Q. And you not only had the opportunity to look for that running board and observe it carefully, but you actually did do that? A. Yes, sir.

"Q. And you saw no grease of any kind on it at all? A. No sir I did not, I didn't see any grease at all."

[12] It clearly appears the plaintiff positively asserted at the taking of his deposition, that he found a lump of grease on his shoe after the accident occurred, and that he thought it came from the running board. This confirms the claim in that regard which is alleged in his complaint filed a year before the trial of the cause. The defendant may not complain of a failure to explain that incident in greater detail since he was apparently twice interrupted at the critical time and prevented from doing so. The latter portion of the above-quoted evidence may not be reasonably construed to mean that the plaintiff previously admitted he found no grease on the running board after the accident occurred. There is no irreconcilable conflict in his evidence in that regard. What he evidently meant from the foregoing quotation is that before he stepped on the board, *prior to the time of the accident*, he looked and saw no grease upon it. That statement had no reference to his finding the grease and oil on the running board when he ran his fingers over it after the accident at the time when

he found the grease on the sole of his shoe. He explained that the reason why he did not see the grease on the board before he stepped upon it, was that it was a cloudy day and dusk in the roundhouse at that time. There was a conflict of evidence in that regard. It was, however, the sole province of the jury to reconcile that conflict and to determine the credibility of the various witnesses.

The written statement of the witnesses Gaskins and Torasso which was offered in evidence adds nothing to the weight of their testimony. It merely reiterates the statement that when the plaintiff called them to him he said: "I slipped and fell down and hurt my foot." It does not appear the cause of his accident was then further discussed. It does not seem strange that the plaintiff who was then suffering pain and anxious to have the washout plugs installed, since that was a part of his duty, should not have considered or discussed at that critical moment the immediate cause of his slipping from the board. It is not unreasonable to believe that one in the stress of a serious accident who is suffering pain, should not forthwith calmly sit down and analyze the exact cause therefor. That sort of deliberation usually takes place subsequently.

[13, 14] It was also the exclusive province of the jury to determine the weight to be given to the two written statements of the plaintiff which were subsequently procured by agents of the company. We may not be permitted to say the plaintiff was unworthy of belief merely because those statements do not contain the exact declaration that he fell from the board as a result of stepping in grease which was negligently left there. He testified that Mr. C. M. Hickok was sent to him as an agent of the company three days after the accident occurred to procure a written statement from him; that he then told him "the company would take care of him"; that the statement was taken on a form consisting of routine questions which were previously prepared by the company; that he was in bed at that time and unable to write; that Hickok read the questions to him and wrote down the answers; that the prepared form contained among other questions the following: "If a person or thing slipped, fell or dropped, * * * state fully and in detail the cause thereof", to which he replied: "I told him that I had stepped in some grease and slipped and didn't go into detail"; that Hickok merely wrote the following: "Lost balance account might have been something on bottom of shoe." The plaintiff said that he signed that statement without reading it. He assumed Hickok had written the answers to the questions as he gave them to him. The variance in those answers may not have seemed important. It was the province of the jury to determine whether, under the circumstances under which this statement was taken, the agent of the railroad company had correctly written down the plaintiff's answers to the questions.

[15] There is a conflict of evidence regarding the presence of a quantity of grease on the running board and the ability of the plaintiff to have seen it on account of the insufficiency of light. There are also some inconsistencies in the testimony of several witnesses. We are aware of the fact that inaccuracies frequently occur in the testimony of perfectly honest and conscientious witnesses. Many of these inconsistencies may be reasonably accounted for. After carefully reading the entire transcript we are unable to say the plaintiff was not worthy of belief or that his story of the presence of the grease was inherently improbable or false.

[16] Upon motion for a new trial the affidavits of four jurors, offered for the purpose of impeaching their verdict, were stricken from the record. That motion was properly granted. The verdict was rendered by a nine to three vote of the jurors. At least one of the four affiants voted in favor of the verdict which was returned against the defendant. He averred that, in spite of the verdict which he had rendered against the defendant, that he believed the company was not guilty of negligence which contributed to the plaintiff's injuries, but that he agreed to the verdict only because he thought the plaintiff sustained his injuries in the course of his employment and that "he should receive some compensation for his injuries".

[17] The appellant contends this inconsistent conduct on the part of jurors constitutes "irregularities in procedure" so serious as to render the verdict void, necessitating the reversal of the judgment for failure to grant a new trial on that ground. We think not. On their voir dire the jurors swore they would render

their verdict solely on the facts presented at the trial and upon the instructions of the court. The court charged the jury that the burden was upon the plaintiff to prove the negligence of the defendant as charged in the complaint by a preponderance of the evidence, and that upon his failure to do so, they were absolutely precluded from finding a verdict against the defendant. To permit a juror to stultify his oath and his verdict in that manner would defeat the very purpose of the wholesome rule adopted in the interest of public policy. It would subject jurors to perverting influences after the restraint of the court had been removed, and tend to defeat justice. It is therefore the uniform rule in this and other jurisdictions to reject affidavits or oral evidence of either concurring or dissenting jurors which tend to contradict, impeach or defeat their verdict, except to show that the verdict was secured by chance as distinguished from the independent judgment of individual jurors. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 58 P. 169; Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94; sec. 657, subd. 2, Code Civ.Proc.; 24 Cal.Jur. 877, sec. 126; 97 A.L.R. 1038, note; 6 So.Cal.Law Rev. 246.

The judgment and the order denying motion for judgment notwithstanding the verdict are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



32 Cal.App.2d 711

SHELLY et al. v. McKIMMINS et al.

Civ. 11040.

District Court of Appeal, First District, Division 2, California.

May 19, 1939.

Hearing Denied July 18, 1939.

1. Army and navy ⇐62

A specification contained in an application for a war risk policy concerning payments of installments upon death or disqualification of beneficiary would be deemed to have been accepted by assured when he signed application. Act Cong. Oct. 6, 1917, § 402, 40 Stat. 409; Act Cong. Dec. 24, 1919, §§ 13, 15, 41 Stat. 375, 376; 38 U.S.C.A. § 514.

2. Army and navy ⇐77(19)

In proceedings by veteran's sisters to establish trust on proceeds of war risk policy paid to veteran's administrator after death of veteran's widow, who was beneficiary in policy, where defendant claimed proceeds as widow's second husband and under a will whereby she devised her property to defendant, findings that veteran was indebted to sisters and had promised to nominate them as second beneficiaries supported conclusion that a trust arose and that administrator of veteran's estate held the fund in trust for veteran's sisters. Act Cong. Oct. 6, 1917, § 402, 40 Stat. 409; Act Cong. Dec. 24, 1919, §§ 13, 15, 41 Stat. 375, 376; 38 U.S.C.A. § 514.

3. Army and navy ⇐77(18)

A suit by veteran's sisters to establish a trust on proceeds of war risk policy paid to veteran's administrator after death of veteran's widow, who was beneficiary in policy, wherein veteran's sisters claimed veteran was indebted to them could not be defeated as an attempt to enforce a creditors' claim contrary to limitations of war risk insurance act, where consideration for veteran's promise to name sisters as secondary beneficiaries of policy could not be measured in terms of money, especially where veteran had intended a trust rather than payment of a debt. Act Cong. Oct. 6, 1917, § 402, 40 Stat. 409; Act Cong. Dec. 24, 1919, §§ 13, 15, 41 Stat. 375, 376; 38 U.S.C.A. § 514.

4. Husband and wife ⇐264

In proceedings by veteran's sisters to establish a trust on proceeds of war risk policy paid to veteran's administrator after death of veteran's widow, who was beneficiary in policy, evidence sustained finding that fund was not community property. Act Cong. Oct. 6, 1917, § 402, 40 Stat. 409; Act Cong. Dec. 24, 1919, §§ 13, 15, 41 Stat. 375, 376; 38 U.S.C.A. § 514.

5. Husband and wife ⇐249

The right of a veteran's sisters to establish a trust on proceeds of war risk policy paid to veteran's administrator after death of veteran's widow, who was beneficiary in policy, could not be defeated on ground that fund was "community property" and hence not subject to gift without consent of veteran's widow, where widow had acquiesced in veteran's promises to nominate sisters as second beneficiaries in con-

sideration of his indebtedness to them, and widow had received more than half of fund during her lifetime. Act Cong. Oct. 6, 1917, § 402, 40 Stat. 409; Act Cong. Dec. 24, 1919, §§ 13, 15, 41 Stat. 375, 376; 38 U.S.C.A. § 514.

[Ed. Note.—For other definitions of "Community Property," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Proceeding by Elizabeth S. Shelly and another against Percy S. McKimmins, as executor of the last will and testament of George McKimmins, deceased, and John Wesley Davis, as administrator with the will annexed of the estate of Frank B. Shelly, deceased (substituted), and John Wesley Davis, individually and as administrator with the will annexed of the estate of Mary E. Davis, deceased, for specific performance of an alleged contract, to impress a trust, and for declaratory relief, each involving the proceeds of a war risk insurance policy. Judgment for plaintiffs, and the last-named defendant appeals on a bill of exceptions.

Affirmed.

Alvin Gerlack, of San Francisco (Irving Schoenfeld, of San Francisco, of counsel), for appellants.

William A. O'Brien, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued upon a complaint stating three causes of action: For specific performance of a contract, to impress a trust, and for declaratory relief, each involving the proceeds of a war risk insurance policy. Plaintiffs had judgment, and the appeal is on a bill of exceptions.

Frank B. Shelly was a major in the regular army. In 1903 he married his second wife. In 1918 he took out a $10,000 war risk insurance policy naming Mary Shelly, his wife, as first beneficiary. In 1922 he died, and Mary Shelly received the monthly payments on the policy, amounting to over $5,000 until her death in 1934. The federal government thereafter paid the balance of the insurance to the administrator of the estate of Frank B. Shelly. In 1930 Mary Shelly married John Wesley Davis, the defendant herein, having previously executed a will leaving all her property to him. The plaintiffs are the sisters of Frank B. Shelly. The controversy involves the fund thus paid to the administrator of the estate of Frank B. Shelly. The plaintiffs' claim rests upon the promise of Shelly that he would, in consideration for money advanced and services rendered, designate them as beneficiaries of the insurance policies to take in the event his wife should predecease them, and that a trust arose in their favor because of that. They also claim under an express contract to make them such beneficiaries, which they argue was partially performed. The defendant claims as legateee of his deceased wife.

[1] The application for the insurance policy carried this specification which must be deemed to have been accepted and approved by the insured when he signed the application: "In case any beneficiary die or become disqualified after becoming entitled to an installment but before receiving all installments, the remaining installments are to be paid to such person or persons within the permitted class of beneficiaries as may become designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy."

The act of the congress of October 6, 1917, section 402, 40 Stat. 409, under which the policy was issued, provided: "Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided. If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons, within the permitted class of beneficiaries as would under the laws of the State of the residence of the insured, be entitled to his personal property in case of intestacy." By the amendment of December 24, 1919 (sec. 13, 41 Stat. 375), the congress enlarged the "permitted class" by including uncle, aunts and others, but did not include the husband of the widow of the insured. In the same act the congress provided (sec. 15, 41 Stat. 376): "That if any person to whom such yearly renewable term insurance has been awarded dies * * * then the monthly installments

payable and applicable shall be payable to such person or persons within the permitted class of beneficiaries" as would succeed to the personal property of the insured under the laws of the state of his residence.

These were the regulations existing at the time the soldier died in 1922. Under them he knew that if his wife should die before all the instalments were received the balance would go to his surviving sisters, the respondents herein, and to his two brothers, long since deceased. Evidence, however, was offered that, on numerous occasions, he communicated this intention to the respondents orally and by letter, and that some of these letters were in such form that they did in fact constitute a specific designation of the respondents as secondary beneficiaries.

After the death of the soldier the congress amended the act (March 4, 1925, § 14, 38 U.S.C.A. § 514) to provide that if the designated beneficiary die prior to receiving all the instalments the balance shall be paid to "the estate of the insured". White v. United States, 270 U.S. 175, 46 S.Ct. 274, 70 L.Ed. 530, held this provision to be retroactive. Basing his claim upon this provision the appellant offered in evidence a will of Frank B. Shelly executed in 1915 in which he left all his property to his wife Mary Shelly. Then the will of Mary Shelly (Davis) was offered, under which the appellant claims. The meat of the controversy is this: The appellant claims the fund as property belonging to the estate of the insured upon the death of the "designated" beneficiary, the respondents claim either upon the ground that they are to be deemed as "designated" beneficiaries, or upon the ground that the administrator is an equitable trustee of the fund for them under the express trust created by the deceased.

It would serve no purpose to discuss all these grounds. The trial court held upon uncontroverted evidence that the deceased was indebted to the respondents, not only for money advanced, but for personal services rendered in boarding and caring for him and his wife during their illness; that, for these and other good considerations, the deceased had promised them "to apply and pay for a policy of war risk insurance in the face amount of $10,000.00 as provided for in the act of congress approved October 6, 1917, and to nominate therein as the first beneficiary, his wife, Mary E. Shelly, and to nominate as second beneficiaries said plaintiffs and Samuel B. Shelly and to arrange and provide that upon the death of his said wife, all sums remaining due and unpaid under the terms of said policy be paid to plaintiffs and said Samuel B. Shelly in such proportions as they would be entitled to under the act of congress approved October 6, 1917".

[2] This finding fully supports the trial court's conclusion that a trust arose and that the administrator of the soldier's estate holds the fund in trust for these respondents. Furman v. Craine, 18 Cal.App. 41, 45, 121 P. 1007; Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; American Bible Society v. Mortgage Guaranty Co., 217 Cal. 9, 13, 17 P.2d 105. The conclusion is supported by decisions of the federal court holding that the "designation" of the beneficiaries need not be in the application for the insurance, or in any special writing communicated to the federal agencies, but that it was sufficient if this were done by letter. Claffy v. Forbes, D. C., 280 F. 233.

[3] It is argued that this suit should fail because it is an attempt to enforce a creditor's claim contrary to the limitations of the act. But, as the trial court found, the considerations for the promise could not be measured in terms of money. The respondents were both older than the deceased. His wife was an alcoholic and in poor health. He expressed the intention, both orally and in numerous letters, of desiring to provide for his elder sisters, who were both unmarried. He did not treat it as payment of a debt, but as a trust for their special care. The case is closely parallel in this respect to Christensen v. Christensen, D. C., 14 F.2d 475, 476, where the court said: "It is true that an assignment of the rights to war veterans' insurance would be invalid. However, complainant comes within the permitted class under section 300 (Comp.St., § 9127½—300 [38 U.S.C.A. § 511, note]), which provides that 'the insurance shall be payable only to a spouse, child, grandchild, parent, brother, sister, uncle,' etc.

"An oral trust is alleged to have been created at the time of taking out the insurance. This was valid under general principles of law (Hirsh v. Auer, 146 N.Y. 13, 40 N.W. 397), and there is nothing in the statute which forbids it in relation to the particular insurance here involved. It amounted to a designation of the complain-

ant as a contingent beneficiary at the time the insurance was taken out."

[4,5] The appellant argues that the fund was community property and hence not subject to a "gift" without the consent of the wife. The trial court found that it was not community, and the evidence sustains this finding. Furthermore, the wife alone could object to the gift. She did not do so, but tacitly consented by her acquiescence in the repeated promises of the deceased. She had received more than half of the entire fund during her lifetime and may be deemed to have treated that as full satisfaction of her community interest.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



32 Cal.App.2d 662

PEOPLE v. MORTON.

Cr. 3196.

District Court of Appeal, Second District, Division 2, California.

May 16, 1939.

Rehearing Denied May 23, 1939.

Hearing Denied June 15, 1939.

1. Criminal law ⇐938(1)

The claim of newly discovered evidence warranting new trial is universally looked upon by the courts with disfavor.

2. Criminal law ⇐958(6)

Refusal of defendant's motion for new trial on ground of newly discovered evidence, in that a cell-mate of defendant in county jail confessed crimes for which defendant was convicted and testified that defendant did not aid him in commission of such crimes, was not abuse of discretion, where defendant failed to show so-called newly discovered evidence was not known to him at time of trial or that he could not have produced it at trial.

3. Criminal law ⇐945(1)

To warrant granting of new trial on ground of newly discovered evidence, newly discovered evidence must be such as to render a different verdict reasonably probable upon retrial.

4. Criminal law ⇐945(2)

Evidence that defendant's cell-mate in county jail confessed crimes for which defendant was convicted and testified that defendant did not aid him in commission of crimes was not such evidence as would render different result reasonably probable on retrial so as to warrant new trial, where it appeared that self-confessed perpetrator knew nothing about crimes except what he had been told, and that he was making effort to relieve defendant of blame because he was facing a long term in federal penitentiary and did not care what he said.

5. Criminal law ⇐977(3)

The defendant could not complain that he was not sentenced within time provided for under Penal Code, where defendant requested continuance at time for pronouncing judgment and expressly waived provisions of Penal Code. Pen.Code, § 1191.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

James V. Morton was convicted on two counts of robbery, and he appeals from the conviction and from an order denying his motion for new trial.

Affirmed.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant appeals from a conviction on two counts of robbery and from an order denying his motion for a new trial.

At the trial the defendant was identified as the man who committed the crimes by several witnesses.

After the order denying the motion for new trial the court allowed the defendant time to procure additional evidence concerning his guilt or innocence. This allowance of time was made upon a direct request of defendant and upon a direct waiver by him of the statutory time for pronouncing judgment.

The point raised by the defendant is that the trial court erred in pronouncing judgment because after the motion for a new trial was denied a prisoner in the county jail of this county, a cell-mate of the defendant, took the witness stand and testified

in substance that he was one of the robbers and that defendant did not aid him in the commission of the crimes. The court thoroughly examined the self-confessed perpetrator of the crimes and made a thorough investigation into all the circumstances, and said: "It leads the Court to believe that Harris [self-confessed perpetrator] was not the man who committed the robbery at all. He does not know anything about it except what he has been told, and he was making an effort to relieve Morton of the blame because he was facing a term in the Federal Penitentiary, on which there was a possibility of 50 years on Alcatraz, and he did not care what he said. So there are no further proceedings that I can see should be taken in this case short of sentence. * * * and I believe that Harris, who claims to have committed this robbery, is just, to speak plainly, an unmitigated liar."

[1, 2] "The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence." 8 Cal.Jur. 427, 428. The defendant makes no showing whatever that his so-called newly discovered evidence was not known to him at the time of the trial or that he could not have produced it at the trial. In the absence of such showing, it cannot be said on appeal that the trial court abused its discretion in denying the motion. People v. Davis, 135 Cal. 162, 67 P. 59.

[3, 4] To warrant the granting of a new trial on the ground of newly discovered evidence, the newly discovered evidence must be such as to render a different verdict reasonably probable upon a retrial. 8 Cal.Jur. 430. It is apparent that the evidence which was submitted was not such as to render a different result probable upon a retrial.

[5] Finally, the defendant contends that he was not sentenced within the time provided for under the provisions of section 1191 of the Penal Code. The record specifically shows that on all occasions the defendant requested a continuance at the time for pronouncing judgment and expressly waived the provisions of section 1191 of the Penal Code. This being true, he cannot now be heard to complain. In re De Voe, 114 Cal.App. 730, 735, 300 P. 874; People v. Von Moltke, 118 Cal.App. 568, 571, 5 P.2d 917; People v. Rubens, 11 Cal.App.2d 576, 587, 54 P.2d 98, 1107.

The judgments are affirmed and the order denying a new trial is affirmed.

We concur: WOOD, J.; McCOMB, J.



MARTIN v. VIERRA.*

Civ. 10541.

District Court of Appeal, First District, Division 1, California.

May 20, 1939.

Rehearing Granted June 16, 1939.

1. Trial ⇐178

A motion for directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support a verdict for plaintiff, and no other reasonable conclusion is legally deducible from the evidence, and any other holding would necessarily be reversed upon appeal or set aside as a matter of law by the trial court.

2. Automobiles ⇐245(6, 72, 91)

In action against automobile driver for injuries to aged woman pedestrian who was struck while crossing street at intersection, evidence *held* to make jury questions on issues of defendant's negligence, plaintiff's contributory negligence, and liability under the last clear chance doctrine.

3. Trial ⇐295(1)

On appeal, all instructions given must be taken and considered as a whole.

4. Trial ⇐296(4)

Giving of instruction on last clear chance which omitted certain elements of the doctrine was not ground for reversal where other instructions stated all elements of the doctrine clearly and correctly.

5. Automobiles ⇐246(58)

In pedestrian's action against automobile driver for injuries suffered when struck

*For subsequent opinion see 93 P.2d 261.

while crossing street, instruction that plaintiff had the right to cross street at any point and was chargeable only with exercise of due care should not have been given where ordinance required pedestrians crossing streets in business district to keep within marked lanes.

6. Trial ⇐296(4)

Error in instructing that pedestrian had right to cross street at any point and was chargeable only with due care was not reversible where court also charged that violation of ordinance requiring pedestrians to keep within marked lanes would be negligence unless excused, and confusion resulting from conflict between two instructions was clarified by other instructions. Const. art. 6, § 4½.

7. Appeal and error ⇐1170(9)

The giving of conflicting instructions is not ground for reversal where it appears that jury was not misled thereby. Const. art. 6, § 4½.

8. Automobiles ⇐246(4, 31)

In pedestrian's action against automobile driver for injuries suffered while crossing intersection, giving of particular instructions on the amount of care required of motorist and pedestrian respectively *held* not error.

9. Appeal and error ⇐1064(1)

In pedestrian's action against automobile driver, verdict should not be set aside because of incidental reference in one instruction to an automobile as a dangerous instrumentality capable of inflicting severe injuries.

10. Appeal and error ⇐1170(9)

In action by aged woman for injuries suffered when struck by automobile while crossing street, alleged error in form of instruction on degree of care to be exercised by persons mentally deficient by reason of old age was not ground for reversal where defendant was given a favorable instruction on plaintiff's duty to exercise greater care, and the evidence authorized finding against defendant on issue of last clear chance. Const. art. 6, § 4½.

11. Appeal and error ⇐1170(9)
Trial ⇐295(1)

In determining whether jury has been properly instructed on the law, instructions taken as a whole must be considered, and questionable instructions are not ground for reversal where appellant's rights are clearly stated in other instructions. Const. art. 6, § 4½.

12. Appeal and error ⇐1170(10)

Where several issues are submitted to jury, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. Const. art. 6, § 4½.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Dolores Martin against Joe Vierra, for injuries suffered by plaintiff when struck by an automobile. From a judgment on a verdict for plaintiff, defendant appeals.

Affirmed.

Frank V. Campbell and Walter E. Rankin, both of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Jensen & Holstein and R. E. Cassin, all of San Jose, for respondent.

KNIGHT, Acting Presiding Justice.

The plaintiff, Dolores Martin, about seventy years of age, while attempting to cross a public street in the business section of Santa Clara during the noon hour on a clear day, was knocked down and severely injured by a delivery automobile owned and driven by the defendant, Joe Vierra; and she brought this action against him for damages. At the trial the cause was submitted to the determination of a jury on three issues of fact, namely, negligence of defendant, negligence of plaintiff, and the last clear chance; and a verdict was rendered in favor of plaintiff for the sum of $2,500. From the judgment entered thereon the defendant appeals. Summarized, the grounds urged for reversal are that the trial court erred in refusing to grant defendant's motion for a directed verdict; that there was a want of evidence to justify the submission to the jury of the issue of the last clear chance; and that the jury was erroneously instructed. We are satisfied that no prejudicial error has been shown.

[1] The law governing the right of a trial court to grant a motion for directed verdict is well settled. As said in the Estate of Lances, 216 Cal. 397, 14 P.2d 768, wherein numerous earlier cases are cited, such a motion may be granted only

when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given; that therefore unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Continuing, the court points out that such a motion is in the nature of a demurrer to the evidence, is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom; that in the determination of such a motion the trial court is controlled by rules entirely different from those governing in the matter of granting a new trial; that on motion for a new trial, the trial court may weigh the evidence and judge of the credibility of the witnesses, whereas on a motion for a directed verdict, it may not do so, its power in passing upon such motion being strictly limited; that therefore, while the state of the evidence may be such as would warrant the trial court in granting a new trial, it would not be justified in directing a verdict on the same evidence. In other words, says the court, the function of the trial court on motion for directed verdict is analogous to and practically the same as that of a reviewing court in determining on appeal whether there is any evidence in the record of sufficient substance to support a verdict.

[2] Measured by the foregoing rules, it is apparent that the evidence here falls far short of being such as would have warranted the trial court in granting a motion for a directed verdict, for the reason that it was conflicting on material points, and the facts and circumstances adduced in support of plaintiff's case were amply sufficient to justify a verdict against the defendant on any one or all of the following grounds: driving his automobile at a speed greater than was reasonable and prudent, having regard to the traffic and so as to endanger the safety of persons crossing the street; operating the same with defective brakes (it was a 1928 model); and failure to exercise due care to avoid colliding with plaintiff after having observed her in the street in a position of peril. In other words, it affirmatively appears from the evidence that when defendant first saw plaintiff she was in the street about 60 feet distant from him; that he observed she was an elderly woman, and was attempting to cross the street; that he gave no warning of his approach, and although he applied his brakes at a point some 33 feet distant from the point of collision, plaintiff was hurled 12 feet by the force of the impact, and the automobile was not brought to a stop until it reached the curb about 23 feet beyond the point of collision.

Defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is based upon the fact that the city maintained an ordinance requiring pedestrians while crossing the streets in the business section to keep within lanes marked by white lines, and the claim that plaintiff was attempting to cross the intersection outside of those pedestrian lanes. There is an apparent conflict in the evidence, however, as to whether she violated the provisions of the ordinance in reaching the point of collision; also as to whether she was actually within the pedestrian lane when struck; and in any event, the situation presented by the evidence was such as to justify the conclusion that after defendant observed plaintiff in the street in a position of peril of which she was obviously unaware, he had the last clear chance to avoid colliding with her by diverting the course of his automobile to the left, which he readily could have done if he had been driving prudently and with due care, instead of swerving to the right. He claimed that if he had adopted the former course he would have collided with a truck; but there is testimony in the record showing that the location of the truck would not have interfered with such movement. It is quite evident, therefore, that in the foregoing state of the evidence the trial court properly denied defendant's motion for a directed verdict, and submitted the cause to the determination of the jury on the issues of fact above mentioned.

[3,4] With respect to the instructions, complaint is made first of a group given at plaintiff's request pertaining to the doc-

trine of the last clear chance, the chief criticism made being that certain elements of the doctrine were omitted therefrom. The rule is, however, that all instructions given must on appeal be taken and considered as a whole; and here the record shows that in addition to those challenged the court gave others proposed by the defendant wherein all of the elements of said doctrine were clearly and correctly stated. Therefore, when the latter are read in connection with those criticized, it becomes apparent that the law bearing upon the subject of the last clear chance was fully and fairly presented to the jury.

[5-7] The next objection goes to instruction No. 7 proposed by plaintiff, to the effect that plaintiff had the right to cross the street at any point and was chargeable in so doing only with the exercise of due care. On account of the existing city ordinance requiring pedestrians while crossing the streets in the business district to keep within lanes marked for such purposes, it is evident that said instruction was inapplicable to the facts of this case and therefore should not have been given. It appears, however, that later in its charge the court gave another instruction proposed by the defendant wherein the law upon the subject was clearly and correctly stated. This latter instruction is numbered 49, and is as follows: "In addition to the general rule of ordinary care which applies to the conduct of all parties using the streets, a traffic ordinance of the City of Santa Clara, in full force and effect at the time this accident occurred, provided as follows: Section 10. Pedestrian's Limited Right to Use of Roadway. When within the business district, no pedestrian shall cross a roadway other than by a crosswalk. * * * It shall be unlawful for any person to be in any roadway other than a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian. * * * The court instructs you that a violation of the foregoing ordinance by the plaintiff would be negligence as a matter of law on her part, unless such violation was excused. The court further instructs you that the place where this accident occurred was within a business district, and therefore it was a violation of the ordinance for the plaintiff to cross at any other place than within a crosswalk." Moreover, the record shows that after the jury retired to deliberate and before it reached a verdict it returned into court at its own request, called the court's attention to the apparent conflict between the two instructions so given, and asked that the matter be clarified; whereupon after some discussion the court reread defendant's instruction No. 49 (the correct one) and omitted entirely any reference to instruction No. 7 (the inapplicable one); and following the reading of the correct instruction it reread also at the request of the foreman of the jury another instruction proposed by defendant to the effect that the slightest degree of contributory negligence on plaintiff's part barred her recovery, no matter how negligent defendant may have been. Thereupon the jury again retired to deliberate, and subsequently returned its verdict in favor of plaintiff. The governing rule is that the giving of conflicting instructions does not serve as ground for reversal where it appears that the jury was not misled thereby (2 Cal.Jur., p. 1027; 1 Cal. Jur.Ten Year Supp., p. 646); and manifestly this is such a case, for as will be seen from the foregoing, the jury itself noted the conflict before it reached an agreement on the merits, and upon returning into court it was not only correctly instructed on the doubtful point but as shown by the record the confusion which had theretofore apparently arisen by reason of the conflict was clarified to the satisfaction of the jury before it again retired to deliberate upon its verdict. As held in the following cases, the determination of the question of whether a jury has been misled by conflicting instructions must depend necessarily upon the circumstances of each particular case (Barkhaus v. Producers' Fruit Co., 192 Cal. 200, 219 P. 435; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768); and here the proceedings had following the return of the jury into court for the very purpose of being advised as to which of the two instructions properly declared the law show beyond doubt that the jury fully understood before it reached its verdict that instruction No. 49 as reread to them was controlling.

[8, 9] Also without merit are the objections made to instructions No. 9, No. 15 and No. 16 regarding the amount of care required of an automobile and a pedestrian respectively. Weihe v. Rathjen Mercantile Co., 34 Cal.App. 302, 167 P. 287. Indeed, quite contrary to the contentions made by defendant in this behalf,

it is held to be error to refuse instructions in the form here challenged (Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95; Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724; Pinello v. Taylor, 128 Cal.App. 508, 17 P.2d 1039); and in Dawson v. Lalanne, supra, the refusal was held to be reversible error. Nor may the verdict be set aside because of the incidental reference in one of said instructions to an automobile as a dangerous instrumentality capable of inflicting severe injuries. Del Carlo v. Oberti, 2 Cal.App.2d 304, 37 P. 2d 1050. In Warnke v. Griffith Co., 133 Cal.App. 481, 24 P.2d 583, 590, relied on by defendant, the trial court refused to give an instruction embodying among other matters the principle of law here questioned, and such refusal was upheld on appeal; not, however, upon the ground, as defendant argues, that such was not the law, but because the requested instruction was "very long" and involved, and the other legal matters incorporated therein would have had the effect of confusing the jury. In fact the soundness of the principle of law here objected to was there expressly recognized, the court in this behalf saying: "* * * and while it is undoubtedly true that the amount of care required of the driver of the truck was greater than that required of appellant, as set forth in the part of the instruction refused by the court, and while such instruction sets forth a correct principle of law, we are of the opinion that the charges given by the court are equally sound as principles of law."

[10-12] Defendant's final point is directed against instruction No. 20, bearing upon the issue of contributory negligence and having particular reference to the standard to be used in measuring the degree of care to be exercised by persons "mentally deficient by reason of old age". As authority for the instruction plaintiff cites the statement of law set forth in section 40, 19 California Jurisprudence at page 603, which is founded on certain portions of the opinion rendered in Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114; and it is quite apparent that the theory upon which the instruction is based finds support in the general language used in said opinion, as well as in the quotation therein from Shearman and Redfield on Negligence (sec. 87). However, assuming that the instruction in the form here presented and given deviated somewhat from the precise standard of conduct contended for by defendant, it cannot be said that the giving of this single instruction had the prejudicial effect claimed by defendant, for as said in the following cases. "In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered * * * and questionable instructions are not ground for reversal where the rights of appellant are clearly stated to the jury in other instructions" (American Marine Paint Co. v. Nyno Line, Inc., 70 Cal.App. 415, 233 P. 366, 368; Anderson v. Southern Pacific Co., 129 Cal.App. 206, 18 P.2d 703); and here not only was the jury instructed in several instances throughout the court's charge in accordance with defendant's views, but the court gave also an instruction proposed by the defendant which in terms and substance was extremely favorable to defendant, to the effect that if the jury found that plaintiff "by reason of physical infirmity or old age was more apt to have difficulty in going about the public streets, then ordinary care on her part would require her to use more care for her own protection * * * than would be required of one who is not so apt to be injured or fall by reason of such infirmity * * *." Moreover and in any event, the question of the precise correctness of instruction No. 20 is not vital in the present case because as stated the evidence was amply sufficient to justify the jury in finding against the defendant under the doctrine of the last clear chance, which, as shown by defendant's instruction No. 46, can be applied only after finding that the plaintiff has in fact been negligent. In this connection attention may be properly called to the general rule of law that "where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error". Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 69 P.2d 483, 488. And reference may be made also to the constitutional inhibition that no judgment shall be set aside or new trial granted in any case, on the ground of misdirection of the jury, unless after an examination of the entire cause, including the evidence, the court should be of the opinion that the error complained of has resulted in a miscarriage of justice. Art. VI, sec. 4½, Const.

of Cal. In the present case there is no reasonable ground upon which it may be so held.

The judgment is affirmed.

I concur: WARD, J.



33 Cal.App.2d 24

MEADOWS v. CLARK.

Civ. 2250.

District Court of Appeal, Fourth District, California.

May 23, 1939.

1. Brokers ⇐19

A "broker" is "agent" for his principal.

[Ed. Note.—For other definitions of "Agent" and "Broker," see Words & Phrases.]

2. Principal and agent ⇐72

Ordinarily, request of principal operates as implied promise to compensate agent for advances made in course of agency and, where no statute prescribes manner in which agent's authority must be evidenced, the statute of frauds does not defeat agent's right to recover on implied promise. Civ. Code, § 2309.

3. Brokers ⇐43(1)

Where statute required that an agreement authorizing an agent to purchase or sell real estate be in writing, failure to make such requirement concerning personal property was indicative of legislative intent to allow an agreement between principal and agent for purchase or sale of personal property to be oral. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

4. Brokers ⇐43(1)

A broker was not precluded from recovering commission from principal for purchase of cattle on behalf of principal by reason of fact that agent's authorization was oral. Civ.Code, § 2309.

5. Brokers ⇐82(1)

In action to recover commissions for purchase of cattle on behalf of principal, complaint was not required to allege whether contract for commission was written or oral. Civ.Code, § 2309.

6. Appeal and error ⇐419(1)

Where, prior to August 15, order was made sustaining demurrer, and judgment for defendant was entered on August 15, notice of appeal reciting that plaintiff desired to appeal from "that order" entered on August 15 sufficiently described judgment from which appeal was perfected.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by W. C. Meadows against J. G. Clark, otherwise known as Garrett Clark, to recover a commission. Judgment for defendant and plaintiff appeals.

Reversed with instructions.

Robert Rollin Rosson, of Hanford, for appellant.

Bradley & Bradley, of Visalia, for respondent.

GRIFFIN, Justice.

This action was brought by W. C. Meadows against J. G. Clark, otherwise known as Garrett Clark, to recover a commission in the sum of $795, alleged to have been due by the defendant to the plaintiff. The sum alleged to have been due was a commission claimed to be owed to the appellant by reason of the appellant acting as respondent's agent under an authorization and an agreement to pay the appellant a certain commission for entering into a contract to buy certain cattle from a third party for the benefit of the respondent. A second amended complaint was filed by the appellant. A demurrer to this second amended complaint was sustained without leave to amend. Judgment for defendant followed.

The second amended complaint alleges that prior to the signing of the contract of purchase and sale and on or about February 26, 1937, the appellant was duly authorized by the respondent to enter into such a contract as his agent. The contract (Exhibit "B" attached to the complaint) entered into between J. G. Clark, through the appellant as agent for the respondent, and Gene Sykes, as representative of the partnership of Sykes-Worddell, reads in part as follows: "Said first party hereby acknowledges receipt from second party the sum of $1,000.00 being at the rate of

$2.00 per head on 500 cattle, which amount is credit on the purchase price of said cattle, and is to be allowed in final settlement under this contract; and this amount, in the event of failure of the second party to accept and pay for said cattle when properly delivered shall be forfeited to the first party in full satisfaction and settlement of this contract as liquidated damages."

The second amended complaint further alleges that the appellant contacted the seller who was ready, able and willing to sell 500 head of steers "at $6 per head per hundred weight", to the plaintiff as agent of the defendant, and that on or about February 27, 1937, the plaintiff did enter into such a contract on behalf of the defendant; that prior to the drawing of the contract the plaintiff was duly authorized to do so at a commission of $2 per head. Further, that the sellers of said steers stood ready, able and willing at all times to perform their part of the agreement was alleged in the second amended complaint. It was further alleged that the defendant deposited $1,000 in the bank in the city of Tulare, county of Tulare, state of California, as required by the contract known as Exhibit "B", and that defendant did buy said cattle pursuant to the terms of said contract; that defendant became indebted to plaintiff for services rendered by plaintiff as agent of defendant; that defendant paid to the plaintiff the sum of $205 as commission, leaving a balance of $795, no part of which has ever been paid and which is now due, owing and unpaid from the respondent to the plaintiff and appellant.

In view of the above allegations, it is the contention of the appellant that the respondent's demurrer to the second amended complaint should not have been sustained.

Appellant claims that the judgment of the lower court is contrary to law.

The question presented is this: Is an agent entitled to recover commission from the principal when the agent entered into a written contract with third persons to buy on behalf of the principal certain personal property under an oral authorization and an oral agreement to pay a certain commission and when the principal did in fact buy said personal property pursuant to the terms of the written contract, and where the principal paid a portion of the commission claimed?

Section 2309 of the Civil Code provides that "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing". Several cases before the appellate courts have involved contracts made by verbally authorized agents, wherein the statute of frauds has been injected.

In A. L. Jameson & Co. v. Redfield, 118 Cal.App. 59, 4 P.2d 817, reversing upon rehearing Cal.App., 2 P.2d 53, section 2309 of the Civil Code was relied upon in defense to a stockbroker's action to recover moneys expended on behalf of his client who had orally authorized him to execute a "short" sale on the exchange. The District Court of Appeal held in its first decision that the lack of a written memorandum authorizing the sale could be set up in defense to the broker's claim for reimbursement, but on rehearing, the first holding was reversed and the judgment of the trial court in favor of the broker was affirmed.

[1, 2] In Liberman v. McDonnell, 97 Cal.App. 171, 275 P. 486, the court held that a broker is agent for his principal. Ordinarily, the request of the principal operates as an implied promise to compensate and reimburse the agent for all advances and disbursements made in the course of the agency, and where no statute prescribes the manner in which an agent's authority must be evidenced, it is well settled that the statute of frauds has no application which defeats the agent's right to recover on this implied promise. Bibb v. Allen, 149 U.S. 481, 13 S.Ct. 950, 37 L.Ed. 819; Mechem, Agency, 2d Ed., 1914, 2480; Campbell v. Willis, 53 App.D.C. 296, 290 F. 271; Rodman v. Weinberger, 81 N.J.L. 441, 79 A. 338; Wiger v. Carr, 131 Wis. 584, 111 N.W. 657, 11 L.R.A.,N.S., 650, 11 Ann.Cas. 998.

The question then is whether or not section 2309 of the Civil Code has any application that changes the general rule. As to an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, the contract is invalid unless the same is in writing and subscribed by the party to be charged or by his agent. Sec. 1624, subd. 5, Civ.Code.

The case of Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962, 103 A.L.R. 822, was an action based on an oral agreement relating

to the recovery of a broker's commission for the sale of certain leases. The court there held (quoting from the syllabus) that "oil and gas leases for a definite term of years are properly classified as estates for years and are chattels real, or personal property, and an agreement authorizing or employing an agent or broker to purchase or sell such leases is not invalid by reason of the fact that it is not in writing". It further held that a contract of employment with a real estate broker to sell such a lease for years is not within the statute of frauds and need not be in writing.

The case of A. L. Jameson & Co. v. Redfield, supra, was an action by a broker to recover moneys expended on behalf of the defendant in the purchase of stock, etc., under an oral agreement. In construing the effect of an oral agreement, the court said [118 Cal.App. 59, 4 P.2d 818]: "The question of validity of such transactions, we think is not affected by the statute of frauds. Upon similar facts our Supreme Court upheld a judgment for commissions by a decision which announced the rule since applied in other jurisdictions and which does not appear to have been overruled in this state. Kutz v. Fleisher, 67 Cal. 93, 7 P. 195. As there stated: 'It was not a case of a sale of personal property by a vendor to a vendee, but of a broker (plaintiff) purchasing and selling stocks for account of another (defendant), advancing money for the purpose, and paying assessments on the stocks purchased. The whole transaction was had under an agreement entered into in advance of the purchases being made. It was no part of the terms of the agreement that it was not to be performed within one year from the making thereof. On the foregoing facts, it follows that section 26 of article IV of the Constitution; section 1624, subdivisions 1, 4 of the Civil Code; section 1793, subdivisions 1, 4 of the Code of Civil Procedure, have no application in this case. The agreement as enforced could be made by parol, and therefore section 1739 of the Civil Code, has nothing to do with the case.' Numerous cases are cited by Meyer on the Law of Stockbrokers and Stock Exchanges, to the same effect, at page 243."

The case cited above does not mention Civil Code, sections 2309 or 1624a, nor does it mention section 1973a of the Code of Civil Procedure. However, the court definitely states that it is not a case of vendor selling to a vendee, but of an agent or broker buying and selling for a principal; hence, the statute of frauds does not apply. Civil Code, section 1624a, and Code of Civil Procedure, section 1973a, apply to sales of lands and goods exceeding the value of $500, and say nothing about a contract between principal and agent. In the case at bar, we do not find the condition of the vendor selling personal property to the vendee, but the situation of a principal and agent, whereby the latter is suing for commissions earned by reason of the sale of personal property.

[3-5] Section 1624 of the Civil Code, subdivision 5, and section 1973 of the Code of Civil Procedure, subdivision 5, expressly require that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must be in writing. No other code section requires the same concerning a contract between the principal and agent for the latter to purchase or sell personal property. Since the legislature has expressly stated that for real estate the agent must have written authority o collect his commission and has failed to make such a requirement concerning personal property, it is quite clear that it intended to allow an agreement between principal and agent for the purchase or sale of personal property to be oral. Guy v. Brennan, 60 Cal.App. 452, 213 P. 265; Davidson v. Kessler, 10 Cal.App.2d 89, 51 P. 2d 174; Kutz v. Fleisher, 67 Cal. 93, 7 P. 195.

This determination sufficiently disposes of the contention that the complaint must allege whether the contract for compensation or commission was written or oral.

[6] The only remaining point raised pertains to the sufficiency of the notice of appeal. Prior to August 15, 1938, an order was made sustaining the demurrer without leave to amend. Subsequently, a judgment in favor of respondent was entered on August 15, 1938. The notice states that the plaintiff "desires to and does hereby appeal from 'that order' entered on the 15th day of August, 1938". The judgment above described was the only order entered on that date. We are of the opinion that the notice of appeal sufficiently describes the judgment from which this appeal has been perfected.

In view of our conclusions of the law and the facts relating thereto, we are of the opinion that appellant's complaint stated

facts sufficient to constitute a cause of action.

Therefore, the judgment of the trial court must be and is reversed with instructions to overrule the demurrer and permit defendant to answer within a reasonable time.

We concur: BARNARD, P. J.; MARKS, J.



33 Cal.App.2d 18

PEOPLE v. WALKER.

Cr. 1670.

District Court of Appeal, Third District, California.

May 23, 1939.

1. Criminal law ⇐1159(1)

In burglary prosecution, a determination that the defendant had a felonious intent, being one of fact, was not subject to review.

2. Burglary ⇐3

Although it may be illegal to own or possess slot machines, there exist certain rights in the owner of a contraband article as against any one other than the state; the owner of slot machines having the privilege of destroying them and the right to surrender them to the authorities.

3. Property ⇐1

There are no property rights innate in objects themselves, but such rights as there are, are in certain persons as against others with respect to the particular objects in question.

4. Property ⇐1

Since "property" or "title" is a complex bundle of rights, duties, powers, and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title.

[Ed. Note.—For other definitions of "Property" and "Title," see Words & Phrases.]

5. Larceny ⇐5

Contraband articles may be the subject of larceny.

6. Burglary ⇐3

Slot machines may be the subject of burglary although it is illegal to own or possess them, since the owner has certain rights therein as against any one other than the state.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Raymond Walker was convicted of burglary, and he appeals.

Affirmed.

Oliver J. Northup, of Redding, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was charged and convicted of burglary, and has appealed from the judgment of conviction.

From the record it appears that defendant and his companions entered the premises of the complaining witness and took therefrom two slot machines.

Two questions are presented upon this appeal. The first point urged is that when the defendant entered the premises he had no knowledge of the slot machines, and therefore entered without any felonious intent, and secondly, that slot machines, being illegal and contraband, may not be the subject of burglary.

[1] As to the first point, the question of intent was determined adversely to the defendant, and being a question of fact is not subject to review by this court.

As to the second point—that slot machines are not subject to burglary—appellant concedes that in People v. Spencer, 54 Cal.App. 54, 201 P. 130, wherein it was held that a person who entered a building with the intent to take liquor containing more than one-half of one per cent by volume of alcohol, and illegally manufactured for beverage purposes during the prohibition era was not guilty of burglary, had been overruled by People v. Odenwald, 104 Cal.App. 203, 285 P. 406, 286 P. 161. However, he claims that the more recent case of People v. Rosen, 11 Cal.2d 147, 78 P.2d 727, 116 A.L.R. 991, has by implication at least overruled the Odenwald case, supra, and has readopted the rule announced in the Spencer case.

Under the facts here presented we do not believe the case of People v. Rosen is applicable, and it will not be necessary to discuss or justify the rule there announced.

In the Rosen case the defendant had, over a period of several months, frequented a gambling house known as "Millers", and had lost about $1,000 in gambling. On the night in question he had played and lost again. Late that night, armed with a revolver he returned and took about $200 from a box which the establishment used as a container for money with which to pay off the winners. It was the claim of defendant that he had not intended to do more than take back his own money and that he would have taken all he had lost if that much had been in the box, but no more. The Supreme Court held the property so taken was the legal property of Rosen and title remained in him even though he had temporarily relinquished possession by reason of his gambling losses. The operator of the game was guilty of a conversion, and it could not be said that the defendant was intending to "take * * * the property of another" as intended by section 484 of the Penal Code.

In the instant case defendant Walker was a total stranger to any property rights or interest in the slot machines. They never had been in his possession and he did not even claim that the slot machines were the depository of any of his money.

[2-4] Although it may be illegal to own or possess slot machines there yet exists certain rights in the individual who may possess such a contraband article as against any one other than the state. The owner at least has the privilege of destroying the machine, he also has the right to surrender it to the authorities. It is true his right to the possession of a slot machine is by law very limited, nevertheless he has certain claims and powers not possessed by any other which invests in him something real and tangible. When the law declares there is no property in a contraband article, as was done in the National Prohibition Act, 41 Stat. 305, or that title is not lost when taken illegally, as in gambling, we are considering rather the right of possession than the legal title, and it is failing to distinguish between these terms that some confusion has crept in the law. There are no property rights innate in objects themselves. Such rights as there are are in certain persons as against others with respect to the particular objects in question. Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title as pointed out by Professor Hohfeld in "Fundamental Legal Conceptions", 23 Yale Law Journal, 16; 11 Cal.Law Review, 369. Also in 11 Cal.Law Review, at page 369, et seq., is found a very fine discussion of the rights of a possessor in contraband property, and the conclusion is there reached that sufficient attributes of ownership are found in the article to constitute something real and tangible.

In Commonwealth v. Rourke, 64 Mass. 397, involving the larceny of money received from an illegal sale of intoxicating liquor, the court, after discussing the property rights involved, considered the case from the point of public policy, weighing the convenience of the administration of the law, with the ethical relationship of the two offenders toward society, and concluded if one were allowed by law to take the illegal gains of another it would embarrass and obstruct the administration of the law; and as to the ethics of the case concluded that neither offender should be excused, but each violation of the law separately dealt with, and each punished by appropriate measures.

[5] In 11 A.L.R. 1032 and 75 A.L.R. 1479 are gathered the cases dealing with this subject, and the doctrine that contraband property may be the subject of larceny has been adopted by all the jurisdictions passing upon that point.

[6] The defendant was legally convicted of burglary, and the judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

32 Cal.App.2d 716

PEOPLE v. DONEGAN.

Cr. 3167.

District Court of Appeal, Second District, Division 1, California.

May 19, 1939.

1. Homicide ⇐294(1)

Where the defense of insanity is interposed to a charge of murder, it is not error for the trial court to state the law of insanity fully and with all its special limitations.

2. Homicide ⇐27

Irresistible and uncontrollable impulse and moral insanity do not constitute defenses to charge of murder.

3. Criminal law ⇐823(7)

In murder prosecution wherein defendant pleaded not guilty by reason of insanity, instruction, on trial of issue of insanity, that defense of irresistible impulse and moral insanity do not constitute legal defense, was not prejudicial to defendant in view of evidence and other instructions correctly instructing jury with reference to defense that defendant was temporarily insane at time of killing.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Dorothy Alice Donegan was convicted of second-degree murder, and she appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, the defendant was charged with murder, it being alleged that she unlawfully and with malice aforethought killed one William Walter Donegan, who was her divorced husband. Pleas of not guilty and not guilty by reason of insanity were interposed by defendant. She was subsequently placed upon trial and the jury returned a verdict finding the defendant guilty of murder in the second degree. Upon the issue raised by the plea of not guilty by reason of insanity, the same jury upon a further trial found that the defendant was sane at the time of the commission of the homicide.

The single ground upon which appellant urges a reversal is that the trial court erred in the giving of certain instructions to the jury on the law of insanity as applied to criminal cases where a defendant seeks to excuse an unlawful act upon the ground that at the time of its commission she was so deranged and diseased mentally that she was not conscious of the wrongful nature of the act committed.

Briefly, appellant contended on the issue of not guilty by reason of insanity that for some six years prior to the homicide she suffered from "spells" which produced a dazed condition when "everything went black, I couldn't see, lost consciousness"; that these "spells" occurred from a month to three months apart. There was evidence given by eye-witnesses to these "spells" that when appellant was seized with one she would "faint—appear unconscious—her body become rigid—she frothed at the mouth—her muscles would stiffen and her mouth would twitch". Appellant herself testified that some three weeks before the murder she purchased a pistol because the deceased had threatened to kill her and she was afraid of him; that on the night of the shooting, June 30, 1938, about nine o'clock p. m., she arrived at the home of her former husband, where her two children were then domiciled; that she had the gun in her purse. Appellant's testimony as to what happened just preceding the killing and immediately thereafter is as follows:

"Q. Now, when you entered the living room did you see anyone in there in the living room? A. No.

"Q. And from the living room where, if any place, did you go? A. Into the kitchen.

"Q. All right. And did you see anyone in the kitchen? A. When I got into the kitchen my little boy jumped up and come running to me.

"Q. Where did he come from? A. From the bedroom.

"Q. From the bedroom? A. Yes.

"Q. And did you see Mr. Donegan there at that time? A. Yes.

"Q. Where was Mr. Donegan? A. He was in bed.

"Q. And what next did you do? A. When the little boy ran to me Mr. Donegan jumped out of bed.

"Q. What, if anything, did he do? A. He grabbed hold of me.

"Q. Now, at the time the little boy came running to you did you have a gun in your hand? A. No.

"Q. You say Mr. Donegan jumped out of bed and grabbed hold of you? A. Yes.

"Q. What, if anything, did he do to you? A. He grabbed hold of my throat.

"Q. What did he do when he grabbed hold of your throat? A. I don't remember exactly. I just remember there was a struggle.

"Q. There was a struggle? A. Yes.

"Q. Were you afraid that Mr. Donegan might harm you at that time? A. Yes.

"Q. When you saw him coming towards you were you afraid that he might even kill you? A. Yes.

"Q. *Do you remember anything that occurred after the struggle started between yourself and Mr. Donegan in the house there?* A. *No, I don't believe I do.*

"Q. What next do you remember? A. I remember my little boy was leading me by the hand outside."

[1-3] Appellant asserts that her defense was that while she was ordinarily sane, there were times when she was insane, and that when she killed her former husband she was in the throes of one of her "spells" and temporarily insane. This being so, prejudicial error is alleged on the part of the trial judge when he instructed the jury that the defense of "irresistible impulse" and "moral insanity", so-called, does not constitute a legal defense to crime. Appellant's contention that the giving of these instructions misled the jury to her prejudice cannot be upheld. That it is not error for the trial court, where the defense of insanity is interposed to a charge of murder, to state the law of insanity fully and with all its special limitations and qualifications, is firmly established. People v. Buck, 151 Cal. 667, 674, 91 P. 529. It requires no citation of authority for the statement that the law refuses to recognize as a defense the "irresistible, uncontrollable impulse" and "moral insanity" doctrines. People v. Sloper, 198 Cal. 238, 248, 244 P. 362. In the instant case, where there was testimony that the deceased had ravished appellant prior to his marriage with her; that he had abused, vilified and beaten her continually throughout her married life, the court was well within the law in admonishing the jury as to the type of insanity which constitutes a defense to crime and pointing out the various forms of mental infirmities which may not be availed of as a defense to a criminal charge.

We cannot see how appellant was prejudiced by the instructions complained of, especially when the court also fully, fairly and correctly instructed the jury with reference to appellant's defense that she was temporarily insane at the time of the killing. In advising the jury on this issue the trial court unequivocally stated that the law recognizes temporary insanity at the time of the commission of a homicide as a defense "just as much as permanent insanity if the temporary insanity meets the requirements of the law, that is, if the defendant at the time of the homicide was so mentally deranged from any cause as not to understand the nature and quality of her acts, or, if she did understand them, could not distinguish between right and wrong in reference to such acts and if you believe from the evidence by a preponderance thereof that the defendant, at the time she committed the homicide, was temporarily insane within the meaning of the law, then regardless of whether the defendant was sane before and after the time when the acts were committed, it is your duty to bring in a verdict that defendant was insane at the time of the commission of the offense".

We find no reversible error in the record. The trial judge accorded appellant a fair and impartial trial upon the issue raised by her plea of not guilty by reason of insanity.

The judgment appealed from is therefore affirmed.

We concur: YORK, P. J.; DORAN, J.

33 Cal.App.2d 48

FALLON et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11106.

District Court of Appeal, First District, Division 1, California.

May 24, 1939.

1. Judgment ⇐677
Parties ⇐10

The statute permitting an action to be brought by one or more parties on behalf of others when parties are numerous is based upon common law theory of convenience to parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy, and representees if sufficiently represented are bound by the order or judgment made. Code Civ.Proc. § 382.

2. Judgment ⇐677

The sufficiency of representation, in action brought by one or more parties on behalf of others, so as to bind representees, is generally gauged by the good faith of the representors and the effect of the order or judgment upon the unnamed parties. Code Civ.Proc. § 382.

3. Parties ⇐40(2)

Under statute permitting action to be brought by one or more parties on behalf of others when parties are numerous, generally, one who has a valuable disclosed interest, as appears from the pleadings, or who is commonly and generally interested, and has not had his day in court by reason of collusion between some of the parties named in the pleadings, may be permitted to intervene. Code Civ.Proc. § 382.

4. Judgment ⇐391

An affidavit of property owners in restricted tract that action against one of owners to enjoin erection of building within tract for commercial purposes was not instituted in good faith on behalf of all property owners in tract, but was in fact filed for purpose of depriving affiants of valuable property rights, raised issues of fact which justified trial court's order setting aside judgment in the action. Code Civ.Proc. § 382.

5. Motions ⇐33(1, 3)

An order of trial court void on its face may be set aside at any time, but if it is void in fact for want of jurisdiction, but not void on its face, a separate action of attack is preferable procedure.

6. Appeal and error ⇐439

Where order of trial court is void for lack of jurisdiction, and such fact is certain from inspection of entire record, trial court is not deprived of jurisdiction to vacate its void order, though an appeal is pending.

7. Motions ⇐59(1)

A superior court has no power to set aside an order regularly made, except in manner prescribed by statute.

8. Judgment ⇐335(1)

A review of judicial orders by the same court which issued them is not countenanced, except to cure clerical errors or determine jurisdictional questions.

9. Prohibition ⇐5(2)

Prohibition would be granted to restrain superior court from vacating its order setting aside a judgment, where it appeared that motion to vacate order was directed to an identical jurisdictional question previously decided by court, and that an appeal from such order was pending.

Original proceeding for writ of prohibition by Joseph P. Fallon and others against the Superior Court of the State of California, in and for the City and County of San Francisco, and the Honorable Sylvain J. Lazarus, a judge thereof, to restrain, during the pendency of appeal, the granting of a motion to vacate an order setting aside a judgment in the case entitled, Ben Liebman and others against M. L. Choynski.

Writ issued.

Walter E. Drobisch, of San Francisco, for petitioners.

Tobin & Tobin and George A. Clough, all of San Francisco, for respondents.

WARD, Justice.

This is an application for the issuance of a writ of prohibition to the Superior Court of the State of California in and for the City and County of San Francisco and one of the judges thereof to restrain, during the pendency of appeal, the granting of a motion to vacate an order setting aside a judgment.

The litigation had its inception in a case entitled "Ben Liebman et al. v. M. L. Choynski" wherein plaintiffs for themselves and on behalf of others owning parcels in a

tract of land sought to enjoin defendant from erecting or using any building within the alleged restricted tract for commercial purposes. The defendant Choynski filed an answer and a cross-complaint to quiet title. Judgment was rendered in favor of the defendant. Subsequently the petitioners in the present proceeding, as alleged interested parties, filed a motion to set aside and vacate the judgment and to permit them to appear as plaintiffs and file an answer to the cross-complaint; further, that the issue be tried upon the merits. This motion was granted.

[1-3] Section 382 of the Code of Civil Procedure permits an action to be brought by one or more parties on behalf of others when the parties are numerous. This is a statutory provision based upon the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy. It is known as the doctrine of virtual representation, and such representees if sufficiently represented are bound by the order or judgment made. The sufficiency of the representation is generally gauged by the good faith of the representors and the effect of the order or judgment upon the unnamed parties. As a matter of protection to such parties, there is a general rule, subject to exception, that one who has a valuable disclosed interest, as appears directly or indirectly from the pleadings, or who is commonly and generally interested, and has not had his day in court by reason of collusion between some of the parties named in the pleadings, may, if good cause appear therefor, be permitted to intervene or enter the ranks of the plaintiffs or defendants as the facts warrant.

[4] In support of the motion to set aside the judgment, petitioners filed an affidavit setting forth in effect that there was an agreement between some of the plaintiffs to the original suit and the defendant in the establishment of a nominal presentation of the interests of the petitioners herein, which resulted in an imposition upon the court; that the action was not instituted in good faith on behalf of all of the property owners of the tract, but was in fact filed for the purpose of depriving the petitioners herein of valuable property rights and without their knowledge of the institution of the proceedings, and that the allegation in the complaint that plaintiffs represented affiants was false and untrue. These averments raised issues of fact. We do not pass upon their truth in this proceeding, but if believed by the judge to whom the motion was presented, there was ample ground to justify the order setting aside the judgment. Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 P. 797. Thereafter the defendant and cross-complainant appealed to the Supreme Court from the order granting the motion. This appeal has been transferred to the District Court of Appeal for hearing. During the pendency of the appeal defendant and cross-complainant seeks an order from the superior court vacating the order setting aside the judgment.

[5, 6] An appeal does not deprive the trial court of jurisdiction to vacate a void order. If it is void upon its face, it may be set aside at any time. If it is void in fact for want of jurisdiction, but not void upon its face, a separate action of attack is the preferable procedure, Isert v. Riecks, 195 Cal. 569, 234 P. 371, but if there is an absence of jurisdiction and this becomes certain from an inspection of the entire record, the trial court is not precluded from taking proper action though an appeal is pending.

[7-9] The motion to set aside the order vacating the judgment was presented to a second judge, successor to the presiding judge of the law and motion department of the court who set aside the judgment. According to the petition the second judge has given notice of his intention to grant the motion. Except in the manner prescribed by statute a superior court may not set aside an order regularly made. United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann.Cas.1916E, 199; Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617. The motion is made upon the ground that petitioners herein were not parties to the original action, and that the order vacating the judgment was void. In paragraph IV of respondents' answer to the present petition, it is alleged, relative to these same parties, that they "were in law and in equity parties to the said action, and were bound by the judgment and decree". Irrespective of the inconsistent position taken by respondents herein, the present motion pending in the superior court is directed to the identical jurisdictional question once decided. The hearing would in fact be a review by the same court of the validity of the judgment. Reviews of judicial orders by the same court are not

contenanced except to cure clerical errors or determine jurisdictional questions, but the identical jurisdictional question in dispute has been determined. An order affirming the last order would be judicially an idle act. Estate of Vizelich, 123 Cal.App. 651, 11 P.2d 870. An order setting aside the order vacating the judgment would in effect be a reversal of an adjudicated issue. The perfection of the appeal removed from the superior court jurisdiction over the matters embraced in the order appealed from. In Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11, 12, the court said: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing (Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. [168], 170, 4 P. 1173, and cases cited), and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth (Garoutte v. Haley, supra [104 Cal. 497, 38 P. 194], and cases cited); but, subject to these exceptions the order is reviewable only on appeal, and, the decision of the trial court once having been made after regular submission of the motion, its power is exhausted. It is functus officio." "If this were not true, there would be no end to litigation." Hogan v. Horsfall, 91 Cal.App. 37, 42, 266 P. 1002, 1004.

The demurrer is overruled. Let the writ issue as prayed.

I concur: KNIGHT, Acting P. J.



33 Cal.App.2d 11

HOUGHAM v. ROWLAND.

Civ. 2255.

District Court of Appeal, Fourth District, California.

May 22, 1939.

1. Attachment ⇐11

As respects attachment, where wholesale used automobile dealer retained certificates of ownership on delivery of automobiles to retailer under oral conditional sales agreement, wholesaler remained legal owner of the property.

2. Attachment ⇐11

As respects attachment, a conditional vendee receives nothing more than a conditional right of possession and security retained by vendor is not a lien, but is a reservation of title.

3. Attachment ⇐11

As respects attachment, one cannot have a lien on personal property of which he is the owner. Civ.Code, § 2874.

4. Pledges ⇐6

One who transfers personal property in pledge as security for a debt must own it or at least have authority to deposit it in pledge.

5. Attachment ⇐11

As respects attachment, wholesale used automobile dealer who retained legal title under executory contract of sale at time of delivering automobiles to retailer had neither a "lien" nor a "mortgage" as security, but had only bare legal title and buyer's promise to pay. Civ.Code, §§ 2874, 2920.

[Ed. Note.—For other definitions of "Lien" and "Mortgage," see Words & Phrases.]

6. Attachment ⇐11

If it were assumed that title to used automobiles sold by wholesale dealer to retailer under oral conditional sales agreement passed to retailer, redelivery of part of automobiles to wholesaler for purpose of sale and application of proceeds to retailer's account had effect of a "sale" rather than a deposit of "security" such as would preclude issuance of attachment, under statute prohibiting attachment on contracts secured by mortgage, deed of trust, lien, or pledge. Code Civ.Proc. § 537, subd. 1.

[Ed. Note.—For other definitions of "Sale" and "Security," see Words & Phrases.]

7. Attachment ⇐11

The statute prohibiting attachment on contracts secured by mortgage, deed of trust, lien, or pledge by its specific enumeration impliedly excludes any other species of securities as basis for precluding issuance of attachment. Code Civ.Proc. § 537, subd. 1.

8. Attachment ⇐1, 2

Statutes providing for the levying of attachments must be strictly construed and followed. Code Civ.Proc. § 537, subd. 1.

9. Attachment ⇐1

When the law designates and specifies in what instances an attachment may be issued and in what cases it is not a legal remedy, the express will of the legislature must control. Code Civ.Proc. § 537, subd. 1.

10. Attachment ⇐11

A wholesale used automobile dealer who retained certificates of ownership at time of delivering automobiles to retailer under oral conditional sales agreement did not have a "mortgage," "deed of trust," "lien," or "pledge" within statute prohibiting attachment on contracts secured by "mortgage," "deed of trust," "lien," or "pledge." Code Civ.Proc. § 537, subd. 1; Civ.Code, §§ 2874, 2920, 2988.

[Ed. Note.—For other definitions of "Deed of Trust" and "Pledge," see Words & Phrases.]

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by E. B. Hougham, doing business under the fictitious name of Baker's Motor Market, against M. H. Rowland, for goods sold on an open book account. A writ of attachment in due form was issued. From an order granting defendant's motion to dissolve the attachment, plaintiff appeals.

Reversed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Frederick E. Hoar, of Bakersfield, for respondent.

GRIFFIN, Justice.

Appellant was a wholesale used car dealer, and respondent a retail used car dealer at the time of the instant transaction. In April, 1938, respondent purchased 16 vehicles for resale upon his used car lot. Appellant delivered the cars but retained the certificates of ownership. Respondent maintains that the certificates were retained pursuant to an *oral conditional sale agreement*. On June 9, 1938, respondent returned to the place of business of appellant four of said vehicles, and asked that he be given credit upon his account for the sum stated in the account for which he had agreed to purchase the vehicles. Appellant refused to allow such credit, whereupon respondent left the four vehicles at the place of business of appellant and authorized him to sell them and credit the proceeds to his account. The remaining vehicles were sold by respondent to third persons. Between the date of the filing of the action and the granting of the motion to dissolve the attachment the vehicles returned to appellant were sold by him and credited to the account of the respondent. The complaint is for goods sold upon an open book account. A writ of attachment in due form was issued on the date the complaint was filed. This writ was issued upon the filing by appellant of an affidavit for attachment, reciting the indebtedness and "that such contract was made and is payable in this state and that payment thereof *has not been secured by any mortgage, deed of trust or lien upon real or personal property;* that said attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of said defendant". Upon a writ so issued, property of the respondent was attached.

Thereafter, respondent moved to dissolve the attachment upon the ground that appellant, at the time of the issuance thereof, held security. The motion was based upon the affidavit of respondent in substance to the effect that except for the sum of $14.09, appellant had security for all merchandise in the form of certificates of ownership for automobiles. The motion was granted. From this order appellant has appealed.

It is contended that the ruling of the court is in error for the following reasons: (1) That appellant did not hold securities of the type prohibited by attachment sections; and (2) That at the time the motion was granted the security, if any, was exhausted.

Section 537, subdivision 1, of the Code of Civil Procedure provides: "In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; * * *."

It is to be noted that this section does not prohibit all types of security, but only specific types. It is contended by appellant that the retention of a certificate of ownership of a vehicle sold by a vendor under an oral executory conditional sales

agreement does not constitute a mortgage, deed of trust, lien, or pledge of personal or real property.

In Standard Auto Sales Company v. Lehman, 43 Cal.App. 763, 186 P. 178, the defendant made a motion to dissolve an attachment on the same grounds above stated. The question there presented was similar to the one here presented. In that case the court rejected the claim of the defendant that the plaintiff, by reason of the fact that it retained title to the property and had the right to retake it in case of default on the part of the defendant in the payment of any of the instalments, had security within the contemplation of said section of the code, and held that attachment was a proper remedy.

[1,2] In determining this question, it is important to notice carefully the precise terms used in the statute. The law does not provide that no attachment shall issue where the plaintiff has other security for the claim, but it designates the specific kinds of security that will bar the remedy, namely, a mortgage, deed of trust, a lien, or a pledge of the property. As to the mortgage or deed of trust, it is quite apparent from the definition of those terms in the code, that appellant had no such security. Civ.Code, sec. 2920. See, also, Andrews v. De Lorm, 102 Cal. App. 623, 283 P. 393; 25 Cal.Jur., sec. 6, p. 15. By the terms of the contract, the appellant remained the legal owner of the property. Van Allen v. Francis, 123 Cal. 474, 56 P. 339; 22 Cal.Jur., sec. 148, p. 1098; Wyman v. Security Ins. Co. of California, 202 Cal. 743, 262 P. 329; Kelly v. Smith, 218 Cal. 543, 24 P.2d 471. The question then arises whether the appellant, under the terms of the oral conditional sale agreement, had a lien to secure the payment of the obligation. As to this, it seems to be plain under the law as it existed prior to the repeal of section 3049 of the Civil Code (Stats.1931, p. 2258) that a vendor's lien did not exist as to personal property independent of possession, or where the property was sold under an executory conditional sale agreement. Bice v. Harold L. Arnold, Inc., 75 Cal.App. 629, 243 P. 468. A conditional vendee receives nothing more than a conditional right of possession and the security retained by the vendor is not a lien, but is a reservation of title. Bice v. Harold L. Arnold, Inc., supra.

[3-5] There is no controversy that the appellant, since the execution of the oral conditional sale agreement, has not had possession of any of the vehicles excepting such vehicles as were sold under the conditional sale agreement and delivered and which were later returned to him by respondent under a subsequent oral agreement. A general lien is a charge upon specific property which the holder thereof is entitled to enforce as a security for the performance of the obligation which exists in his favor *against* the owner of the property. Civ.Code, sec. 2874. The existence of a lien and ownership as to the same property in the same party at the same time is not in accordance with the legal conception of these terms. It is manifestly the rule that a person cannot have a lien upon personal property of which he is the owner. It would seem plain, therefore, that appellant did not have a lien, as that term is understood in the law, upon any of said vehicles. It seems equally plain that appellant was not secured by a *pledge* of said property. In order to have such security the person who transfers personal property in pledge as a security for a debt must own it or at least have authority to deposit it in pledge. Appellant must have been the pledgee and in possession of the property. Sec. 2988, Civ.Code; Goldstein v. Hort, 30 Cal. 372, 375. By retaining legal title under the executory contract of sale and passing possession at the time of its execution, appellant had neither a lien nor a mortgage as security, but only the bare legal title and the buyer's promise to pay. Standard Auto Sales Co. v. Lehman, supra, 43 Cal. App. at page 771, 186 P. 178. It is to be observed that the existence of a vendor's lien under section 3049 of the Civil Code (now repealed) always presumed that title to the goods had passed to the vendee, and it has been held that it would be an incongruous conception that the vendor might have a lien upon his own goods. Eads v. Kessler, 121 Cal. 244, 53 P. 656.

In the above-cited case the court quotes section 119 of Tiedeman on Sales, as follows: "In order that a vendor of goods may claim a lien on the goods, they must have already become the property of the vendee, for one cannot have a lien on goods belonging to himself. * * * The only cases in which the vendor can have a lien on the goods are those in which the title to the goods passes to the vendee without delivery or possession."

At the time of the repeal of section 3049 of the Civil Code there was adopted the Uniform Sales Act (Stats.1931, chap. 1070, p. 2234) providing for unpaid sellers' liens (secs. 1772, 1773, 1774 and 1775, Civ.Code) and also providing that a lien may be lost when the seller delivers the goods to * * the buyer without reserving the property in the goods or the right of possession thereof; or when the buyer lawfully obtains possession of the goods; or by waiver. Sec. 1776, Civ.Code. We find no provision in these sections, under the facts recited above, that would give the appellant a lien constituting security within the meaning of section 537, subdivision 1 of the Code of Civil Procedure or that would change the rule laid down in the cited cases. It is clear from the evidence that at all times appellant had title to and was the legal owner of all the vehicles in question. Sec. 186, 177 and 178, Vehicle Code; True v. Crane, 119 Cal.App. 653, 7 P.2d 357; Parke v. Franciscus, 194 Cal. 284, 228 P. 435; Samuels v. Barnet, 79 Cal. App. 529, 250 P. 405; Coca Cola Bottling Company v. Feliciano, Cal.App., 89 P.2d 686.

It was held in Alexander v. Walling, 105 Cal.App. 525, 288 P. 138, prior to the repeal of section 3049 of the Civil Code, that the seller could not have a lien on personal property of which he was the owner, and he had no lien for the price in the case of an executory sale where he retained the title; that section 3049 of the Civil Code, relating to seller's liens, referred only to sales in which the title had passed and not to executory sales where the title was in the seller, and that a sale under an *oral conditional sale agreement* as above mentioned would not transfer title. It would therefore appear that no lien exists for the reason that the vendor cannot have a lien upon personal property of which he is the owner. Katzenbach & Bullock Co. v. Breslauer, 51 Cal.App. 756, 197 P. 967; Standard Auto Sales Company v. Lehman, supra; Eads v. Kessler, supra; Rayfield v. Van Meter, 120 Cal. 416, 52 P. 666; Rauer v. Rynd, 27 Cal. App. 556, at page 563, 150 P. 780, 783.

[6] If we accept respondent's only possible remaining available contention, which we do not, that the title to the vehicles did pass to respondent, and that the redelivery of the four vehicles to appellant for the purpose of sale and applying the proceeds to his account constituted a deposit of security for the payment of the debt within the meaning of section 537, subdivision 1 of the Code of Civil Procedure, then the rule quoted in Rauer v. Rynd, supra, would apply, viz., "When personal property is delivered as security, the transaction is a pledge. But if goods are delivered by a debtor to his creditor in payment of the debt, the transaction has the effect of a sale; and the same is true if goods are delivered by the debtor to the creditor to be sold, and the proceeds applied on the debt with a return of the surplus."

[7] If we are, therefore, to be guided by the plain meaning of the statute, it would follow that appellant was entitled to the writ of attachment. The only ground upon which this conclusion could be avoided would be that the statute contemplates other security as well as those which are specifically mentioned. We think the statute having specified the four particular kinds of securities, to-wit, mortgage, trust deed, lien and pledge, by implication there would be excluded any other species.

[8, 9] It seems to be the well-settled rule that statutes permitting and providing for the levying of attachments must be strictly construed and followed. Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36, 113 Am.St.Rep. 253. When the law, therefore, designates and specifies in what instances an attachment may be issued and in what cases it is not a legal remedy, the express will of the legislature must control.

The record indicates that after the issuance of the writ of attachment and prior to the order releasing the writ, respondent sold the four vehicles for the sum of $99. After expending the sum of $28.65 for parts and replacements, a balance of $361.74 remained due and unpaid. These facts were called to the attention of the court by proper affidavit of the appellant when the motion to discharge the attachment was presented.

[10] In the light of our reasoning and conclusion herein expressed and that expressed in the case of Standard Auto Sales Company v. Lehman, supra, we are impelled to hold that the contract was not secured by any mortgage, deed of trust, or lien upon real or personal property, or any pledge of personal property. We think that the trial court, in holding that

this was not a proper place for attachment, has gone outside of the plain meaning of the statute.

The order dissolving and discharging the writ of attachment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



33 Cal.App.2d 73

CRAWFORD v. MARYSVILLE FUEL CO.

Civ. 6068.

District Court of Appeal, Third District, California.

May 25, 1939.

1. Appeal and error ⇐931(1)

In examining the sufficiency of evidence to support a finding, reviewing court must accept as true all evidence tending to establish correctness of finding as made, consider all inferences that might reasonably have led to the same conclusion, and resolve every substantial conflict in testimony in favor of the questioned finding.

2. Appeal and error ⇐989

In determining sufficiency of evidence to support a judgment, reviewing court need consider only testimony which, if believed by the trial court, would support the judgment.

3. Sales ⇐441(4)

In action by turkey grower against seller of feed for damages caused by alleged poisoning of turkeys by feed which contained moth balls, evidence *held* to authorize judgment for defendant on ground that the moth balls did not cause injury to the turkeys.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by T. J. Crawford against the Marysville Fuel Company, for damages caused by alleged poisoning of plaintiff's turkeys from turkey feed purchased from defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Charles A. Wetmore, Jr., of San Francisco, Erling S. Norby, of Marysville, and Edward F. Treadwell, of San Francisco, for appellant.

Ray Manwell, of Marysville, and George R. Freeman, of Willows, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought to recover damages suffered as the result of plaintiff having fed his turkeys paddy rice purchased from defendant, as turkey feed, it being alleged that the paddy rice contained napthalene in the form of moth balls, and that as a result of the feeding of said rice many of plaintiff's turkeys were poisoned and died, and the remainder of the flock lost weight and otherwise deteriorated.

The court rendered judgment in favor of defendant, and from that judgment this appeal is taken.

The appellant's principal contention is that the evidence does not support the finding that plaintiff has not been damaged in any sum by reason of the feeding of said rice purchased from defendant.

[1, 2] It must be remembered that an appellate court in examining the sufficiency of the evidence to support a questioned finding must accept as true all evidence tending to establish the correctness of the finding as made, considering also all inferences which might reasonably have led the court to the same conclusion. It is also necessary that every substantial conflict in the testimony be resolved in favor of the questioned finding. In examining the record, therefore, it is our duty to weigh that testimony which, if accepted by the trial court, will logically lead to the conclusion that the presence of moth balls or napthalene did not make the rice unmerchantable and unfit to be used for feed for turkeys. It is only necessary to consider that testimony which, if believed by the trial court, would support the judgment. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157.

The complaint alleges, briefly, that defendant at all times mentioned was engaged in the feed business, and that plaintiff was engaged in the business of turkey

raising, and was the owner of some 2680 tom turkeys and 215 hen turkeys, which were being prepared for the market. That on the 4th day of February, 1936, plaintiff purchased from defendant some two tons of paddy rice for turkey feed, and at the time of the sale defendant knew that plaintiff was engaged in turkey raising and that said rice was to be used for turkey feed; that defendant warranted said rice so sold to plaintiff to be fit for the purpose for which it was sold; that said rice was not merchantable nor fit to be used for such purposes for the reason that it contained a poisonous substance known as napthalene, of the presence of which plaintiff had no knowledge. Plaintiff fed some of this rice to his turkeys, and as a result thereof some 876 toms and 122 hens died and others became sick, to the damage to plaintiff in the sum of $6,884.43.

The answer of defendant admitted the sale of the rice to plaintiff but denied it contained any poisonous substance or that the same was unfit for the purpose for which it was sold, and denied that any of plaintiff's turkeys became sick or died as a result of the feeding of said rice or that plaintiff was damaged in any amount by any act of defendant.

[3] From the evidence adduced at the trial it appeared that plaintiff had been engaged in turkey raising for several years, and during the months of September, October and November of 1935, plaintiff had some disease among his turkeys and during that time lost about 350 turkeys. The exact nature of the disease was not determined, but the turkeys were treated and by Thanksgiving time they were apparently well, and a number were marketed during the holiday season.

On the 29th day of January, 1936, the day on which he made his last purchase of other type grains prior to the delivery of the paddy rice, plaintiff told an employee of defendant corporation that his turkeys were sick and that he was having trouble and he did not know what to do. On the 4th day of February, 1936, plaintiff took delivery of some ten or twelve sacks of the rice in question, and the following day he took a similar amount, and on February 6th, he received delivery of the balance of the order.

Plaintiff testified that he fed the grain from a truck into the feed troughs on the evening of February 4th and on the next day 15 or 20 turkeys were dead with compacted crops, and that over a period of several days other turkeys became affected, being unable to eat, and died of starvation. Three or four days after the first feeding of the paddy rice plaintiff noticed the napthalene balls in the feed troughs and on the ground. It also appeared that the plaintiff had been using corrosive sublimate, a mercuric chloride combination, for disinfecting the turkeys' drinking water, and on the 6th day of February, 1936, plaintiff called upon the farm adviser of Yuba county, and inquired as to whether or not the use of an ounce and a half of corrosive sublimate to about fifty gallons of water was a good disinfectant. The farm adviser testified that corrosive sublimate is a poison and that it should not be used as a disinfectant in any proportion and that it had an accumulative effect on turkeys, that is, they gradually absorbed the poison from the disinfectant in the tissues of the kidneys, which was bound to cause trouble later on as well as immediately.

There is apparently no dispute but what the napthalene was in the paddy rice. This rice had been purchased by defendant corporation from the Rice Growers' Association and they had acquired the rice from the Appraisal Board of the California Rice Industry. This rice was sample rice, and the napthalene had been placed therein to keep out vermin. Prior to the sale the association had attempted to screen the moth balls out of the rice, although apparently some had been overlooked. The rice was analyzed in March of 1936 and was then shown to contain .04 of one per cent of napthalene.

On February 14, 1936, plaintiff took two of his sick turkeys to the state department of agriculture, where they were examined, and an autopsy showed they were suffering from an inflammation of the intestines called interitis, which could have been caused by a variety of conditions such as different classes of food, overeating, climatic conditions, or even the disinfectant used in the water.

Mr. Gierke, a pathologist for the state department of agriculture, division of animal industry, made no finding that napthalene had anything to do with the condition of the turkeys, but found that the turkeys suggested faulty feeding as the

chief cause of the trouble. Mr. Gierke also performed certain experiments on other turkeys,—one was fed some of the paddy rice in question for a period of ten days with no ill effects; it was then forcibly fed one-half gram of moth balls for five or six days, and after an interval of about a week was again fed pieces of moth balls, and shortly thereafter died. It was also developed that a turkey would not voluntarily eat napthalene, and in carrying out these experiments it was necessary to forcibly feed it to them. Other portions of the same lot of paddy rice as that purchased by plaintiff was sold by defendant to two other turkey growers, both of whom fed the rice to their turkeys without any ill effects whatever. In the feed troughs of these two growers were found moth balls after each feeding, which the turkeys had rejected.

Certain experiments were carried out by Wilbur Smith and Mrs. Gusta Corey, which also showed that turkeys would not voluntarily eat the napthalene, and also it developed that the napthalene placed with the paddy rice did not adhere to the rice grains. Mrs. Corey also testified that in her opinion paddy rice was not a proper feed without adequate greens to go with it.

It was established that turkeys are delicate birds and difficult to raise and that the normal loss varies from twelve to twenty-five per cent.

A turkey picker testified that he picked turkeys for plaintiff on February 2d, which was prior to the feeding of the rice in question, and at that time the turkeys did not look very good. They had lost weight. He also observed that "they stood around humped up", and that there was probably half a dozen dead turkeys lying along the edge of the corral.

Plaintiff, himself, testified on direct examination, that his turkeys were sick and dying between the 27th day of January, 1936, and the 3d and 4th days of February, which was prior to the purchase of the paddy rice.

Dr. Robert B. Aird, called as a witness by plaintiff, testified that napthalene was not classified as a poison. Mr. C. H. P. Lichhardt also testified that napthalene was used for medicinal purposes for both humans and animals.

From the foregoing brief summary it is clear the evidence is sufficient to support a judgment in favor of the defendant, and also there was no abuse of discretion on the part of the trial court in denying the motion for a new trial.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.



34 Cal.App.2d Supp. 775

CLARK v. MARJORIE MICHAEL, Inc., et al.

Civ. A 4157.

Appellate Department, Superior Court, Los Angeles County, California.

May 19, 1939.

1. Assignments for benefit of creditors ⇐ 310(1)

Services of forelady are "personal services," within statute declaring salaries for personal services rendered to assignor for benefit of creditors preferred claims against assignee, especially where she also works physically as in designing, pressing, and sewing clothes. Code Civ.Proc. § 1204.

[Ed. Note.—For other definitions of "Personal Services," see Words & Phrases.]

2. Assignments for benefit of creditors ⇐ 310(1)

That one seeking preferential payment of salary for skilled services to corporate assignor for benefit of creditors was holder of majority of capital stock and president and manager of assignor did not defeat such preference, where corporation officers were not paid for their services as such, but drew salaries as workers, and salary was due claimant for services performed as worker, in absence of showing that she was employed as such by herself as officer. Code Civ. Proc. § 1204.

3. Assignments for benefit of creditors ⇐ 310(1)

The statute declaring salaries for personal services to assignor for benefit of creditors preferred claims against assignee bases right to preference on nature of work done by claimant pursuant to his employ-

ment, and such preference is not defeated by claimant's holding of position unrelated to such work, such as that of officer of corporation employing him. Code Civ.Proc. § 1204.

4. Constitutional law ⇐70(3)

Whether one having voice in directing corporation's affairs should not be permitted to work for it in some other capacity or should not be allowed preference of claim against assignee for benefit of corporation's creditors for salary due for such work is matter of public policy for legislative rather than judicial consideration. Code Civ.Proc. § 1204.

SCHAUER, J., dissenting.

Appeal from Municipal Court of City of Los Angeles; Charles Newell Carns, Judge.

Action by V. Clark against Marjorie Michael, Incorporated, M. Galvan as assignee, to enforce preferential payment of salary, due plaintiff for services rendered to named defendant, by codefendant as assignee for named defendant's creditors. From a judgment denying preference, plaintiff appeals.

Reversed, with directions.

B. Warren Vinetz, of Los Angeles, for appellant.

Charles J. Katz, Alfred Gitelson, and Samuel W. Blum, all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The question for decision is, whether the plaintiff has a preferred claim under provisions of section 1204 of the Code of Civil Procedure, reading as follows: "When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within ninety days prior to such assignment, or the taking over of such property, or to the commencement of the proceeding when a court action is involved, and not exceeding two hundred dollars each, constitute preferred claims, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay same becomes available." Provisions of the section not quoted impose certain conditions of payment, compliance with which is not questioned here, and they need not be considered.

[1] The facts are not in dispute and are practically all stipulated. Defendant Galvan is assignee for the benefit of creditors of defendant Marjorie Michael, Inc., hereinafter referred to as the corporation. The plaintiff's assignor, Nancy Vinci, was employed by the corporation, during the period specified in the statute, to perform skilled services as designer, presser, and sewing and forelady at a salary of $50 per week, and the sum of $150 sued for herein became due to her from the corporation for these services during the period above mentioned and is unpaid. As thus depicted, plaintiff's claim is undoubtedly within the statute and entitled to preferential payment from the defendant Galvan, an assignee for creditors. The fact that Vinci acted as forelady does not debar her from a preference. Services of a forelady are personal services, within the meaning of this statute, especially where she also works herself, as in this case. See Levitt v. Faber, 1937, 20 Cal. App.2d, Supp., 758, 64 P.2d 498.

[2] Defendant Galvan does not dispute the propositions just stated, but points to the additional facts that plaintiff's assignor, Vinci, was, at all times in question, the holder of a majority of the capital stock of the corporation, and also its president and manager, which, as he contends, materially alter the picture. However, Vinci and the other officers of the corporation were not being paid anything for their services as officers but were "drawing salary as workers." She so testified, and her testimony was not in any way disputed or impeached. Even without this testimony, it plainly appears from the stipulation that the money she seeks to recover here was due her for her services as "worker" in the capacities above mentioned, and not for any official services. In other words, the services for which a

preference is sought were not performed by Vinci, either in whole or in part, in her capacity as president or manager. It does not appear that her employment as worker was made by herself acting as president or manager, and under the general presumption of regularity we must assume that it was not. We do not think these facts defeat her preference. The statute does not so declare and we see no sufficient reason for reading such a provision into it by construction. In support of this conclusion we find several decisions from other states.

Construing and applying a similar statute of Washington, giving a preference to claims of "every person performing labor" for "moneys due him * * * for labor performed," in the case of one who was president, director and managing officer of a corporation, the Supreme Court of Washington said: "Before the claim of the director can be allowed against the assets of an insolvent corporation which is in the hands of a receiver, it must be established by a clear preponderance of the evidence: First, that the services were clearly outside of the ordinary duties as director; and, second, that they were performed under circumstances sufficient to show that it was well understood by the corporate officers as well as himself that the services were to be paid for by the corporation." Concluding that both these facts were shown, the court held the officer was entitled to a preference for his claim for services outside his official duties. Brown v. Wilcox Lumber & Logging Co., 1922, 118 Wash. 336, 203 P. 949, 950. This case was approved and followed in Cavanaugh v. Art Hardware, etc., Co., 1923, 124 Wash. 243, 214 P. 152, 155, where the court said that in the previous case "we held that, where a director and manager of a corporation performs manual services for the corporation clearly outside of his duties as such officer, he has a valid, preferred claim for such services", and applied the rule to a trustee, manager and general superintendent of the workshop who also worked on the lathes as an ordinary mechanic, allowing him a preference for his services as mechanic.

In Ferrell-Michael, etc., Co. v. McCormac, Tex.Civ.App.1915, 184 S.W. 1081, 1086, a Texas statute, giving to clerks, bookkeepers and other classes of workers a first lien upon certain property of their employers for the pay due them, was in question as applied to one who was manager but also rendered clerical and bookkeeping services, and the court said: "We think, therefore, that it should be held that in cases like this, where the contract of employment contemplates the performance of services to secure the payment of which the statute was evidently enacted, that the statute should be given effect, even though the clerk, servant, or other person named in the statute was also required to perform services more properly perhaps relating to the functions of a superintendent or manager, who, it appears, is not included within the protected classes of the statute."

In Davis v. Nanty Glo Auto Co., 1936, 123 Pa.Super. 349, 187 A. 227, under a statute giving a preferred claim upon an execution sale to money due "for labor and services rendered by any miner or mechanic," the court, while holding that one who was president and general manager of a corporation was not entitled, under the circumstances, to a priority, said: "Obviously, wages or salary due the president and general manager of a business corporation are not entitled to any priority. It may be possible that one employed as a general manager at a fixed salary would have the right to accept inferior employment and render such 'labor and services' as are contemplated by the statute, but merely because one holding an executive position voluntarily performs manual labor and services does not bring him within the class of servants entitled to enforce claims for their wages. His status must be determined by the nature and character of his employment."

A like question has frequently arisen under the provision of the Bankruptcy Act § 64b, 11 U.S.C.A. § 104(b), that, in distributing the assets of a bankrupt, preference shall be given to claims for "wages due to workmen, clerks, traveling or city salesmen, or servants." Construing this provision of the Bankruptcy Act, the court in Re Crown Point Brush Co., D.C.N.D. N.Y.1912, 200 F. 882, 886, although denying a preference claimed by a president and general manager and by a treasurer and assistant general manager for their claims for services deemed by the court to be official, said: "It is, of course, true that, in the absence of a statute prohibiting a corporation to hire its president, or treasurer, or general manager, or assistant general manager, or a director, to do the work of a mechanic or common laborer, it may

do so, and for such labor under such an employment he would be entitled to priority. In other words, these officers are not disqualified from hiring to the corporation to do any kind of work." In Re H. O. Roberts Co., D.C.Minn.1912, 193 F. 294, 295, the court, allowing a claim as preferred, said: "The fact that a claimant is a director or officer of a corporation does not disable the corporation from employing him as a clerk also. If the labor performed by him is so performed under his employment as clerk, and is not performed as a part of his duties as an officer, then he is entitled to priority for his wages as a clerk." In Re Eagle Ice & Coal Co., D.C.E.D.Pa.1917, 241 F. 393, 394, the court, while disallowing the preference claimed, said: "Had the company desired, it could, notwithstanding the fact that he was its president, have employed him as a workman, clerk, traveling or city salesman or servant, and in such case he would have been entitled to prove against the bankrupt estate the amount of his salary as president as a general creditor and the amount of his wages as a preferred creditor. * * * But in this case the sole employment was as president." To the same effect are In re Swain Co., D.C. N.D.Cal.1912, 194 F. 749; In re Capital Paint Co., D.C.N.D.Cal.1916, 239 F. 424; In re Pacific Co-op. League Stores, 9 Cir., 1923, 291 F. 759, 761. In Re Pacific Co-op. League Stores, supra, the court said: "If their principal services were those of a clerk or salesman, their claims are not affected by the fact that the claimants also incidentally and secondarily performed supervisory or even managerial powers. * * * In all cases it is the nature of the actual work done by the employee, and not the mere title of the position held by him, which determines his right to a preference." Concurring with the rules stated in this last quotation are Brady v. McCann, 6 Cir., 1925, 8 F.2d 928; In re Cost Cut Counterbore Co., D.C.E.D.Mich.1922, 283 F. 670, 672; Blessing v. Blanchard, 9 Cir., 1915, 223 F. 35, Ann.Cas.1916B, 341; In re Roebuck Weather Strip, etc., Co., D. C.S.D.N.Y.1910, 180 F. 497.

[3, 4] Our statute is of the same character and is framed in pursuance of the same purpose as the provision of the Bankruptcy Act on which the decisions above cited were made. We see no reason for not applying the same rule to it. To our eyes it clearly bases the right of the claimant to a preference upon the nature of the work done by him for which the claim is made—in pursuance, of course, of an employment to do it—and does not provide that a preference otherwise proper shall be defeated by the holding by a claimant who is within the categories specified of some other position not related to the work done. Defendant would have us reject the claim by reason of such holding. If one who has a voice in directing the affairs of a corporation should not be permitted to work for it in some other capacity, or if, when he does so work, he should not be allowed a preference for such work under Section 1204 of the Code of Civil Procedure, that is a matter of public policy for legislative rather than judicial consideration. We find no such policy now embodied in Section 1204. But we may suggest, in passing, that application of the present section as we view it is not likely to impede or obstruct the efforts of any considerable number of employees who are not officers or of any large number of general creditors to obtain payment of their claims. The corporations whose officers perform for them personal services which are within the terms of section 1204, will not be the large corporations with many workmen needing the protection of this section, but the small concerns, incorporated for the convenience of a few persons engaged in some small business who are as dependent on the proceeds of their own labor for support as are any other workers. Such corporations may have no employees but their own officers, and will usually have few others and not many general creditors. It may be for this reason that the legislature has not written into section 1204 any exception of such cases as we have here.

There are some cases construing the Bankruptcy Act or state statutes of similar character, in which language may be found opposed to our conclusion. See notes, 54 A.L.R. 567 et seq. and 111 A.L.R. 1453 et seq. On analysis of the cases suggesting such a contrary view, it will be found that in most of them the services for which preference was sought were official services, rendered by officers in their capacity as such, and remarks made by the several courts must be considered with such a state of facts in mind.

A similar question has arisen under the workmen's compensation acts. Those acts limit the right to receive compensation under them to employees. Some of them expressly deny that right to executive officers

and the same effect has been given others by judicial decision. There appears to be a nearly unanimous agreement by the various courts, however, that while an executive officer may not receive compensation for injuries received by him in the course of the performance of his official duties, such an officer may also be employed and act as an ordinary employee and if while so employed and acting he receives a compensable injury he is not to be denied compensation therefor because he is also an officer. See notes in 15 A.L.R. 1288 et seq. and 81 A.L.R. 644 et seq., where many cases on this subject are cited and reviewed, from which it appears that there is little dissent from this legal proposition but much variation in the states of fact to which its application has been invoked. While it is true the question under the workmen's compensation acts is not identical with that here presented, yet both statutes have as their purpose the protection of workmen. For this reason there is an analogy between the compensation cases and those arising under the preference statutes; and there is also a common factor in the question whether an officer of a corporation who is also its employee or workman in some subordinate capacity may enforce the rights of such an employee or workman, notwithstanding his status as an officer. A few illustrative cases only are here cited.

In Skouitchi v. Chic Cloak & Suit Co., 1921, 230 N.Y. 296, 130 N.E. 299, 301, 15 A.L.R. 1285, the court, referred to a previous decision as holding "that 'the higher executive officers of a corporation are not, as such, its employees in the ordinary sense of the word,'" and further said: "It was fully recognized, however, that there was nothing to prevent a corporation, if it so desired from hiring one of its officers to be and to perform the work of such an employee as was contemplated by the statute." Accordingly it was held that one holding ten per cent of the stock of a corporation, who was its president and treasurer but performed no substantial duties in these capacities, and was also employed as general manager, but did not in fact act as such, merely performing services in packing, shipping, selling and delivering goods for the corporation, was entitled to compensation for injuries received by him while performing these services.

In Stevens v. Industrial Comm., 1931, 346 Ill. 495, 179 N.E. 102, 81 A.L.R. 638, the court reviewed a number of other decisions, including that last above cited, declared that there was a distinction between the executive officers of a corporation and its employees and that the former could not recover compensation under the statute, but held that compensation could be recovered for the death of one who was owner of nearly half the stock of a corporation and, with another half owner, did all its mechanical work, and who was also its secretary and treasurer, where his death resulted from injuries received while he was on a mission for the corporation which was not, the court held, any part of his official duty.

In Re Raynes, 1917, 66 Ind.App. 321, 118 N.E. 387, 391, the court said, referring to executive officers of a corporation: "such an official might serve in a dual capacity; that is, as an officer and also as a workman. It is not unreasonable to conceive of a case where the discharge of the official duties would constitute but a small portion of the services rendered by him to the corporation. Such an officer might be hired in fact to perform manual labor in connection with other employés, and his time in the main be occupied in performing such service and regular wages be paid him accordingly. Such an official in his capacity as a workman might measure up in all respects to the conception of an employé within the meaning of the act as we have hereinbefore developed it, and in such capacity we believe that he should be regarded as an employé within the meaning of Compensation Acts." Accordingly the court held that one who was a stockholder, director and secretary-treasurer of a corporation, as well as its buyer, salesman and collector, might be an employee entitled to compensation but remanded the case for further consideration and a finding of fact on this point.

In Southern Surety Co. v. Childers, 1922, 87 Okl. 261, 209 P. 927, 929, 25 A.L.R. 373, the court held that one who was majority stockholder, and president of a garage corporation, but spent a portion of his time in doing manual or mechanical labor for it, was while so engaged to be regarded as an employee entitled to workmen's compensation. The court said: "It appears to us that the better reason dictates that compensation should not be denied one because he happens to be a stockholder and president or other executive or managing officer of the corporation that employs him,

and that that fact alone, is not sufficient to eliminate him from those regarded as employees within the meaning of such act. Obviously, where the claimant was the chief executive officer of a large corporation and his duties did not require that he perform manual or mechanical labor, he could not be regarded as the employee within the meaning of the act or the terms of the policy, and if he sustained injuries while performing manual or mechanical labor, which was no part of his duties, but in which he acted as a mere volunteer, he would not be entitled to compensation. On the other hand, although the claimant was the owner of the majority of the stock and was the chief executive officer of a corporation, yet if he performed manual or mechanical labor as a part of his duties, such an official in his capacity as a workman might measure up in all respects to the conception of an employee within the meaning of the act. The case at bar affords an apt illustration of a case where the official of a corporation served in a dual capacity; that is, as an officer and as a workman."

Defendant cites and principally relies on Carpenter v. Policy Holders L. Ins. Ass'n, 1937, 9 Cal.2d 167, 70 P.2d 487, 489, 111 A.L.R. 1450, and contends that it is determinative here. That case dealt with the same statute now before us, section 1204 of the Code of Civil Procedure, and it held that certain officers of the corporate assignor there, who were, respectively, its president, its vice president, and its secretary-treasurer, were not entitled to preference under the section. But the salaries which they were claiming were for their services as such officers, and that appears to have been the ground of decision in the case. The court referred to "major officers of an insolvent concern who have claims for unpaid salary," and said, in part: "We are of the view that it was not within the purposes and objects of section 1204, Code of Civil Procedure, to give officials of a corporation, such as a president, vice president and secretary-treasurer, a preferential claim for an unpaid balance of salaries due them when the corporation passes into liquidation. * * * None of the specific designations in the section * * * connote an official capacity. * * It is our conclusion that under section 1204, Code of Civil Procedure, the respondent officers, who are president, vice president, and secretary-treasurer of the corporation in liquidation, are not entitled to priority in payment of any portion of their claims for salary." We do not believe the court intended by anything it said in this case to hold that an officer who drew no pay for his services as such might not be allowed a preference for other services rendered by him in a capacity which did come within the "specific designations in the section." Certainly the facts before it called for no such holding. In each of the cases cited by the court in support of its decision the compensation for which the officer sought preference was due to him for official services, at least in part, and in some of them this fact was emphasized as a ground of decision. As a further indication that the court was not intending to decide the question now before us, we note that in support of its ruling the court cited cases in which contradictory views were expressed on our question, to wit, In re Crown Point Brush Co., supra, 200 F. 882, in which, as already stated, the court declared that officers who were also laborers would be entitled to a preference for labor performed, and England v. Beatty Organ Co., 1886, 41 N.J.Eq. 470, 4 A. 307, in which a contrary opinion was expressed. The dissenting opinion in the Carpenter case refers to the case as one involving "the salaries of those rendering personal services to corporations as officers thereof." The case merely holds, in effect, that the services of such officers as such are not to be regarded as "personal services" within the meaning of that term as used in section 1204.

The judgment is reversed with directions to enter judgment for the plaintiff as prayed for in her complaint, appellant to recover her costs of appeal from Respondent Galvan.

I concur: BISHOP, J.

SCHAUER, Judge (dissenting).

I dissent. It is conceivable that cases may arise hereafter in which the legal aspects are entirely similar to those of the instant case but wherein the insolvent corporations do not possess assets enough to pay the preferred claims in full and wherein the officers and directors of such corporations shall file demands constituting the major portion of the claims for priority. If the foregoing ruling by the majority of this court is followed as a pre-

cedent in those cases it will operate substantially to impair for bona fide employees the benefits wisely intended to be secured for them by section 1204 of the Code of Civil Procedure. Said section 1204 is designed and intended to protect laborers and subordinate employees generally in the collection of wages due them for services rendered while employed in a business managed by another. Even to the extent of possibly defeating entirely the claims of general creditors, it has been considered necessary, or at least conducive to social welfare, to throw the protective cloak of this legislation about those occupying positions which are subordinate or completely voiceless, in the managerial scale, because it is to the public interest that such persons, who ordinarily have no means of ascertaining or keeping currently informed concerning the financial status of their employer, and who often are dependent for the very necessaries of life upon the receipt of their earnings from week to week, shall receive those earnings *without deduction or delay,* in preference to the claims of general creditors who ordinarily have been under less necessity of dealing with the employer, have been better able to ascertain his financial status and are less dependent for livelihood on the collection of the particular debt due them. The debt to them would ordinarily be one of many outstanding, current accounts while to the employee it might be his only account and perhaps his entire capital. Such legislation, besides being beneficial to the immediate objects of the preference granted, obviously conduces to the general public welfare and should be upheld and protected from insidious abuses as well as from direct attacks; I think it was never intended that by it the managing heads of a corporation, who, by virtue of their offices, are in a position superior to that of general creditors as well as that of subordinate employees, should be given the power deliberately to run the corporation further into debts whereby they establish themselves as creditors with a preference over the less informed general creditors.

Said section 1204 provides that: "When any assignment * * * is made for the benefit of creditors * * * or results from any proceeding in insolvency or receivership * * * the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor * * * or corporation, within ninety days prior to such assignment * * * or to the commencement of the proceeding * * * and not exceeding two hundred dollars each, constitute preferred claims, and must be paid by the trustee, assignee or receiver before the claim of any other creditor * * * and must be paid as soon as the money with which to pay same becomes available. If there is insufficient money with which to pay *all such labor claims* in full the money available must be distributed among the claimants in proportion to the amount of their respective claims. * * * This section is binding upon all the courts of this State * * *." (Italics added.) The drafters of that statute by their use of the words "all such labor claims" inferentially suggest that they thought they were preparing legislation to protect employees rather than employers.

Plaintiff's assignor, Nancy Vinci, for approximately one year prior to the assignment for the benefit of creditors which was made by defendant corporation, was the president and manager of such defendant corporation and owned a majority of its outstanding stock. As such president and manager, in the performance of the duties of such offices, she would naturally have become acquainted with, and currently maintained knowledge of, the financial affairs of her corporation. She was the manager of such affairs on behalf of the corporation and its stockholders. As such manager she caused herself to be employed by the corporation in the performance of skilled labor for a salary or wage of $50 per week. This salary or wage was paid to the plaintiff's said assignor for approximately one year; the corporation then seemingly had become financially distressed; nevertheless said assignor, who must as president and manager of the corporation have had full knowledge of the facts, caused herself to remain in the corporation's employ and caused the corporation to continue hiring her for three weeks during which she and other employees were not paid. Such three weeks' operation of the business without paying salaries or wages was doubtless intended to be for the benefit of the corporation and the assignor as the principal stockholder thereof; now, however, such assignor has filed a claim seeking *as an employee* the preference created by the above quoted section 1204 of the Code of Civil Procedure.

I think the legislature did not intend by the enactment of said section 1204 to give to any person the chameleon-like quality of wielding the power of management of the corporation *employer* to continue its business and herself as an employee thereof beyond a time when it met its obligations and then in the guise of an oppressed *employee* to claim the preferential benefits accorded by the statute to protect bona fide employees.

In the majority opinion an attempt is made to distinguish the case of Carpenter v. Policy Holders Life Ins. Ass'n, 1937, 9 Cal.2d 167, 70 P.2d 487, 111 A.L.R. 1450, from the case at bar. The sole distinction pointed out is that in the case before us it is asserted, despite the justified inference and implied finding to the contrary, that the plaintiff's assignor and the other officers of the corporation were not being paid anything for their services as officers but were "drawing salary as workers" exclusively, while in the case last cited the claims were made by the corporation's president, vice president, and secretary-treasurer, without the nature of the services performed by them, other than as possibly may be inferred from the titles of their offices, appearing. Such asserted distinction in plainer words amounts to this: That if the president of a corporation performs services which are ordinarily rendered by a subordinate employee he is entitled to a preference for the salary due him for such work, but if the services he renders are those ordinarily pertaining to the office of president he has no preference. I do not think our statute can be reasonably so construed and our supreme court has not so construed it.

In the case mentioned (Carpenter v. Policy Holders Life Ins. Ass'n, 1937, 9 Cal.2d 167, at page 169, 70 P.2d 487, at page 489, 111 A.L.R. 1450 supra), the supreme court, speaking through Mr. Justice Seawell, said: "We are of the view that it was not within the purposes and objects of section 1204, Code of Civil Procedure, to give officials of a corporation, such as a president * * * a preferential claim for an unpaid balance of salaries due them when the corporation passes into liquidation. While it is true that a literal wording of said section might seem to include such officials, we are of the view that they are in a class apart from others who work for the corporation for wages or salaries, and that in the absence of express mention it was not the legislative intent to include them within the class given priority." As previously pointed out by the court, 9 Cal.2d on page 168, 70 P.2d on page 488, 111 A.L.R. 1450, "the preference given is for the 'wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services.'" The requirement made by the statute as the condition of its preference is *not of a type of service* but *in the character of the relationship to the employer.* The claimants in the case cited were employees and the services rendered by them were *personal services* and hence within the statute as to that exaction, but because the persons rendering those services bore a *managerial relationship* to the corporation employer they were held to be "in a class apart from others who work for the corporation for wages or salaries." It is they—the managerial staff, by reason of their offices, not their services by reason of the character thereof—that "are in a class apart from others who work for the corporation for wages or salaries." There can be no tenable contention here that plaintiff's assignor was not actually the president of the involved corporation and performing the duties of that office during the period for which application of the preference is sought.

My learned associates insist that "In each of the cases cited by the court [in the Carpenter case] in support of its decision the compensation for which the officer sought preference was due to him for official services, at least in part. * * *" One of the cases so cited is that of England's Ex'rs. v. Beatty Organ Co., 1886, 41 N.J.Eq. 470, 4 A. 307. From that case the following quotation shows that the New Jersey court was considering and discussing, and apparently thought that it was concerned with, a question similar to ours. It said: "Is the president of a corporation, when engaged in and about the business of his company, whatever its character may be, a laborer, within the contemplation of the act? Does the act fairly mean to embrace one or all of the members of the company, as well as all or any others who may be employed by it? Can the members of a corporation employ themselves, respectively, and, in case of failure, stand upon the statute for any compensation that may be due? The president of a corporation, under the act, is and must be a director.

He is part and parcel of the organization. There must be employer as well as employed; and the question arises, does the act authorize the organization, which is the employer, to employ itself? Does the statute mean to go so far as to empower the directors of a corporation to employ themselves, as the workmen and laborers, to do all the work and labor necessary to be done, and then, in case of insolvency, to give them the statutory lien, and to prefer them to all the general creditors? I cannot so understand the act. I think, under our statute, every court would do nothing more than place every such creditor upon the same footing as the general creditor. I cannot perceive any reason for giving the slightest advantage to those under whose management such a concern is wrecked." Attention is also called to the following language from In re Grubbs-Wiley Grocery Co., D.C.W.D.Mo.1899, 96 F. 183, 184 (likewise cited in the Carpenter case), construing the bankruptcy act: "The board of directors, as is frequently the case, might have voted a salary to the president for his services. Could it be maintained that he was a workman or servant of the company on a salary, entitling him, on the declaration of bankruptcy of the concern, to have his salary paid as a preferred claim? Indeed, it would present a remarkable feature of the bankrupt act, if the managing officers of a business corporation could vote themselves salaries ad libitum, and after, by their mismanagement, wrecking the company, and inviting an adjudication of bankruptcy, they could, to the exclusion of other creditors of the concern, whose money and property they had obtained on credit, come in as preferred creditors, to the exclusion of such general creditors. The act, in my judgment, admits of no such construction." This language was quoted and followed in In re Carolina Cooperage Co., D.C.E.D.N.C.1899, 96 F. 950, 953, and the case was cited with apparent approval in Re Boston French Range Co., D.C.D.Mass.1916, 235 F. 916.

One wishing to review the cases of several jurisdictions discussing questions somewhat akin to ours may find annotations in 54 A.L.R. at page 567 and in 111 A.L.R. at page 1453. An exhaustive review and citation of the authorities is also revealed in the scholarly opinion of Judge Jenney rendered in Proceeding in the Matter of Reorganization of Pacific Oil & Meal Co., D.C.S.D.Cal.1938, 24 F.Supp. 767. I do not here discuss further the cases from other jurisdictions because in my opinion no useful purpose would be served thereby; none of those cases is precisely in point. If reason commends the rule I urge, it may sometime be followed; if not, those cases will not help it. Judge Jenney's opinion, however, while dealing with federal acts (Section 77B, Bankruptcy Act, 11 U.S.C.A. § 207, and Chandler Bankruptcy Act, 11 U.S.C.A. § 1 et seq.), discusses considerations in interpreting those acts which are equally applicable to our problem of construction. It may be said of our legislature and section 1204 of the Code of Civil Procedure, as Judge Jenney said of Congress and the Bankruptcy Acts, that it "certainly never intended that wage claims of officers of a corporation—even minor officers—who are in any way responsible for management or who assist in policy forming should be given priority over the claims of general creditors." In re Pacific Oil & Meal Co., D.C.1938, 24 F.Supp. 767, 770, supra. We may also, with profit, give consideration to this further quotation from Judge Jenney's opinion (24 F.Supp. page 771): "It is a matter of common knowledge among those who have followed the discussions at the more recent National Bankruptcy Conference, where the framework of the new Chandler Bankruptcy Act was originally constructed, that the growing tendency to enlarge priorities was deplored. * * * It is the opinion of this court that any right to priority should be clearly authorized by the Act and established by the evidence."

If the president and general manager of a corporation can do what the plaintiff's assignor here seeks to accomplish, so also could an entire board of directors. The bona fide employees of a relatively small corporation, who had no voice in its management and no special knowledge of its affairs, might, under such a rule, at the end of a period of employment without receipt of pay, find themselves with a technical preference, half or more empty of benefit because the substance that should have been all theirs was to be divided also among the managing heads, who by reason of their superior position in the structure of the corporation had been able by so continuing the operation of the business and their own employment therein, to secure for themselves such share of the

corporation's assets; and the general creditors, who perhaps had become such while the corporation was solvent and before the debt to the managing heads had been contracted, would make no recovery.

I do not think that the mere ownership of stock in a corporation by an employee should be considered as raising any question as to his right of preference for wages earned as an employee and I can conceive of a case where a bona fide employee might be vested with the naked title of the office of president or manager of a corporation and still remain in fact a subordinate employee and entitled to the preference of said section 1204, but where, as here, the evidence is ample to show that plaintiff's assignor was actually the functioning president and manager of the employing corporation, then I hold that we may not, as an appellate court, disturb the conclusion and finding of the trial court that plaintiff's claim arises from services performed by the principal officer of the employer corporation and that such managing head is not entitled to the preference logically given by the statute to those who are truly employees.

The judgment should be affirmed.



NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8898

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

